

NAFTA/UNCITRAL ARBITRATION RULES PROCEEDING

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In the Matter of Arbitration :

Between: :

:

GRAND RIVER ENTERPRISES SIX NATIONS LTD., :

et al., :

:

 Claimants/Investors, :

:

 and :

:

UNITED STATES OF AMERICA, :

:

 Respondent/Party. :

:

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HEARING ON THE MERITS

Friday, February 12, 2010

The Fairmont Hotel
24th and M Streets, N.W.
Roosevelt Room
Washington, D.C.

The hearing in the above-entitled matter
came on, pursuant to notice, at 9:00 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 themselves on that subject, if there's anything
2 else to be said.
3 MR. FELDMAN: Thank you, Mr. Luddy. We
4 agree.
5 PRESIDENT NARIMAN: We've tried as far
6 as possible not to ask you anything because we are
7 now almost pushed to the wall, as it were, because
8 Sunday is the day we have to adjourn.
9 As I said, we are pushed to the wall
10 and we have to finish by Sunday noon, at least
11 until one o'clock, if you don't mind adjusting the
12 timing between yourselves, I suppose there's only
13 Mr. DeLange left as a witness.
14 MR. LUDDY: That's correct.
15 PRESIDENT NARIMAN: There's no other
16 witness.
17 MR. FELDMAN: Thanks.
18 MR. LUDDY: We can begin one
19 preliminary matter, you'll recall that it was a
20 while ago, I guess a week ago yesterday, on
21 redirect. On redirect Ms. Cate solicited
22 extensive testimony beyond the scope of both my

P R O C E E D I N G S

1
2 ARBITRATOR CROOK: Can we invite one of
3 the parties to describe for us why we've been out
4 and what we plan to do.
5 MR. LUDDY: We've been sitting in a
6 hotel room for the last seven days because of the
7 storm that struck last Friday, I guess, and then
8 we received another one Tuesday, so federal
9 government has been shut down, therefore, the
10 World Bank's offices are shut down.
11 Therefore, we moved the hearing today
12 to this venue where we hope to complete the
13 balance of the proceedings by Sunday. It's our
14 expectation, I think we have three plus hours
15 left. We are going to proceed with Mr. DeLange,
16 and then a couple of presentations by Mr. Violi
17 and Mr. Weiler, subject to questioning by the
18 Tribunal, you know.
19 It's our hope that we would conclude
20 before lunch or thereabouts.
21 And thereafter, the Respondents would
22 have the ball and I guess they can speak to

1 cross and Mr. DeLange's initial statements, but as
2 a result we want to introduce a few short pages of
3 deposition testimony taken in the New York action
4 of a NAAG attorney. And a document submitted by
5 Nebraska to rebut stuff we did not have an
6 opportunity to address in our submissions to the
7 Tribunal.
8 MR. FELDMAN: Mr. President, we just
9 received a copy of these two documents with
10 Claimants a few minutes ago. We would object to
11 their use for the questioning of Mr. DeLange.
12 Claimants' counsel, in fact, instructed
13 us that we were not to even present the documents
14 to Lang prior to his testimony. He has never seen
15 these documents before, nor are these recent
16 documents.
17 One is a transcript of a deposition
18 taken by Mr. Violi from May of 2008, that was a
19 full two months before Claimants even filed their
20 Memorial in this matter, let alone their reply
21 brief.
22 The other document is dated from 2007.

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1 This is not recent information. This is
 2 information that could have been presented in
 3 Claimant's Memorial, is information that could
 4 have been presented in Claimants' Reply, but
 5 Claimants are choosing to introduce this
 6 information for the first time at the Merits
 7 Hearing, and we would object to their introduction
 8 into the case.
 9 PRESIDENT NARIMAN: Subject to that
 09:02:20 10 objection, you can ask him.
 11 MR. LUDDY: Great. These are copies --
 12 I'll give copies of all the documents. Because I
 13 have a few transcripts.
 14 MS. CATE: Mr. Chairman, may we have a
 15 little bit of time to allow the witness to read
 16 the documents.
 17 MR. LUDDY: I have no objection and for
 18 the record, I did advise Mr. Feldman last evening
 19 that we intended to put the documents in.
 09:02:51 20 PRESIDENT NARIMAN: All right.
 21 MS. CATE: Mr. Chairman, I also have
 22 another matter I would like to discuss with regard

1509

1 CROSS-EXAMINATION
 2 BY MR. LUDDY:
 3 Q. Mr. DeLange, how long have you been
 4 with the Idaho --
 5 MS. CATE: Objection. Has the witness
 6 been given the documents?
 7 PRESIDENT NARIMAN: If you have them
 8 ready, Mr. DeLange, please take time to read it.
 9 (Pause in the Proceedings.)
 09:05:49 10 MR. LUDDY: There was a second
 11 document, Brett. It's the Nebraska privilege log.
 12 I put it up there.
 13 PRESIDENT NARIMAN: Who gave this?
 14 MR. LUDDY: I did. That's the maybe
 15 deposition. A maybe decision. I didn't think you
 16 guys had that last week. I think you did at one
 17 point. Wait a minute, wait a minute. Maybe I did
 18 not.
 19 A. (Reviewing document.)
 09:07:56 20 Q. Are you ready, Mr. DeLange?
 21 A. Yes. Thanks.
 22 Q. How long have you been with the Idaho

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1 to an objection I made on Thursday of last week.
 2 It was with regard to a piece of new evidence that
 3 was submitted by Claimants.
 4 Upon further review of this document on
 5 Friday, it became very clear to me that this
 6 document is actually on the record. It's actually
 7 in Claimants' core bundle at tab 20.
 8 MR. LUDDY: 20, the Idaho document.
 9 MS. CATE: Right. However, I would
 09:03:27 10 also ask the Tribunal reflect upon what was
 11 actually stated at the time as to the source of
 12 the timing of the receipt of this document.
 13 Claimants did say they received it from the State
 14 of Idaho and that they only received it two or
 15 three weeks ago.
 16 MS. MONTOUR: I'm sorry. Is there an
 17 objection or not?
 18 MS. CATE: No. I'm retracting an
 19 objection.
 09:03:49 20 PRESIDENT NARIMAN: Let's get on with
 21 something.
 22 MR. LUDDY: Great.

1510

1 Attorney General's office?
 2 A. Since 1990.
 3 Q. And you've had some experience with
 4 litigation as an attorney, correct?
 5 A. Yes.
 6 Q. And some experience with assessing the
 7 completeness or propriety of an adversary's
 8 document production, correct?
 9 A. I assume so, I don't recall any right
 09:08:25 10 off.
 11 Q. But as part of your experience as an
 12 attorney, you're involved in reviewing your
 13 adversary's document production, correct?
 14 A. Yes.
 15 Q. And when you're reviewing that document
 16 production, you don't just focus on the volume of
 17 the productions, do you also focus on the
 18 responsiveness and completeness of the production,
 19 don't you?
 20 A. I'm sure that's true.
 09:08:45 21 Q. So the fact that an adversary may have
 22 produced boxes and boxes of documents doesn't make

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1 it an appropriate production if he's withheld
2 important documents, does it?
3 A. I imagine that's true, sure.
4 Q. Now, you mentioned a lawsuit in New
5 York involving Grand River and 31 States'
6 Attorneys Generals, correct?
7 A. Yes.
8 Q. Do you remember how many plaintiffs
9 there were in that action originally?
09:09:19 10 A. No.
11 Q. Okay. It was more than just Grand
12 River, wasn't it, sir?
13 A. I believe that's my understanding.
14 Q. Does seven or so ring a bell?
15 A. No.
16 Q. Okay. And when that suit was first
17 filed, what was the first pleading that the State
18 of Idaho filed in that matter?
19 A. I don't recollect.
09:09:41 20 Q. Did Idaho object to the jurisdiction of
21 the New York courts to hear that matter as to
22 Idaho?

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1 wanted to make Grand River litigate their claims
2 against them in their home states, did they not?
3 A. I can't speak for the other states. I
4 imagine they would have thought similarly.
5 Q. Now, it's not an altogether uncommon
6 practice U.S. litigation for parties to object to
7 personal jurisdictions of courts, is it, sir?
8 A. I've seen cases where personal
9 jurisdiction is an issue raised, yes.
09:11:07 10 Q. But unlike GRE whose personal
11 jurisdiction objections in California, South
12 Dakota and Wisconsin were upheld, Idaho's
13 objection to personal jurisdiction was rejected,
14 was it not, sir?
15 A. Correct. In New York.
16 Q. Yes. Idaho's objection to jurisdiction
17 in the New York case was rejected, correct, sir?
18 A. My memory is the Federal District
19 Judge, Judge Keenan granted our motion but the
09:11:44 20 Second Circuit reversed on that issue. I think
21 that's accurate.
22 Q. Now, you said on Friday that the case

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1 A. Yes we did. Well, we object on the
2 personal jurisdiction grounds.
3 Q. Personal jurisdiction grounds, right?
4 So despite the fact that your fellow
5 attorneys generals had negotiated the MSA with big
6 tobacco in New York, Idaho did not want to appear
7 in New York to defend that action, did it?
8 A. We objected because we did not believe
9 the Federal Court in the Southern District of New
09:10:13 10 York could properly exercise personal jurisdiction
11 over the State of Idaho in New York based on the
12 claims being made by Grand River.
13 Q. And Idaho and all the other states
14 except New York wanted Grand River to have to
15 litigate those claims in each of the 30 separate
16 states, didn't they?
17 A. Well, we certainly thought one
18 appropriate place would have been Federal Court in
19 the District of Idaho.
09:10:38 20 Q. As to the Idaho claim?
21 A. Correct.
22 Q. And you wanted -- the other states also

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1 had 31 AGs named. And tell me a little bit about
2 how the defense of that is structured amongst the
3 AGs?
4 A. I don't think I said anything on Friday
5 but --
6 Q. It was last Thursday?
7 A. Right.
8 Q. I don't want to hear what you said on
9 Friday.
09:12:17 10 A. Well, the states would meet often
11 telephonically to discuss the issues of the case.
12 The claims that were being made, the sort of
13 matters that were being raised.
14 Q. Okay. And the states that are involved
15 in the litigation we're talking about, they
16 appointed a liaison counsel to act on their behalf
17 in the New York court, correct?
18 A. Yes, that was New York.
19 Q. That was the State of New York's AG's
09:12:47 20 office, correct?
21 A. Correct.
22 Q. So the other AGs did not participate in

1 every court appearance, correct?

2 A. I don't think every state has in every
3 court appearance. I know different states have at
4 different court hearings.

5 Q. You have not appeared at every court
6 appearance, have you?

7 A. No, I have not.

8 Q. And you have not participated in every
9 conference call with the various judges handling
09:13:09 10 that matter, have you?

11 A. I don't know -- probably not. I've
12 been on quite a few calls with the Judge.

13 Q. Now, on Thursday in response to
14 questioning from Ms. Cate, you described some of
15 the discovery that had been done. If you want to
16 look at your transcript, I believe it's there.
17 I'm specifically talking about page 1475. I
18 believe the Tribunal has it.

19 PRESIDENT WARIMAN: Yes.

09:14:02 20 A. Yes, sir.

21 Q. Now, you indicated that thousands of
22 pages of documents had been produced, several

1 to the plaintiff's efforts to obtain econometric
2 data that the states had received in the
3 significant factor proceedings.

4 Do you recall that?

5 A. Faintly.

6 Q. Faintly?

7 A. Yes.

8 Q. You were not on any of the conference,
9 many conference calls that summer with Magistrate
09:15:33 10 Judge Eaton, the New York AG's office and
11 attorneys for the various OPMS, were you?

12 A. I don't believe so.

13 Q. And are you aware that ultimately GRE
14 did not receive the econometric data that it
15 sought from the underlying significant factor
16 proceedings?

17 A. I'm not sure which data did and did
18 not. I'm not recollecting.

19 Q. Are you aware GRE did not receive the
09:16:01 20 Marlin database on pricing maintained by RJR that
21 it sought from the significant factor proceedings?

22 A. I'm not aware.

1 depositions, including Mr. Levine, who we're going
2 to hear about. Then at the end of that answer,
3 you say, "Lots of econometric data was produced, I
4 believe." You see that?

5 A. Yes.

6 Q. Okay. You were not personally
7 responsible for producing that econometric data
8 that you claim was produced, were you?

9 A. I was not personally responsible.
09:14:36 10

11 Q. Who was personally responsible?

12 A. Well, I think members from the tobacco
13 project and PricewaterhouseCoopers probably were
14 the places where that data came from. That's my
15 memory.

16 Q. So the econometric data that you're
17 talking about is the PricewaterhouseCoopers data,
18 correct?

19 A. Correct.

20 Q. Okay. Now, do you recall there was
09:15:00 21 also in the summer, I guess it was of '08, but
22 anyone can correct me if it's a different year,
there was extended discovery battles with respect

1 Q. Are you aware that GRE did not receive
2 the voluminous FTC data that it had sought and
3 that the states had received in the underlying
4 significant factor proceedings?

5 A. I'm not aware.

6 Q. Are you aware that GRE did not receive
7 the RJR strategic planning documents that the
8 states had received in the underlying significant
9 factor proceedings?
09:16:31 10

11 A. I'm not aware.

12 Q. Okay. All of that was handled by
13 liaison counsel, correct, those issues?

14 A. I believe that's true, and there were a
15 number of matters decided by the Magistrate Judge
16 and he entered a number of evidentiary rulings and
17 the process worked itself out.

18 Q. Now, we talked about the defense group
19 among the states that were involved in the New
09:17:10 20 York litigation, correct, how they communicated
21 through liaison counsel. If you could turn to
page 1473 of your deposition -- testimony, I mean.

22 A. Yes, sir.

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1 Q. Ms. Cate asked you, are there -- line
2 two, "Are there any groups that are more
3 specifically related to a certain tobacco entity,"
4 and at that point she was talking about groups
5 within NAAG, correct?
6 A. I don't know if she's talking about
7 NAAG or just groups that are formed by several
8 states.
9 Q. Okay.
09:17:52 10 A. It could have been either.
11 Q. Yeah. I think if you go to the 1472
12 for context, it might reveal itself. But it's not
13 particularly important.
14 A. Sure.
15 Q. And in response to that, you identified
16 the group of attorneys that have formed a defense
17 group of the New York action because the logistics
18 involved in 31 different states appearing before a
19 judge and making filings and things of that
09:18:20 20 nature, correct?
21 A. Uh-huh, yes.
22 Q. And she asked you, "What is that group

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1 pages later Ms. Cate says, "Is the GRE Working
2 Group still ongoing?"
3 A. Okay. I see that question.
4 Q. So was Ms. Cate --
5 PRESIDENT NARIMAN: He hasn't seen that
6 question.
7 THE WITNESS: I see it, sir.
8 Q. It was Ms. Cate, not you as the
9 witness, that first identified the group defending
09:20:06 10 the New York action as the GRE Working Group,
11 wasn't it, sir?
12 A. I guess so.
13 Q. Now, had you spoken to Ms. Cate prior
14 to your testimony in this matter?
15 A. Yes.
16 Q. And you had talked about what you were
17 going to be testifying about?
18 A. Yes.
19 Q. And had you told Ms. Cate that the
09:20:26 20 group defending --
21 MS. CATE: Objection. This is attorney
22 work product.

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1 called?" This is on the bottom of 1473.
2 "What is that group called?" And you
3 responded, quote, I don't think it really has a
4 name. The Grand River Group. I mean, it's not
5 like we have role or attendance or anything like
6 that."
7 Do you see that?
8 A. Yes.
9 Q. Now, you did not refer to it as the GRE
09:18:48 10 Working Group, did you, sir?
11 A. Not here, no.
12 Q. Okay. In fact, the first person in
13 that exchange between you and Ms. Cate that
14 referred to that group of attorneys, the 31
15 defending the litigation was Ms. Cate, was it not?
16 A. In this questioning?
17 Q. Yes. If you could turn to page 14 --
18 one second -- 1476, and you can review the
19 intervening pages if you care to, but specifically
09:19:36 20 I'm talking about a line from Ms. Cate on page ten
21 where despite the fact that you had told her you
22 didn't think the group really had a name, three

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1 MR. LUDDY: I don't believe there's a
2 privilege here.
3 PRESIDENT NARIMAN: You cannot say what
4 they were talking about. Anyway reframe your
5 question.
6 MR. LUDDY: Okay.
7 Q. Let's look at Mr. Hering's testimony
8 from previous in this proceeding. I think you
9 have that up here. It's page 276 of the --
09:21:20 10 ARBITRATOR CROOK: Mr. Luddy, if I may,
11 is this going to be a substantial line of
12 questioning? Should the Tribunal get out the
13 transcript?
14 MR. LUDDY: No, I actually gave you
15 your transcript. It was a few pages --
16 PRESIDENT NARIMAN: Day one or day two?
17 MR. LUDDY: It's very short.
18 ARBITRATOR CROOK: Okay. Thank you.
19 Q. And on page 276 of that testimony, line
09:21:52 20 12.
21 "QUESTION: There is -- are you
22 familiar with the GRE Working Group?

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1 "ANSWER: Yes.
2 "QUESTION: Who comprises that group?
3 "ANSWER: Our working groups are
4 whomever chooses to be part of it."
5 And then there is a lengthy answer.
6 And again, at the bottom of the
7 following page, 277:
8 "Who is involved in this working
9 group?"
09:22:26 10 Mr. Herring answers: "Honestly, I have
11 no idea at this point."
12 Now, take a moment to review that, that
13 testimony, including the lengthy answer on 277 and
14 see if you see in there, Mr. DeLange, any
15 reference by Mr. Hering to Ms. Cate's suggestion
16 that the GRE Working Group was comprised only of
17 and only existed for purposes of defending the New
18 York action.
19 A. I don't understand the question.
09:23:06 20 Q. Does Mr. Hering refer at all to the New
21 York litigation with GRE in his answer when he's
22 asked to talk about the GRE Working Group?

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1 of course, not only states who are being litigated
2 but a state who's not in the litigation, that
3 lawsuit is still going to have an impact on their
4 precedent at the least with respect to their MSA.
5 So they had interest and I'm sure we
6 had phone calls where we have discussed, you know,
7 here's the way things are going, here's the claims
8 being made because I think any state would want to
9 have -- I know Idaho would, if we're not a named
09:25:14 10 party, to want to know how those claims could
11 affect our state.
12 So I'm sure at times, it's kind of an
13 ad hoc group. I'm sure there's times when states
14 more than the litigating states have collected
15 together on a phone call to say what's going on
16 with the case, here's the claims, here's some
17 issues that are arising and here's where things
18 stand.
19 Q. Take a look at the Nebraska privilege
09:25:41 20 document under your left arm.
21 A. Yup.
22 MS. CATE: Again, we object to this

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1 PRESIDENT NARIMAN: How does he know?
2 MR. LUDDY: He can read the testimony.
3 A. The testimony says what it says. I
4 imagine the panel has already heard that
5 testimony. I don't know.
6 MS. CATE: Mr. Chairman, can I object
7 to this line of questioning? It's really not
8 relevant, the opinion he has of what Mr. Hering
9 said, you have the testimony --
09:24:03 10 MR. LUDDY: Fair enough. I'll move
11 along.
12 Q. Mr. DeLange, it's not the case, is it,
13 that the GRE Working Group is comprised solely of
14 the states that are defending the New York
15 litigation, is it?
16 A. I think that's probably correct. There
17 are instances over the eight years in this
18 litigation where issues have arisen related to
19 Grand River that have impacted all the states, for
09:24:31 20 example, when Grand River did its MSA application,
21 obviously, that impacted all the states and Grand
22 River's lawsuit, which challenges the MSA affects,

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1 document. It could have been submitted much
2 earlier in this case.
3 MR. LUDDY: For the record, it could
4 not have been submitted until Mr. DeLange was the
5 first after three witnesses to make the suggestion
6 defined by the record now, I believe, that the
7 Grand River working group arose out of the
8 litigation in New York as opposed to deal with
9 specific Grand River issues under the escrow
09:26:09 10 statutes and, otherwise, as we will see is the
11 case from Mr. Levine's deposition.
12 Q. Do you see this group, it identifies a
13 Grand River working group as of 2002, first on
14 page five.
15 PRESIDENT NARIMAN: This one?
16 MR. LUDDY: Yes.
17 MS. CATE: I also would like to object
18 on the grounds that this, to my knowledge, doesn't
19 have Mr. DeLange's name on it anywhere, and he's
09:26:38 20 not involved.
21 MR. LUDDY: His name is on it.
22 MS. CATE: On page five. Okay.

1 Q. Now, the GRE Working Group as of
2 October 17, 2002, consisted of only ten states,
3 correct, sir?

4 A. That's what Nebraska has listed here.

5 Q. Correct. And in fact, Idaho, is not
6 even included, is it, sir?

7 A. Nebraska has not listed Idaho.

8 Q. And two of the ten states that are
9 listed were not defendants in the New York action,
09:27:16 10 were they, Oklahoma and Pennsylvania,
11 specifically?

12 A. I don't know if they were or not.

13 Q. Okay. And as of 2002, again, just
14 focusing on the name GRE Working Group, as of
15 2002, there were six or seven plaintiffs in the
16 New York action, weren't there, sir?

17 A. That's probably right. I don't have a
18 good -- it's eight years ago. I don't remember
19 when the other plaintiffs dropped out and I really
09:27:53 20 don't know the total number of plaintiffs but I
21 know this was more than Grand River in the
22 beginning. That's correct.

1 MR. FELDMAN: Mr. President, this
2 document is a Nebraska, from the Nebraska Attorney
3 General's office. Mr. DeLange has testified he
4 has no knowledge of this document. He is simply
5 being asked questions of a document he has no
6 knowledge of. We request this line of questioning
7 end at this point.

8 MR. LUDDY: I just have a couple more.
9 I'm not asking about -- I just have couple more,
09:29:29 10 Mr. President.

11 Q. Let's look at the entry of 10/18/02
12 concerning -- page two, and it indicates it was,
13 that the parties to this communication the
14 document that was withheld on privilege grounds
15 where Gregory Barnes and the GRE Working Group,
16 this is back in 2002 when it only consisted of the
17 ten or so states that we've seen. And it says the
18 subject of the document was held was e-mail
19 regarding enforcing state judgments in Canada. Do
09:30:10 20 you see that?

21 A. Yes.

22 Q. That didn't have anything to do with

1 Q. And then the following year, and this
2 is during 2003, as the allocable share -- as
3 efforts to adopt allocable share were really
4 getting underway. In June -- in June of 2003, the
5 Grand River Working Group had exploded to, I think
6 it's 45 states. You can take my word on that or
7 you can count them, and that included more than
8 dozen states that had nothing whatever to do with
9 the New York litigation, did it not, sir?

09:28:39 10 MR. FELDMAN: Objection.

11 A. It does look here that Nebraska has
12 listed states that are not plaintiffs in the
13 litigation -- not defendants in the litigation.

14 Q. Well, you're not suggesting that
15 Nebraska did not have accurate information with
16 respect to the composition of the GRE Working
17 Group, are you?

18 A. No. I'm just -- I don't have the
19 ability to speak on behalf of Nebraska. I'm just
09:29:01 20 saying Nebraska has listed quite a few states.
21 Looks like some of them were not defendants in the
22 litigation.

1 the New York litigation, did it, sir?

2 A. I would suspect not. I don't
3 understand --

4 MR. FELDMAN: Objection. Mr. DeLange
5 has no knowledge.

6 THE WITNESS: I really don't.

7 A. I know that there were more than ten
8 states that were sued in 2002. It was 30 plus
9 states. I mean, you sued us all in the beginning.
09:30:34 10 I think you settled with one state. You settled
11 with Kentucky, didn't you?

12 Q. You know, I think -- I appreciate you
13 pointing that out, sir, because that's exactly the
14 point. We sued 31, and at the time the GRE
15 Working Group only consisted of ten. It was not a
16 group designed and adopted to defend the New York
17 action, was it, sir?

18 A. And I disagree. There were more states
19 working on this matter than ten states at the time
09:30:59 20 and were having discussions about the litigation.
21 I know I was part of discussions in 2002 about the
22 case and about the matters that were being raised.

1 Q. Now, in 2003, the GRE Working Group
2 even included Mr. Moore from the State of
3 Mississippi, did it not?
4 A. I don't know.
5 Q. Look at page four of the GRE Working
6 Group participants. Middle column, about a third
7 of the way down.
8 A. I see that.
9 Q. Mississippi is not even a member of the
09:31:42 10 MSA, is it?
11 A. No, it is not.
12 Q. And yet Mr. Moore, who would have no
13 interest in the matters being litigated in New
14 York, Mr. Moore, Mississippi was involved in the
15 communications amongst the states concerning GRE,
16 wasn't he?
17 A. I don't know what Mr. Moore's interest
18 would or would not be. I don't have the ability
19 to testify on his behalf. I don't know. This is
09:32:08 20 -- today's the first I've actually seen this
21 document, so I don't know the listing or non
22 listing of states and the reasons why they would

1 being deposed?
2 MR. LUDDY: I'm sorry. It is Peter
3 Levine, who was an attorney for NAAG and at the
4 time, I believe Mr. Hering or somebody will
5 correct me if I'm wrong, or at least now I believe
6 he might be head of the tobacco project, chairman.
7 A. I think he's the director of the
8 tobacco project.
9 MR. LUDDY: Director of the tobacco
09:33:59 10 project within NAAG?
11 MS. CATE: Again, I want to reiterate
12 the objection to the use of this document.
13 A. I think what Peter is saying here is
14 correct and I think that's what my testimony was,
15 was that at least I can speak for Idaho.
16 Fundamentally, most of the conversations had to do
17 with the litigation but when you filed your MSA
18 application that affected all the states. The
19 claims that you're making certainly have impact on
09:34:26 20 all the states. Grand River has had escrow issues
21 in a number of states, that states wanted to see
22 how are those issues being dealt with and what

1 be part or would not be part.
2 Q. But that all goes to -- it really has
3 very little to do with the document, sir. It
4 really goes to why the group was formed and who
5 its members were and what they were doing?
6 A. And I think I've testified to that.
7 Q. And they were doing a lot more than
8 just defending the New York action, were they not,
9 sir?
09:32:41 10 A. I think that's what I've said. I think
11 that's correct.
12 Q. And if you look at page 184 through 188
13 of Mr. Levine's testimony?
14 A. Yes. I'll read from page 186.
15 I don't know specifically what the
16 mandate was or what the objectives were in forming
17 the GRE Working Group but, in general, a working
18 group would, if it's dealing with the company,
19 would address any issues, any MSA or escrow state
09:33:29 20 issues raised by that company, correct?
21 ARBITRATOR CROOK: Mr. Luddy, excuse
22 me, could you tell us who this gentleman is that's

1 seemed to be the issues that they perceived that
2 were most pressing or common. So at different
3 times -- it's a very ad hoc sort of group, I
4 believe, and so -- and it's not unique to Grand
5 River. We have done this with a number of other
6 tobacco companies, both PMs and not participating
7 manufacturers just related to what's being
8 presented to us.
9 There's an ad hoc working group with
09:35:07 10 respect to R.J. Reynolds with respect to their
11 marketing. There's one that's working now on
12 another PM who's sued the states, General Tobacco.
13 So I think what Peter's saying is correct and I
14 think it's accurate.
15 Q. But unlike your testimony, a week ago
16 Thursday, both Mr. Hering and Mr. Levine described
17 the GRE Working Group without any reference
18 whatever to the New York action, which you
19 suggested was the genesis and sole or primary
09:35:42 20 reason for the GRE Working Group.
21 Do you find that odd?
22 A. I don't think I suggested it was the

1535

1 sole reason and I can speak for Idaho. Our
2 involvement, to my recollection, began with the
3 litigation, other than some folded.

4 I mean, by 2001, we had escrow issues
5 with your client, they had not paid on units sold
6 cigarettes put into escrow. For us, in Idaho, I
7 think most of the calls related to the discovery
8 issues going on, the Antitrust claims being made,
9 the commerce clause claims being made.

09:36:23 10 Then I recall a number of discussions
11 when the MSA application came for the short time
12 it came and, you know, that's my recollection of
13 our involvement with states. And then I remember
14 other states have similar units sold escrow issues
15 with respect to Grand River that we would talk to
16 them about and say what are you all doing with
17 respect to that and how are you handling it and
18 here's what we're doing, which is, you know, it's
19 not the only company. It's one of many, many -- I
09:36:55 20 shouldn't say many, but one of several other
21 companies. We're doing the same thing we're
22 having escrow problems with some other companies,

1537

1 A. Yes.

2 Q. I think I'm going to ask you to turn to
3 Respondent's -- I'm sorry. Claimants'
4 supplemental core documents number 71, which is
5 the statement, the second statement of --

6 A. Mr. Montour.

7 Q. Mr. Montour. Thank you, Mr. DeLange.

8 In your testimony Thursday you were
9 asked if you understood the context of the GRE MSA
09:38:47 10 application. Do you remember that?

11 A. I believe I do.

12 Q. And you said simply that -- this
13 testimony is on page 1491 of your transcript if
14 you want to review it, sir.

15 MS. CATE: Counsel, if you're going to
16 use a document he has not seen, would you allow
17 him time to read it, please.

18 MR. LUDDY: Absolutely. I have no
19 reason to know if he's seen it or not. It's been
09:39:20 20 in the record.

21 A. Seen Mr. Montour's statement?

22 Q. Yes.

1536

1 too, so we would talk about those, as well.

2 Q. And apart from your involvement in the
3 GRE Working Group, you're not aware, you wouldn't
4 be aware of what other members of the GRE Working
5 Group were doing when you were not involved in
6 those conversations, correct, sir?

7 A. I think by definition that's true I
8 would not be aware of things that I'm not aware
9 of.

09:37:23 10 Q. Fair enough. I think we can even
11 stipulate to that.

12 To your knowledge, the Respondent has
13 not produced any documents pertaining to the GRE
14 Working Group in this matter, have they?

15 A. I'm a witness, I don't know what they
16 --

17 Q. Did you produce to the Respondent the
18 documents maintained by Idaho with respect to the
19 GRE Working Group?

09:37:51 20 A. I do not believe so.

21 Q. Let's go back and talk about the GRE
22 MSA, which you had mentioned?

1538

1 PRESIDENT NARIMAN: Referring to core
2 bundle --

3 Q. Why don't we go ahead and if you feel
4 you need time to review something, you can have as
5 long as you want.

6 A. Thank you.

7 Q. When you were asked about the context,
8 you said it was filed April 3rd, 2006, and the GRE
9 had requested a response in ten days, correct?

09:39:49 10 A. That's my memory, yes.

11 Q. Let's look at page -- or I'm sorry.
12 Jerry Montour's second statements. Supplemental
13 core document 71, paragraph 22.

14 PRESIDENT NARIMAN: Montour?

15 MR. LUDDY: Montour, his second
16 statement. I'll read it in the record if the
17 Tribunal doesn't have it handy.

18 PRESIDENT NARIMAN: No, we have it, but
19 please read. The supplemental.

09:40:27 20 MR. LUDDY: Supplemental core document,
21 it's thin.

22 PRESIDENT NARIMAN: Read it.

1539

1 MR. LUDDY: This is Mr. Montour
2 speaking, paragraph 22.
3 "In August 2005, I instructed Len Violi
4 to meet with a lawyer from the National
5 Associations of Attorneys General to discuss our
6 case and the possibility of GRE and PYS joining
7 the MSA. As Len Violi recorded in his affidavit
8 dated April 13, 2006, attached as Exhibit 1, he
9 explained to the NAAG lawyer that GRE could not be
09:40:58 10 made responsible for escrow payments alleged by
11 MSA states for on-reserve sales or for brand which
12 GRE may have served as a primary label
13 manufacturer because in neither case could these
14 products be properly considered or intended by GRE
15 for sale in the United States."
16 Do you see that.
17 A. Yes.
18 Q. So that meeting between Mr. Violi and
19 NAAG in connection with GRE possibly joining the
09:41:25 20 MSA had occurred about six, eight, nine months
21 prior to the formal application you referenced
22 that was submitted in April, correct?

1541

1 separate position that it could not make escrow
2 payments with respect to brands for which it could
3 not be deemed a tobacco manufacturer."
4 See that?
5 A. Yes.
6 Q. Now, you were not aware when you
7 testified last Thursday about the discussions
8 between Mr. Levine and Mr. Violi at the meeting
9 and what Mr. Levine had undertaken to provide to
09:43:18 10 Mr. Violi after the meeting, were you?
11 A. I don't think I have a recollection of
12 those happening. Presently, I don't.
13 Q. And you were not aware of the delays
14 described by Mr. Violi in paragraph 26 of his
15 affidavit, were you sir?
16 A. I -- no.
17 PRESIDENT NARIMAN: Let me interject at
18 the state. I want to know did any state to your
19 knowledge, other than State of Idaho or any other
09:43:53 20 state, respond to this application at any time?
21 They wanted an answer in ten days, which was too
22 short, but did anybody respond, response on

1540

1 A. I guess so.
2 Q. And let's look at the affidavit of
3 Mr. Violi which is attached, there's no page
4 breaks, so we're going to have to struggle through
5 here.
6 It's attached to Mr. Montour's
7 affidavit. I think it's Exhibit 1, Mr. DeLange.
8 Specifically, I'll refer you to paragraph 25 and
9 26, which I'll read into the record.
09:42:17 10 "Mr. Levine and I resolved without
11 prejudice that NAAG would, to the extent possible,
12 discern from the states with outstanding demands
13 for escrow compliance with Grand River in an
14 effort to see if the parties could mutually agree
15 on terms to join the MSA."
16 Next paragraph, 26.
17 "As of February 2006," this is eight
18 months, seven months after the meeting in August
19 '05, "As of February 2006 the settling states have
09:42:47 20 still not provided Grand River with a complete
21 report of their escrow demands by brand, nor was
22 any progress made with respect to Grand River's

1542

1 record. That's all I want.
2 THE WITNESS: Mr. Chairman, to my
3 understanding, no. I think the Federal Judge
4 noted that in May, NAAG wrote Grand River on
5 behalf of the states saying that the application
6 was incomplete and needed, it needed further
7 follow-up.
8 I think that's in the record and I
9 think that's as reflected by what the Federal
09:44:27 10 Judge stated. To my knowledge, I don't think any
11 individual state responded to that application.
12 MR. LUDDY: There is a response by NAAG
13 that is in the record and is a subsequent exhibit
14 to Montour's second statement, Jerry Montour's
15 second statement. And, in fact, we'll probably
16 touch on that briefly here this morning with
17 Mr. DeLange.
18 For the record, it's a letter from Mark
19 Greenwald to Len Violi dated May 19, 2006. Mark
09:45:06 20 Greenwald --
21 PRESIDENT NARIMAN: What date?
22 MR. LUDDY: May 19th, 2006.

1543

1 Mr. Greenwald at the time, and I think Mr. Hering
2 testified to this, was with NAAG.
3 PRESIDENT NARIMAN: Okay.
4 Q. Now, you also mentioned the ten-day
5 period. The date of Mr. -- of the application was
6 April 3rd. Is there anything that's significant
7 that happens in the context of the life of OPMS 12
8 or 13 days after April 3rd of every year back
9 then, and now, I guess?
09:45:42 10 A. Well, April 15th the date when MSA
11 payments are transmitted to the escrow agent.
12 Q. Okay. And in 2006, two of the states
13 that GRE was then actively involved in the market
14 or at least the Seneca brand was actively involved
15 in the market, not GRE, where Oklahoma and
16 Arkansas, which that year was the first year they
17 adopted Allocable Share Amendments. Are you aware
18 of that?
19 A. I don't know when their Allocable Share
09:46:15 20 Amendments were adopted and I don't know whether
21 Grand River was actively marketing its product.
22 Q. I think I restated that, but . . .

1545

1 that.
2 Let's talk about the back payments that
3 NAAG, on behalf of the states, presumably, but in
4 any event, NAAG requires before there could be --
5 an NPM could become a signatory --
6 A. NAAG doesn't represent anything. NAAG
7 requires the states, it's the states that require
8 -- just so we're --
9 Q. That's fair. NAAG is the actual
09:48:24 10 communicant of the information, correct?
11 A. Yes.
12 Q. Let's look at Exhibit 3 to the Jerry
13 Montour affidavit and, Mr. Chairman, this is the
14 letter that I was referring to previously from
15 Mr. Greenwald.
16 A. Exhibit 3?
17 Q. Yes.
18 PRESIDENT NARIMAN: Of May 19th?
19 MR. LUDDY: Correct.
09:49:17 20 ARBITRATOR CROOK: Mr. Luddy, could we
21 have just a minute to look at this?
22 MR. LUDDY: Certainly.

1544

1 So do you -- does that explain to you
2 at all the urgency of trying to get a resolution
3 prior to April 15th because wouldn't the Seneca
4 brand be off the lists in Arkansas and in Oklahoma
5 if the full boat escrow payments weren't made?
6 A. I think that certainly could be --
7 depending how a state handles and addresses it, if
8 you don't make your escrow, you could be taken off
9 your directory. I think the states certainly
09:47:01 10 could do that. It doesn't explain to me, waiting
11 until April 3rd to file your MSA application.
12 Q. Well, in terms of the context of the
13 application, don't you agree that the meeting in
14 April -- I'm sorry, of August 2005, the subsequent
15 communications between Mr. Violi and NAAG, the
16 undertaking by NAAG to provide breakdowns of
17 escrow by brand, their delays in doing so, and the
18 impending April 15th date under the new Allocable
19 Share Amendments, isn't that all context to GRE's
09:47:38 20 application to join the MSA?
21 A. I don't know -- it is what it is.
22 Q. In order to join the MSA -- strike

1546

1 PRESIDENT NARIMAN: This is Exhibit 15
2 from NAAG to --
3 (Discussion off the record.)
4 ARBITRATOR CROOK: Is there a
5 corresponding subsequent submission of documents
6 by Respondent?
7 MR. FELDMAN: We prepared a list of the
8 documents that were put in last week, which we can
9 provide at this time.
09:50:46 10 ARBITRATOR CROOK: Different matter.
11 We'll deal with this off the record.
12 (Discussion off the record.)
13 Q. This is, the first letter indicates
14 this is, the first page of this first sentence
15 indicates this is a response to Mr. Violi's
16 submission of the application by Grand River, do
17 you see that?
18 A. Yes.
19 Q. Okay. And this is written by NAAG.
09:51:15 20 Did you receive a copy of this letter
21 contemporaneously? I don't notice any cc's on it?
22 A. I don't recollect. I imagine I did,

1547

1 but I don't remember.

2 Q. Read the last, second to last paragraph
3 on the second page, finally, and this is NAAG
4 writing, "Finally, before an application to join
5 the MSA could be forwarded to the states for
6 disposition," and it lists a number of things that
7 NAAG claims needs to be involved.

8 Is it your understanding that NAAG gets
9 applications such as GREs and takes action on them
09:51:59 10 without ever forwarding them to the states?

11 A. No, and I know that they don't.

12 Q. Did you know that every state received
13 an application or a copy of GRE's application?

14 A. I don't know if every state did. I
15 know when an application comes in, NAAG advises
16 the states. I've seen others applications, so --

17 Q. Did you see GRE's?

18 A. I don't recall. I think I did, but I
19 truly don't recall.

09:52:35 20 PRESIDENT NARIMAN: Was this
21 application received by all the states to your
22 knowledge?

1549

1 PRESIDENT NARIMAN: Was this letter in
2 concerns with the state's instructions or was it
3 on your own batch?

4 THE WITNESS: This NAAG letter of May,
5 my recollection there were a number of discussions
6 amongst the states and instructed, you know, were
7 talking to NAAG and saying this is the sort of
8 response we think we need back. And I'm sure Mark
9 wrote it, and I'm sure Mark wrote in his own
09:54:15 10 language.

11 But the states, my recollection is the
12 states were in agreement with this letter and this
13 is the sort of response we wanted to communicate
14 back. So this was the states saying so.

15 Q. So you don't have a specific
16 recollection of seeing the application, but you
17 have a recollection of telling Mark Greenwald how
18 to respond to it, is that your testimony?

19 A. I remember discussions. I remember the
09:54:43 20 application saying, we had this application, it
21 was with the short time frame. It was, if I
22 recall, a number of discussions had. So I

1548

1 A. I think at some point NAAG forwarded it
2 to us because I have a recollection of seeing but
3 I don't recall, sir.

4 Q. Wait a minute. That testimony was
5 unclear to me. I thought you didn't remember but
6 now you do.

7 Can you read back the last --
8 (The reporter read back.)

9 A. I'll just restate it, if you'd like. I
09:53:01 10 don't recall for sure, I believe I did. This is
11 unfortunately too long ago for me to remember
12 precisely. Generally, I do recall receiving
13 notices of MSA applications from a certain company
14 and what was in them, sometimes the states will
15 then give feedback, relating to, well, we don't
16 have any sales in our state, we don't have
17 concerns about escrow, or in a different case, it
18 will be -- we do have escrow sales and they're
19 totally compliant or we have escrow sales that are
09:53:40 20 not compliant, we need to address that issue.

21 So I know I've been part of those sorts
22 of conversations.

1550

1 remember discussions being had, yes, sir.

2 Q. Let's look on the bottom of page one.
3 And it refers to the MSA. This is Mr. Greenwald's
4 letter and it refers to the MSA, a requirement
5 apparently of the MSA that Mr. Greenwald is
6 referring to and it reads as follows: Quote,
7 within a reasonable time after signing the MSA --
8 let me read the whole sentence in context.

9 PRESIDENT NARIMAN: What are you
09:55:27 10 reading?

11 MR. LUDDY: I'm reading the last
12 paragraph of page one of the Greenwald letter.

13 Q. "Moreover, it is evident from its
14 application that Grand River is not willing to
15 comply with the provisions of the MSA that may
16 require or that require every participating
17 manufacturer, quote, within a reasonable time
18 after signing the MSA, to make any payments
19 including interest thereon at the prime rate, that
09:55:52 20 it would have been obligated to make had it been a
21 signatory as of the MSA execution date."

22 Do you see that?

1551

1 A. Yes, sir.

2 Q. Okay. So let's talk about that
3 sentence and specifically its application to GRE.

4 This letter was written in 2006, so,
5 from whenever, pick a date, 2001, 2000 forward,
6 GRE had been selling sticks to NWS, that NWS had
7 been distributed on-reserve in various states,
8 including your state of Idaho and I think we
9 established last week that Idaho has never and
09:56:41 10 continues not to seek escrow payments with respect
11 to those shipments to Reservations within the
12 state of Idaho, correct?

13 A. It's a little more precise than that,
14 but we did have off-Reservation sales for which we
15 had units sold in our state. We had about 7.8
16 million cigarettes sold in 2001, 2002 to Idaho
17 that we did not collect escrow on those sales --

18 Q. Those weren't NWS sales, were they?

19 A. Those are Grand River cigarettes.

09:57:16 20 Q. Okay.

21 A. Those cigarettes sold to a purchaser,
22 who is either a member of a tribe or an entity

1553

1 In Idaho, all those sticks at NWS that
2 sold on-reserve, now Mr. Greenwald was demanding
3 in 2006, that GRE pay, make full MSA payments with
4 respect to all of those on-reserve sticks,
5 correct?

6 A. Yes.

7 Q. Okay. And that is because the states
8 demand that if you become a member of the MSA that
9 you submit to the application of MSA to on-reserve
09:58:59 10 sales, correct?

11 A. Actually, it's because the MSA requires
12 payment made by a tobacco company for which, I
13 think technically, MSA payments go, flow from when
14 the federal excise tax affixes.

15 Q. Correct.

16 A. So if there were federal excise tax
17 sales, then the MSA has a payment attach. And the
18 MSA says if you want to join the MSA, you,
19 company, you will need to make payments, MSA
09:59:31 20 payments for any of those cigarettes for which you
21 had a federal excise tax obligation.

22 Q. Right. Which is different than escrow

1552

1 wholly owned by a member of a tribe on an Idaho
2 reservation are not state tax so, therefore, those
3 are not units sold. We had both types of sales
4 during that time frame in our state.

5 Q. Can we put in another bucket for a
6 minute and I'll give you a chance to speak at them
7 at length, but put in another bucket for a minute,
8 the sales that were the subject of the escrow
9 action all right and let's just deal with, for
09:57:52 10 lack of a better word, we've been describing all
11 along the on-reserve sales of Seneca brand sticks
12 by NWS. Okay?

13 A. Yes, sir.

14 Q. So for all these years NWS had been
15 selling Seneca brand sticks on-reserve in Idaho,
16 as well as other states, and nobody is demanding
17 or collecting escrow with respect to those sticks?

18 A. Well, Idaho is not. Other states have
19 different tax laws.

09:58:16 20 Q. All right. Okay. Let's just deal with
21 Idaho. And then the Tribunal can extrapolate the
22 other states based upon the record as it sees fit.

1554

1 because escrow is based upon state excise tax and
2 the unit analysis?

3 A. Right escrow is state tax specific
4 driven.

5 Q. Right because it's based upon, because
6 participation of the MSA is based on FET, as
7 opposed to S and T, participation in the MSA
8 requires a company to submit to the application of
9 the MSA to on-reserve activity, correct?

10:00:10 10 A. Yes. The FET is generally affixed way
11 before you know where it's going to go, I think,
12 but if there's an FET there's an MSA obligation.
13 That's true today for Phillip Morris for its
14 cigarettes sold on an Idaho reservation or R.J.
15 Reynolds. There's FET on those cigarettes and
16 they pay MSA payments on them.

17 Q. That's not entirely true, is it, sir?
18 Doesn't Phillip Morris and the other OPMs pay upon
19 shipments as certified by Management Science
10:00:48 20 Associates as opposed to FET?

21 A. I would, you know what, that would be a
22 question I would then say I'd call Michael Hering

1555

1 at NAAG to clear me up. You could be right. My
 2 understanding is, and I'll probably exhaust it
 3 here real quick, if there's an FET obligation,
 4 essentially there will be an MSA payment.
 5 How the cigarettes are recorded -- it
 6 has nothing to do with MSA, it's called Management
 7 Science Associates, something like that. But
 8 Phillip Morris has cigarettes sold on an Idaho
 9 reservation today and they're making MSA payments
 10 on them, I believe.
 11 ARBITRATOR ANAYA: So there are MSA
 12 payments with regard to cigarettes sold on
 13 reservations to tribal members?
 14 THE WITNESS: I believe so because the
 15 MSA obligation attaches --
 16 ARBITRATOR ANAYA: I understand. That
 17 would be the effect, though?
 18 THE WITNESS: I think that would be
 19 correct.
 10:02:00 20 MR. VIOLI: Professor Anaya, if the
 21 Tribunal would like --
 22 ARBITRATOR ANAYA: I don't think this

1557

1 Q. I could be wrong, I thought they were
 2 but it's not urgent for purposes of our
 3 discussion.
 4 A. Yes, sir.
 5 Q. Under the MSA or under the state's
 6 interpretation of the escrow statutes and, again,
 7 you could limit it to Idaho unless you know the
 8 people, if everyone does this, which I think is
 9 the case, but the states try to impose escrow on
 10 the manufacturer of a product without record to
 11 who owns the trademark or who is the ultimate
 12 distributor; is that fair?
 13 A. I can speak to Idaho because I'm not
 14 totally familiar with every state. Idaho, for
 15 lack of a better word, we use the fabricator test.
 16 If you make the cigarette, you have an escrow
 17 obligation for it. If you're a PM, you make the
 18 have the cigarette, you have the MSA obligation
 19 for it. We had a fair amount of litigation with
 10:04:31 20 Brown & Williamson and House of Prince about that
 21 very issue. So we follow what we call the
 22 fabricator test. If you make it, you have the

1556

1 is the time to continue on the record.
 2 PRESIDENT NARIMAN: Go on.
 3 Q. Let's talk about some private label
 4 products that GRE had manufactured for other brand
 5 or trademark holders and I think Idaho,
 6 ultimately, I think these cigarettes were the
 7 subject of the Idaho escrow complaint but you can
 8 correct me if I'm wrong on that.
 9 Are you aware in the early 2000s before
 10:02:43 10 GRE started selling Seneca and Opal sticks to
 11 Tobaccoville for off-reserve distribution and
 12 sales, that GRE had done some contract
 13 manufacturing for other trademark holders, such as
 14 Westport, Capital and a number of others?
 15 A. I don't have any recollection of that.
 16 Q. Do you know whether --
 17 A. I don't believe our escrow issues, I
 18 think they were almost all -- I think they're
 19 almost all Seneca and Opal, maybe not Opal but
 10:03:20 20 Seneca. I don't recall the other brands, I guess
 21 it's possible it could, but I don't recall hearing
 22 about those brands.

1558

1 obligation. If you're an NPM, it's escrow if
 2 you're a PM, it's MSA.
 3 Q. And that's a common test amongst the
 4 states, isn't it? To your knowledge, there aren't
 5 states that have a different test, other than the
 6 fabricator test, do they?
 7 A. I think that's common. I don't know
 8 whether every state -- I just don't know. I can't
 9 speak for sure if every state does it the same
 10:05:06 10 way.
 11 Q. Now, are you aware that some of these
 12 contractor or lot production manufacturing jobs
 13 that GRE did, for instance, the owners of the
 14 Westport trademark or the Capital trademark, that
 15 GRE was not the only manufacturer of those
 16 particular products?
 17 A. I have no such knowledge.
 18 Q. Have you ever heard of situations where
 19 a trademark owner executes different contracts with
 10:05:37 20 different manufacturers to produce lots of its
 21 product?
 22 A. That certainly sounds familiar. I

1559

1 mean, I know we have had issues with companies who
2 have tried, with trademark holders who tried to
3 get someone else to make it, and then point the
4 fingers at each other who hold the escrow. We
5 just say, look, if you make it, you owe it and not
6 get into these contractual arrangements of how
7 that, you know, who has the escrow. If you make
8 the cigarette, you owe the escrow.

9 Q. For all the brands, for the entirety of
10:06:17 10 the brands, not just those sticks that you
11 manufactured. That's the point.

12 A. I have not faced that issue, so I
13 haven't studied that.

14 Q. Are you aware some states, most notably
15 Virginia and a few others were demanding that GRE
16 and this is prior to the MSA application in 2006,
17 were demanding that GRE pay full escrow on the
18 entirety of a brand, even though GRE may have only
19 produced or manufactured a small percentage of the
10:06:48 20 sticks sold under that brand name?

21 A. I have no such knowledge of that.

22 Q. Do you know whether that is why GRE was

1561

1 we just said we have 7.8 million GRE cigarettes,
2 the escrow on that is this. We have received --
3 we have not received any money yet on that, on
4 those units sold.

5 Q. Let's talk a little bit about the Idaho
6 directory. You had mentioned last Thursday that
7 at some point the Seneca Cayuga were on the
8 directory but then asked to be removed.

9 Do you remember that?

10:08:59 10 A. Yes, sir.

11 Q. Based upon your experience and
12 understanding of the directory, can you imagine a
13 circumstance under which a manufacturer would
14 affirmatively request to be removed from the
15 directory?

16 A. They didn't want to do business in our
17 state. I mean we have had several companies ask
18 to be -- their product to be removed from our
19 directory and we've complied with it. Seneca
10:09:31 20 Cayuga didn't give us a reason, they just -- after
21 we resolved our escrow issue with them, at some
22 point after, you know, "We just don't want to have

1560

1 requesting and NAAG never provided the breakdown
2 of escrow payments by brand prior to its MSA
3 application?

4 A. I have no such knowledge of that. I
5 know that NAAG has states and, for example, Idaho
6 reported, we have seven -- approximately 7.8
7 million units sold for which we don't have escrow
8 deposited. And we reported that back but I can't
9 speak for any other state.

10:07:27 10 Q. Do you know if Optiva brand was sold in
11 Idaho?

12 A. That doesn't ring a bell.

13 Q. And do you know whether NAAG has to
14 this day broken out escrow demands by the various
15 states by brand?

16 A. I believe NAAG has provided GRE lists
17 of the outstanding escrow balances for the various
18 states. I don't know if they've broken it out by
19 brand. I don't know.

10:08:05 20 Q. Has Idaho broken it out by brand?

21 A. I don't recollect. I don't believe so.
22 I think we said -- I'd have to go look. I think

1562

1 our cigarettes sold in your state anymore, would
2 you please remove us from your directory," and he
3 said, "Okay."

4 PRESIDENT NARIMAN: You said you had
5 resolved the escrow issue.

6 THE WITNESS: Yes, with the Seneca
7 Cayuga, they had an escrow account and they had
8 deposited money into it but after all the
9 wholesaler reports came in, they were about \$5,000
10:10:04 10 short, it turned out. So we wrote them a letter.
11 We said, you know, "Here's the reports we've got
12 this amount of units sold left. You owe some more
13 money."

14 And the Seneca Cayuga essentially said
15 okay, and they deposited the money in the account
16 and made it whole. So we were done. Then at some
17 time sometime thereafter --

18 PRESIDENT NARIMAN: When was this?

19 THE WITNESS: That was 2005, I believe.
10:10:30 20 Then, thereafter at some point they communicated
21 to us they wanted, they wanted -- they didn't want
22 to have the cigarettes sold in our state anymore

1563

1 and asked that the product be removed from the
2 market -- from the directory, so we complied with
3 that.
4 Q. Just so we're clear, Seneca Cayuga is
5 unassociated with GRE?
6 A. That's my understanding. Seneca Cayuga
7 is a federally recognized tribe. I believe
8 they're located in Oklahoma.
9 Q. Let's look in and see if we can't
10:11:02 10 define the reason why they were motivated to do
11 that. The way the directory works --
12 MS. CATE: I would object to the line
13 of questioning for the reason you're asking the
14 witness to speculate.
15 MR. LUDDY: I'm going to leave the
16 Seneca Cayuga behind.
17 Q. At some point in your testimony last
18 week you had suggested that if GRE would just get
19 on the directory, NWS could distribute all the
10:11:31 20 Seneca brand it wanted to, correct?
21 A. Under the law GRE certifies its
22 cigarettes and they get put on the directory, then

1565

1 A. Well, yes.
2 Q. Okay.
3 A. I think the acts of doing that submit
4 you to the personal jurisdiction of the state of
5 Idaho but that's for a court to decide.
6 Q. Okay. And then if GRE were on the
7 directory, NWS would then sell its cigarettes, the
8 Seneca brands to WarPath on-reserve, right?
9 A. Yes.
10:12:58 10 Q. But then once it's on the directory,
11 downstream distributors of WarPath could take the
12 product off-reserve, correct, because it's on the
13 directory?
14 A. Yes.
15 Q. And once it goes off-reserve, Idaho is
16 going to stick GRE for escrow with respect to the
17 sales by its downstream distributors off-reserve,
18 correct?
19 A. That's incorrect. The stamping -- the
10:13:33 20 taxing and stamping obligation is on the
21 wholesaler. WarPath is a retail outlet, at least
22 that's to my knowledge. And so if there's a tax

1564

1 the complementary act doesn't prohibit the sale of
2 those cigarettes, that's correct.
3 Q. Now, if a brand is not on the
4 directory, it's unlawful for stamping agents to
5 stamp it, correct, and sell it?
6 A. That's one of the provisions, yes.
7 Q. But if the cigarette brand is on the
8 directory, then the stamping agents can stamp it
9 and distributors can sell it in the state of
10:12:07 10 Idaho, correct?
11 A. Correct.
12 Q. And they can sell it on or off-reserve,
13 correct?
14 A. Yes.
15 Q. And to get on the directory, GRE would
16 have to register to do business in Idaho, correct?
17 A. They'd have to certify with the
18 Attorney General. They'd have to appoint a
19 registered agent. They would have to establish a
10:12:29 20 qualified escrow fund.
21 Q. In your eyes, submit to the
22 jurisdiction of Idaho law, correct?

1566

1 obligation, it is on the distributor. A retailer
2 does not have any tax obligation under Idaho law.
3 Q. Who's got the responsibility for the
4 escrow, not the wholesaler or the retailer?
5 A. Well, Grand River does, but for only
6 those state taxed cigarettes. So, for example,
7 Scott Maybee is a retailer. He sold millions of
8 cigarettes into our state and you have the
9 decision in front of you. We never sought tax
10:14:13 10 revenues from him because there isn't a tax
11 obligation on a retailer, even an Internet
12 retailer, they just have no tax obligation.
13 That's why we had no escrow obligation and we had
14 no tax issues that arose. With Native Wholesale,
15 they're a wholesaler and they're wholesaling to a
16 retail outlet, WarPath.
17 So WarPath does not have any tax
18 obligations at the state level and Native
19 Wholesale sells to WarPath because WarPath is
10:14:49 20 wholly owned by Native Americans, has no -- has a
21 tax exemption.
22 So I don't understand how there would

1567

1 then be escrow on Grand River --
 2 Q. Could a wholesaler buy quantities of
 3 cigarettes from WarPath, a state licensed
 4 wholesaler?
 5 A. Well, WarPath would have to comply with
 6 our wholesaler laws, I believe. To my knowledge,
 7 they had not applied for it. I'm not aware that
 8 WarPath is a wholesaler.
 9 Q. Could a wholesaler buy product from --
 10:15:25 10 A. From a retailer?
 11 Q. Yes. Or other retailers?
 12 A. Can a wholesaler buy -- I don't know.
 13 That's speculation. We've never had -- I've never
 14 come across a situation where a retailer turns
 15 around and sells cigarettes back to a wholesaler,
 16 who's then going to sell them to some other
 17 retailer.
 18 Q. A wholesaler in Idaho can also buy
 19 Seneca brand once it's in the directory to
 10:15:59 20 wholesalers outside of Idaho anywhere in the
 21 country correct?
 22 A. I don't know why not.

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1 litigation is all about.
 2 Q. If Idaho -- if GRE agreed to submit to
 3 the jurisdiction of Idaho and puts Seneca brand on
 4 the directory, it would actually increase the
 5 likelihood of Seneca brand cigarettes being sold
 6 in Idaho off-Reservation, correct, even if GRE
 7 didn't want them to be sold off-Reservation?
 8 A. We're speculating, I don't know.
 9 Q. But isn't that a reason why a
 10:17:35 10 manufacturer might not want its cigarettes on a
 11 directory in Idaho or any particular state because
 12 it doesn't want to be responsible for escrow
 13 because it can't control the downstream
 14 distribution of its product?
 15 MS. CATE: Objection. Please don't put
 16 words in the witness's mouth.
 17 MR. LUDDY: It's cross-examination.
 18 A. I don't know how to answer that.
 19 That's just speculation. We have lots of
 10:18:02 20 companies who have their cigarettes sold. Grand
 21 River is on the directory in other states, and so,
 22 I don't know -- I don't know how to respond to

1568

1 Q. Once it's in Idaho, you're going to
 2 charge GRE for escrow on those cigarettes, right?
 3 A. Assuming that the wholesaler sales are
 4 state taxed, yes.
 5 Q. Which is a fair assumption, correct?
 6 A. Well, unless they're selling them
 7 on-Reservation.
 8 Q. I'm taking on-reserve out of the
 9 wholesaler in Boise?
 10:16:24 10 A. I believe that's probably accurate.
 11 (Discussion off microphone.)
 12 Q. But as it stands now, that same
 13 wholesaler in Boise could not buy Seneca brand
 14 cigarettes from an out-of-state distributor and
 15 sell them in Idaho, could it?
 16 A. Well, they're not supposed to. I mean
 17 --
 18 Q. Well, they would be breaking the law, I
 19 guess, right?
 10:16:54 20 A. Yes.
 21 Q. All right.
 22 A. That's what our Native Wholesale

1570

1 your question -- I can't respond to your question.
 2 It's just speculating why someone would or would
 3 not want to have their cigarettes sold in any
 4 given state.
 5 Q. Do you know whether Grand River,
 6 whether Seneca sold on-reserve in any of the
 7 states that Grand River is on the directory?
 8 A. I have no knowledge. I don't know.
 9 Q. Let's look at -- is Skydancer sold
 10:18:59 10 on-reserve in Idaho, do you know?
 11 A. I think Skydancer is a brand family of
 12 the Seneca Cayuga and I believe there were sales
 13 in Idaho that were escrowed sales. I'm not
 14 recollecting whether we had any non escrowed sales
 15 at that time. It's about five years ago, but
 16 Skydancer is one of the brand families of the
 17 Seneca Cayuga.
 18 PRESIDENT NARIMAN: This line of
 19 questioning now, you must remember this is after
 10:19:33 20 arbitration, you have to bring it within one of
 21 the articles.
 22 Q. Let's look just briefly --

1 MR. LUDDY: And I'm getting ready to
 2 wrap up, Mr. President.
 3 Q. -- the Maybee decision which you asked
 4 about last week.
 5 A. Yes, sir.
 6 PRESIDENT NARIMAN: Which one, this
 7 Supreme Court?
 8 MR. LUDDY: Correct.
 9 PRESIDENT NARIMAN: State of Idaho.
 10:20:03 10 Q. State of Idaho, okay?
 11 A. Yes, sir.
 12 Q. Page three. First full paragraph after
 13 the block quote, the court here is talking about
 14 the goals of the complementary act and it states,
 15 last sentence of that paragraph, I'll read it:
 16 "The state was seeking to protect the scheduled
 17 fee payments under the MSA and ensure that
 18 appropriate escrow funds are available to the
 19 state when needed to pay medical expenses incurred
 10:20:45 20 due to tobacco-related health conditions thereby
 21 protecting the public health."
 22 Do you see that?

1 didn't want to accomplish, but none of them said
 2 in their escrow statutes, the Model T or
 3 otherwise, "We want to raise the price of NPM
 4 cigarettes so teens don't buy them," that's not in
 5 Model T Escrow Statute is it, sir?
 6 A. No, they talk in more broad terms. I
 7 can tell you that's certainly what was testified
 8 to to the Legislature for both of these statutes.
 9 Q. But it wasn't the findings the
 10:22:26 10 legislature made and they made findings with
 11 respect to public health as the Supreme Court
 12 articulates here, but the public health they were
 13 seeking to protect was with respect to these
 14 escrow statutes, so that if they dreamed up a
 15 cause of action at some point over the next 14
 16 years, they would have a source of recovery,
 17 correct?
 18 A. I think it's much broader than that,
 19 Mr. Luddy.
 10:22:48 20 Q. Well, you may think it's much broader
 21 but the Supreme Court did not, correct?
 22 A. I don't think you can attribute the

1 A. Yes.
 2 Q. Okay. And in identifying the goals of
 3 the complementary act, the states did not or the
 4 Idaho Supreme Court did not mention what we've
 5 heard an awful lot about last week, did not
 6 mention that it wanted to make sure that
 7 cigarettes, the prices of the cigarettes stayed
 8 high so that minors wouldn't buy them, did they?
 9 A. The Supreme Court didn't say that.
 10:21:19 10 Q. And the legislature didn't say that in
 11 the complementary act, either, did it?
 12 A. I don't think Section 39-8401 got that
 13 specific and did not mention that. In fact, I
 14 think the court quotes that section that's just
 15 above what you read there on the same page.
 16 Q. And the Idaho Escrow Statute didn't get
 17 that specific, either, did it, sir?
 18 A. I don't believe it talked about raising
 19 the price of cigarettes in the statute.
 10:21:48 20 Q. So we have heard an enormous amount of
 21 testimony and argument from people speculating
 22 about what these various legislatures wanted to or

1 Supreme Court what they were thinking based upon
 2 this one statement. They talked about protecting
 3 the public health. I'm sure if the issuance that
 4 needed to be addressed that the raising the
 5 cigarette prices they would have addressed it, but
 6 it wasn't an issue before the court. So they're
 7 just trying to summarize their understanding which
 8 the statutes are, in part, designed to protect the
 9 public health.
 10:23:19 10 Now, one part of the public health is
 11 higher cigarette prices put a significant downward
 12 pressure on youth smoking rates, that also
 13 encourages more so some people to quit, and that's
 14 a benefit to the public health of the state of
 15 Idaho.
 16 Q. The Legislature made no such finding in
 17 its adoption of the complementary act, did it,
 18 Mr. DeLange?
 19 A. They talked in more broad terms, just
 20 in terms of the public health itself.
 10:23:46 20 Q. And the same with the Escrow Statute,
 21 they made no finding that raising the prices of
 22

1 NPM cigarettes to avoid teen smoking was an
 2 objective of the act, did they, sir?
 3 A. They didn't say that.
 4 PRESIDENT NARIMAN: You were to give us
 5 a statement of purpose of the complementary act --
 6 THE WITNESS: Yes, sir.
 7 PRESIDENT NARIMAN: -- as in the
 8 statute. That means as in the documents which go
 9 through the legislature, as well as for the escrow
 10:24:20 10 amendments.
 11 THE WITNESS: Yes, sir. I forwarded
 12 the statement of purpose to --
 13 PRESIDENT NARIMAN: At some point in
 14 time, please give it to us.
 15 MR. FELDMAN: Mr. President, we have
 16 the Idaho statement of purpose for you.
 17 THE WITNESS: Now, I think the one I
 18 sent was for the allocable share. If you also
 19 want the complimentary one, we can download that
 10:24:43 20 and send it, too. I don't think I forwarded that.
 21 I understood you only want the allocable share
 22 one, that's the one I forwarded on but we can get

1 tripled the 2003 market share loss of 6.24826
 2 percent to 18.74478 percent to obtain the
 3 percentage of the NPM adjustment. From this PWC
 4 calculated a potential maximum 2003 NPM adjustment
 5 of \$1,201,507,711.99 consisting of potential
 6 maximum 2003 NPM adjustment of one billion and
 7 then some for the originating manufacturers and a
 8 potential maximum 2003 NPM adjustment of 86
 9 billion -- I'm sorry, \$86,113,400.08 for the
 10:27:14 10 subsequent participating manufacturers.
 11 Do you see that?
 12 A. Yes, sir.
 13 Q. So under the NPM adjustment and just
 14 for 2003 the subsequent participating
 15 manufacturers are eligible subject to final
 16 determination on due diligence, are eligible for
 17 \$86 million payment from the states if there's an
 18 NPM adjustment; is that correct?
 19 A. Well, if there's an NPM adjustment and
 10:27:46 20 states are found not to have diligently enforced,
 21 then that adjustment would be available to them
 22 based upon -- it's a very complicated formula but

1 the other one easily.
 2 Q. Can you look at core document 20, and
 3 I'm wrapping up here.
 4 PRESIDENT NARIMAN: Core document?
 5 MR. LUDDY: Core document 20. I'm
 6 sorry, Claimants' core documents. 20.
 7 THE WITNESS: Is that one of these?
 8 MR. LUDDY: Yes, it is, Idaho brief.
 9 PRESIDENT NARIMAN: What is that
 10:25:24 10 document?
 11 MR. LUDDY: Core document 20 --
 12 A. This is an Idaho brief when we brought
 13 our action against the PMs to declare that we have
 14 diligently enforced our Escrow Statute.
 15 PRESIDENT NARIMAN: Oh, yes.
 16 Q. Could you look at paragraph 28. This
 17 is going to be a very brief line of questioning,
 18 Mr. Chairman. It concerns the competitive status
 19 as between NPMs and SPMs I'm going to read a
 10:26:11 20 sentence that starts on the top of page 18 and is
 21 a part of paragraph 28 of this brief.
 22 Quote: The independent auditor PWC

1 depending upon their market shares.
 2 Q. And the vast majority of subsequent
 3 participating manufacturers, the vast majority of
 4 sticks sold by subsequent participating
 5 manufacturers are sold by exempt SPMs, correct?
 6 A. I'm not aware if that's the case or
 7 not.
 8 Q. But these are the exempt SPMs that
 9 already don't pay a nickel on their grandfather
 10:28:29 10 share, correct?
 11 A. They don't pay an MSA payment on the
 12 grandfather share but most of them have cigarette
 13 sales far larger than the grandfather share.
 14 Commonwealth --
 15 Q. Commonwealth is four times. You know
 16 what the other ones are? You say most of them
 17 have larger --
 18 A. I think many do.
 19 Q. Is that really true, Commonwealth?
 10:28:52 20 A. Let me tell you my understanding. I
 21 believe most of them sell beyond the grandfather
 22 share.

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1 Q. Okay. But that's a little different
2 than saying most of them have far larger shares.
3 Commonwealth has far larger shares, correct, but
4 the other ones don't, do they, Mr. DeLange?
5 A. I think most of them have sales above
6 and beyond their grandfather share.
7 Q. Okay. But in addition now we see here
8 from your brief in Idaho or the State of Idaho's
9 brief, in addition to not paying a nickel on their
10:29:21 10 grandfathered share they stand to get a
11 substantial chunk in the case of Commonwealth or a
12 large exempt SPM like Liggett, a substantial chunk
13 of \$86 million in rebates essentially, if there's
14 an NPM adjustment, correct?
15 A. The MSA allows for an NPM adjustment if
16 all these conditions apply and have some very
17 complicated formulas, the result is as we stated
18 here, if the states are found not to have
19 diligently enforced their respective escrow
10:29:59 20 statutes, the SPMs in the aggregate would be
21 entitled to this portion, this part of the NPM
22 adjustment.

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1 don't have to pay anything on the historical
2 market share, so they're free to either include or
3 not to include that MSA charge in the pricing of
4 their cigarettes, correct, or at least below their
5 grandfathered share, right?
6 A. I don't know how they account for
7 their --
8 Q. Right. But if you saw NPMs in Idaho
9 pricing below what their full blown MSA payment
10:31:42 10 would be, there's nothing Idaho can do about that,
11 is there? They can't go to the exempt SPM and
12 say, "Hey, raise your prices, it's a little too
13 low?"
14 A. The MSA doesn't authorize us to do
15 something to that respect. I'm not aware of any
16 of that situation happening, so I haven't had to
17 deal with it.
18 Q. You're not aware of it happening
19 because Idaho doesn't monitor SPM prices, correct?
10:32:10 20 A. We don't systematically monitor SPM or
21 PM prices.
22 Q. And neither of the other states do

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1 Q. And do the NPMs stand to get any piece
2 of the NPM adjustment money, if there's a rebate
3 of everybody?
4 A. Well, by definition no because they're
5 not part of the MSA.
6 Q. Right. But any rebate that the exempt
7 SPMs would get under the NPM adjustment would
8 reduce the average stick cost that they pay under
9 the MSA, right?
10:30:33 10 A. You're asking me economic questions
11 now.
12 Q. Withdrawn.
13 Now, I take it that it's your position
14 or it's the state of Idaho -- somebody in Idaho's
15 decision, not the Idaho Supreme Court, but I take
16 it that it's your position that you want to keep
17 cigarette prices high to discourage minors from
18 smoking, correct?
19 A. I think it's my office's position that
10:31:02 20 higher prices benefits the public health, it does
21 reduce youth smoking.
22 Q. The reduced SPMs as we discussed, they

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1 either, do they, sir?
2 A. I can't speak to the other states.
3 Q. NAAG doesn't, does it, sir?
4 A. I can't speak for NAAG on that.
5 Q. Now, on the SPM piece, the 86 million
6 we're talking about, they're eligible for an NPM
7 adjustment even though the case of Commonwealth
8 certainly and Liggett, as well, they haven't lost
9 any market share since signing the MSA, have they?
10:33:02 10 A. Two of the original OPMs have not lost
11 market share for that year either, but the MSA
12 allows for NPM adjustment if all those conditions
13 flow, so Phillip Morris gained market share and
14 they're still entitled --
15 Q. And they're still standing get money
16 back right?
17 A. Yes, that's how it works.
18 MR. LUDDY: I have no further questions
19 of the witness at this time.
10:33:32 20 PRESIDENT NARIMAN: Okay.
21 MS. CATE: Mr. Chairman, may we take a
22 brief break.

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1 PRESIDENT NARIMAN: Yes. Are you done
2 with the witness?
3 MS. CATE: I believe we'd like to have
4 redirect.
5 (Whereupon, at 10:33 a.m. the hearing
6 was adjourned until 10:43 a.m. the same day.)
7 PRESIDENT NARIMAN: Let's begin.
8 ARBITRATOR CROOK: Back on the record
9 the record should then indicate we do not have
10:47:34 10 further questions from the Respondent and the
11 witness has been excused with the appreciation of
12 all concerned.
13 PRESIDENT NARIMAN: Wait a minute. You
14 better put it in the record. Yes.
15 There is no further examination,
16 redirect or otherwise, on behalf of the
17 Respondent. And the examination of Mr. Brett
18 DeLange is concluded. Yes.
19 Thank you.
10:48:02 20 Okay. Now what?
21 MR. VIOLI: Claimants will have a short
22 presentation presented by Mr. Weiler and then

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1 MR. WEILER: It's my in-between
2 argument.
3 What I would like to do this morning
4 and fairly quickly, if possible, is answer three
5 questions that the Tribunal had.
6 And what I have before you, just to
7 make it easier, because I know we're running short
8 on time, the two documents that you see tape bound
9 here could have been what I would subject you to
10:49:56 10 orally, but instead I've reduced it to writing.
11 And I will make even briefer arguments along with
12 the PowerPoint. So you'll see that when I -- so
13 when I refer to evidence here it's also mentioned
14 in here in more detail.
15 PRESIDENT NARIMAN: Okay.
16 MR. WEILER: And I've lost track of
17 documents entering into the record so I'll just
18 make sure the ones I'm going to refer we're sure
19 on. So the back of the large binder --
10:50:26 20 MR. FELDMAN: I'm sorry, counsel.
21 Mr. President, this appears to be a
22 brief.

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1 which will follow with a presentation by myself
2 regarding the evidence that is in the record.
3 PRESIDENT NARIMAN: Keep track of time.
4 MR. VIOLI: We will. Thank you.
5 MR. WEILER: We have two hours and 20
6 minutes.
7 MR. VIOLI: Is that the current
8 presentation that's in the back?
9 MR. WEILER: You will need that?
10:48:37 10 PRESIDENT NARIMAN: We will?
11 MR. WEILER: You will need that.
12 Yes. Are you still needing to have on
13 with you -- you probably will.
14 Both Mr. Violi and I have documents in
15 that big binder. They're there for you when you
16 need them.
17 PRESIDENT NARIMAN: Okay. Let's go.
18 Come on, Mr. Weiler. This is your
19 closing argument?
10:49:30 20 MR. VIOLI: No. No.
21 PRESIDENT NARIMAN: The opening
22 argument.

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1 PRESIDENT NARIMAN: I don't know what
2 it is. It's his argument.
3 MR. FELDMAN: But this isn't a slide.
4 I mean, this appears to be a brief.
5 MR. WEILER: Well, I mean I can, if you
6 prefer, speak them. I'm trying to be timely in my
7 concern so I mean I can, if you'd like, speak
8 these instead, because they basically say the same
9 thing that I'm going to say.
10:50:52 10 MR. FELDMAN: I mean it's one thing to
11 distribute slides but distributing a brief is
12 something very different.
13 MR. WEILER: I don't really think these
14 are briefs. I mean these are -- one is four
15 pages, with a little bit on five and the other --
16 MR. FELDMAN: There are footnotes --
17 there are footnotes in this document.
18 MR. WEILER: Well, there's like --
19 well, one footnote is -- there's -- let's see,
10:51:10 20 there's one footnote there, so there's two
21 footnotes in one of the documents and on the other
22 one -- and if you'd like I'll read the footnotes

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1 for you, when we get to them. And three in the
 2 other. The one footnote just refers to the
 3 transcript. I mean --
 4 MR. KOVAR: Mr. President, if I may
 5 just say, you know, we all -- we all prepare our
 6 oral statements in writing but we don't submit
 7 them to you as if they were briefs. The only
 8 thing that -- that we give for reference are
 9 slides and I -- this is highly inappropriate.
 10:51:40 10 MR. WEILER: And inappropriate
 11 because --
 12 MR. KOVAR: Because it's not a slide.
 13 MR. WEILER: -- I'm trying to think of
 14 which rule we're talking about.
 15 MR. KOVAR: We're asking the Tribunal
 16 and we're asking the president to rule that we
 17 can't submit our oral statements in writing.
 18 MR. WEILER: Why not?
 19 MR. KOVAR: That's all we're asking
 10:52:00 20 because otherwise we of course could present you
 21 with the writings that we will be presenting
 22 orally.

1589

1 question -- this is a question Professor Anaya and
 2 Mr. Crook both alerted our attention. It refers
 3 to paragraph 77 and 103 of the position on
 4 jurisdiction. And the short answer you see below
 5 there is that the measures that we're dealing with
 6 with respect to the on-reserve sales, to use that
 7 colloquial term, are actually the contraband
 8 measures. And the contraband measures were all
 9 brought in after 2001, March 12.
 10:53:25 10 So our short answer is the
 11 on-Reservation retail sales question from a time
 12 standpoint -- from a timeliness standpoint is a
 13 moot point.
 14 That being said, we want to be fair and
 15 address this whole concept of retail sales
 16 on-reserve so that we're all fairly clear with it
 17 and how it meshes with the contraband measures and
 18 our application.
 19 So this evidence here is evidence on
 10:53:55 20 the record which is quoted in -- for the most part
 21 in my on-reserve --
 22 ARBITRATOR CROOK: Excuse me,

1588

1 MR. WEILER: We have no objection to
 2 the Respondent providing their writings -- their
 3 written version of their oral presentation.
 4 PRESIDENT NARIMAN: At some point of
 5 time up to now we have to agree to all this and he
 6 could speak to all this in the record. He could
 7 speak to all this in the record which would take a
 8 long time. So he's giving this for the benefit of
 9 the Tribunal.
 10:52:28 10 If you don't want us to look at it, we
 11 won't and we'll listen to him instead.
 12 MR. KOVAR: Mr. President, if I may,
 13 this is the oral part of the proceedings, so if he
 14 wants something in the record he should have to
 15 read it.
 16 PRESIDENT NARIMAN: Okay. Let's read
 17 it. Come on.
 18 This is what he's saying so it will
 19 come on the record as well as be here. Okay.
 10:52:47 20 Come on.
 21 MR. WEILER: With respect to
 22 on-Reservation sales. So this was the first

1590

1 Mr. Weiler.
 2 MR. WEILER: Yes.
 3 ARBITRATOR CROOK: Quick question.
 4 So your presentation to us -- I can't
 5 lay my hands on my copy of the jurisdictional
 6 decision right away. But is that Paragraph 103
 7 did not extend to the Contraband Laws.
 8 MR. WEILER: That's correct.
 9 ARBITRATOR CROOK: Okay. Question of
 10:54:17 10 fact. We'll look. Thanks.
 11 MR. WEILER: With respect to the
 12 evidence.
 13 So what we have in the evidence with
 14 respect to the issue of retail sales and the
 15 distribution of cigarettes with respect to retail
 16 sales on-reserve.
 17 So we have from Mr. Montour in his
 18 questioning --
 19 PRESIDENT NARIMAN: It would -- it
 10:54:37 20 would help me if you could first tell me how are
 21 you -- I mean what is your conclusion? And then
 22 you can support it by any evidence you want.

1 MR. WEILER: Certainly. The
2 conclusion --
3 PRESIDENT NARIMAN: What is your case?
4 MR. WEILER: Our case is that the
5 Contraband Laws as applied to the Claimants is a
6 violation of the legitimate expectation they had
7 as both Claimants and as Native American Claimants
8 with respect to the application of these measures.
9 We say that these measures have been
10:55:09 10 applied in a manner which violates those
11 legitimate expectations, which breaches them. And
12 the point of that is to describe, because the
13 whole point of this section is the question of
14 on-reserve retail sales.
15 We know that the Tribunal said, with
16 respect to on-reserve sales, we will allow,
17 because there's an expectation that on-reserve
18 retail sales -- I want to make sure I say it
19 accurately.
10:55:38 20 ARBITRATOR ANAYA: We didn't affirm an
21 expectation.
22 MR. WEILER: Oh, okay. Okay.

1 perspective, the Contraband Laws are not -- are
2 fair game, so to speak. We may make claims about
3 them because they took place after that date.
4 PRESIDENT NARIMAN: I don't follow
5 that.
6 MR. WEILER: Your colleagues,
7 Mr. President, were concerned that the parties
8 both address themselves to the decision on
9 jurisdiction and the timeliness of what measures
10:57:10 10 could or could not be considered.
11 And with respect to on-reserve sales,
12 there was the statement in paragraph 77 and again
13 in 103 that retail sales of brands distributed
14 on-reserve, any impact upon them could still be
15 considered on the merits from any measure.
16 But our point today is, and then in our
17 short answer to your question on that point is, it
18 doesn't really matter because the measures that
19 have done that harm and that were measured by our
10:57:45 20 evaluator were actually all from the Contraband
21 Laws. So therefore it doesn't really matter.
22 So since I've explained the answer

1 ARBITRATOR ANAYA: There seems to be
2 some implication the jurisdictional award --
3 MR. WEILER: No. The jurisdiction --
4 I'm sure the jurisdiction -- while I would
5 certainly have loved them to do so, the
6 jurisdictional decision did not create -- it did
7 not deny or affirm an expectation. But it did
8 state that it would still be timely for measures
9 that were older than 2001, March 12, to be in the
10:56:11 10 record. And to be considered as part of the
11 claim.
12 It turns out, though, that in the past
13 two years that the states that have actually
14 affected, interfered with, impaired the use of the
15 Claimants' brands on-reserve, the measure has
16 actually not really been the Escrow Statutes, it's
17 been the complimentary or contraband statutes.
18 PRESIDENT NARIMAN: When?
19 MR. WEILER: That was the date that the
10:56:39 20 Tribunal detected as -- yes. So all the
21 Contraband Laws came after that.
22 So the point is, from a timeliness

1 quickly that it doesn't really matter, to be fair
2 and full, I'm going to explain how we see the
3 Contraband Laws applying to the distribution
4 on-reserve by NWS.
5 PRESIDENT NARIMAN: Okay.
6 MR. WEILER: Okay. And so again the
7 breach here would be Article 1105, fair and
8 equitable treatment, a failure to honor legitimate
9 expectations.
10:58:25 10 So the evidence that we have, if you
11 turn to page two of the -- of the --
12 PRESIDENT NARIMAN: Notes.
13 MR. WEILER: -- notes.
14 Thank you Mr. President.
15 We see a cross-examination section for
16 Mr. Montour and you see some quotes there. And
17 essentially what we have is that Mr. Montour
18 states affirmatively that NWS distributes the
19 Claimants' brands only in Indian country and he
10:58:54 20 did confirm that he's talking about federally
21 recognized Tribes and federally recognized Indians
22 and Indian-owned entities.

1595

1 So he's clarifying with answers to
2 Professor Anaya what exactly he meant by that.
3 And --
4 ARBITRATOR ANAYA: What page?
5 MR. WEILER: Oh, page two of the notes.
6 ARBITRATOR ANAYA: Is this the only
7 evidence on this point? Because he doesn't really
8 say he's not selling off-reserve. He's says he
9 hasn't been -- never been accused of selling a
10:59:40 10 product.
11 MR. WEILER: Oh, in our -- in his
12 witness statements it also definitely says that
13 and this is him confirming. But yes, sir,
14 definitely, his witness statements say he only
15 sells on-reserve in his original witness
16 statement. I think it's also in his second one as
17 well, so. . .
18 And actually down below you'll see down
19 at the bottom of page three confirmation evidence
11:00:03 20 in chief previously filed on the record. I have
21 Arthur Montour's witness statement -- I'm sorry,
22 at the bottom of page two. If I said three, I

1597

1 shipments other than to an Indian Reservation?
2 "No, I don't have any evidence of
3 shipments other than Indian Reservations. I do
4 have some evidence of some product showing up
5 off-Reservation.
6 "Okay."
7 And then little bit later: "So as a
8 practical matter the smoke shops that are on I-25
9 between Albuquerque and Santa Fe right off the
10:01:39 10 highway, as a practical matter, are those tax
11 shops selling tax-exempt cigarettes?
12 "Yes."
13 So that's the point that I'm making
14 there.
15 And then with respect to Mr. Eckhart
16 again, he confirms that he has no evidence of the
17 proportion of retail sales transactions allegedly
18 involving NWS-distributed cigarettes taking place
19 off-reserve.
11:02:02 20 And then finally again Mr. Eckhart, no
21 actual evidence of substantial effects from
22 alleged retail sales of Seneca and Opal brands

1596

1 meant bottom of page two.
2 You see Arthur Montour witness
3 statements and I've given the tab and the Core
4 Document date, Arthur Montour's second witness
5 statement and Jerry's. So that's why where you
6 would be directed for that information.
7 So what about the other ones?
8 Well, again, I have here -- we have
9 here highlighted versions -- this is the shorthand
11:00:35 10 of these highlighted versions.
11 So we have Mr. Eckhart on the record
12 saying, California does not impose Escrow Statutes
13 or escrow laws on the Claimants' brands
14 distributed by NWS.
15 And we have Mr. DeLange I believe what
16 would have been last week saying, Idaho does not
17 impose Escrow Statutes or excise taxes on
18 Claimants' brands distributed by NWS.
19 We have Mr. Thomson confirming the same
11:01:02 20 and then having a discussion with arbitrator
21 Anaya, which you would find in my notes on page
22 four: "But you don't have any evidence of

1598

1 off-reserve. That you can find on pages three and
2 four.
3 So I'll read the highlighted parts for
4 you.
5 The questioning is I think all by --
6 almost all by Professor Anaya.
7 "Are those or are those not taxable
8 sales for the purpose of the Escrow Statute.
9 "There are clearly some.
11:02:31 10 "Which ones?"
11 Little bit further: Even by Native
12 Wholesale supply or -- or by -- I mean clearly the
13 Tobaccoville ones are, I guess, is what I'm
14 saying. And then some of the Native Wholesale
15 supply ones I --
16 The ones that are sold on-Reservation?
17 And then he continues -- I mean Mr. --
18 Professor -- I'm sorry, President Nariman
19 interrupts --
11:02:51 20 ARBITRATOR ANAYA: What page are we,
21 sorry? What note?
22 MR. WEILER: Page three.

1599

1 President Nariman. "How do you view
 2 it? He's asking you, how do you view it?"
 3 And then Professor Anaya, "I mean, if
 4 you don't know, that's fine. But who knows? I
 5 mean, someone has got to be making determination,
 6 right?"
 7 "Well, it's an individual state
 8 determination."
 9 So he doesn't actually answer the
 11:03:11 10 question put to him directly. Down below
 11 professor -- I'm sorry, President Nariman: "Do
 12 you happen to know? If you don't, please tell us
 13 or -- please tell us you don't. What is the
 14 proportion of on-Reservation sales regarding the
 15 Claimants to the off-reserve sales? Do you happen
 16 to know?"
 17 "No."
 18 And then below.
 19 "No, but genuine on-Reservation sales.
 11:03:31 20 I just want to know, would they be exempt or
 21 nonexempt from the statute?
 22 "What I know is that if you are

1601

1 with my Contraband Laws. And my Contraband Laws
 2 require you, Claimant, to make a number of
 3 certifications to me, which Mr. DeLange did
 4 confirm today, means that the Claimant would have
 5 then accepted personal jurisdiction and then
 6 therefore submitted fully to the jurisdiction of
 7 that state.
 8 PRESIDENT NARIMAN: Did Mr. DeLange
 9 mention the reason for the statute? He's given us
 11:04:50 10 the reason, which says that there was some mistake
 11 or assumption, et cetera. You are to deal with
 12 that.
 13 MR. WEILER: Well, yes. And what
 14 Mr. Luddy was demonstrating with his questioning
 15 was he was showing that the problem that any
 16 Indian distributor such as the Seneca Cayuga, such
 17 as ourselves has with allowing our names, our
 18 brand names to appear on that list, is if they
 19 appear on that list, not only is that going to
 11:05:21 20 upset the local Nation because we are now allowing
 21 possible regulation by a state of commerce
 22 on-reserve, but much worse than that, for our own

1600

1 members, here is what I know is at the absolute
 2 core of what has to be exempt. If you and I are
 3 members of the same tribe, we have a transaction.
 4 That transaction is absolutely non-taxable by
 5 states.
 6 "I understand that."
 7 And we have little bit more evidence
 8 that -- you know, for your full effect. But
 9 that --
 11:03:57 10 PRESIDENT NARIMAN: How are you going
 11 to link this up to the Contraband Law? This is
 12 something -- I don't follow this.
 13 MR. WEILER: The whole point is I'm
 14 demonstrating that -- and, actually, thank you for
 15 asking the question, because right below at the
 16 bottom of the screen you see the --
 17 PRESIDENT NARIMAN: Stand alone.
 18 MR. WEILER: That both of them say it's
 19 a stand alone measure and that I can do it. So
 11:04:15 20 even if I don't go after your on-reserve
 21 distribution of your brand with my Escrow Statutes
 22 or with my tax statutes, I still can go after you

1602

1 personal wealth --
 2 ARBITRATOR ANAYA: Explain that to me.
 3 How does that upset --
 4 MR. WEILER: There are some -- there
 5 are Nations that are -- well, I actually have --
 6 when I get to this one I have an example of it.
 7 The example of it being the Creek in
 8 Oklahoma who have just filed an application to
 9 have an amended version of the Contraband Law in
 11:05:53 10 that case declared nonenforceable on Creek land.
 11 The concern that they express there and other
 12 Nations clearly express is that they don't want
 13 states extending their jurisdiction under the
 14 Contraband Laws to transactions such as a
 15 distributor wholesale transaction that otherwise
 16 would be regulated by their own regulations. They
 17 don't want that overlapping regulation unless they
 18 can state to state, Nation to Nation negotiate it.
 19 They don't simply want it asserted and then
 11:06:30 20 essentially it makes their -- it can make their
 21 regulations redundant.
 22 ARBITRATOR ANAYA: So the Creek Nation.

1603

1 But other --

2 MR. WEILER: We don't have evidence on

3 the record in detail of all the Nations that do

4 that, so I wouldn't submit that I have that.

5 So that's the one factor. But the

6 more -- so the more important factor, though --

7 PRESIDENT NARIMAN: You're saying this

8 law is not binding on you? This stand-alone law,

9 Contraband Law.

11:06:59 10 MR. WEILER: We say the stand-alone law

11 is not binding on transactions that take place

12 on-reserve at the distribution and wholesale

13 level.

14 PRESIDENT NARIMAN: By reason of what?

15 Why?

16 MR. WEILER: Well, because federal

17 Indian law and the -- and the Jay Treaty, the

18 Ghent treaty, the 1794 treaty, we say that our

19 expectations are based both on constitutionality

11:07:24 20 or federal Indian law --

21 PRESIDENT NARIMAN: You have to

22 challenge it. You have to challenge it. We can't

1605

1 of honoring its obligations with respect to Native

2 Americans.

3 So, we think we have very good reason

4 as other Native Americans have to seek out

5 international remedies to be able to remedy this

6 problem.

7 ARBITRATOR ANAYA: At some point are

8 you going to elaborate upon this argument that

9 federal Indian law, the Jay Treaty and all these

11:08:49 10 other things, you know --

11 MR. WEILER: The next -- the next

12 packet.

13 ARBITRATOR ANAYA: Just at this point,

14 I'm trying to get it straight in my head.

15 The Contraband Laws apply with regard

16 to transactions on-Reservation, you're saying,

17 with regard to --

18 MR. WEILER: Yes.

19 ARBITRATOR ANAYA: So the transaction

11:09:04 20 being the sale -- the wholesale sale of

21 cigarettes --

22 MR. WEILER: Yes.

1604

1 rule whether it's unconstitutional,

2 constitutional, concrete or federal law, can we?

3 MR. WEILER: Yes, you can, with

4 respect. All of the case we've cited on the

5 notion of fair and equitable treatment and

6 legitimate expectation is that the regulatory

7 environment that the Claimant finds, the Claimant

8 has expectations with respect to that. If they

9 are violated to an extent satisfactory to the

11:07:49 10 Tribunal, the Claimant can seek damages because

11 domestically the Claimant cannot seek damages for

12 that.

13 More importantly, the very notion of

14 investment law, the very notion of protecting a

15 foreign investor is that the foreign investor has

16 the option -- the substantive option to go to an

17 arbitration before an impartial independent

18 international Tribunal to have their claim

19 arbitrated by that body rather than having to

11:08:19 20 submit themselves to the courts.

21 And the entire point that we would make

22 is, the United States doesn't have a great record

1606

1 ARBITRATOR ANAYA: -- to an

2 on-Reservation retailer?

3 MR. WEILER: Yes.

4 MR. VIOLI: We're not saying we agree

5 with that. The state does.

6 MR. WEILER: Yes. Yes. The states all

7 have in their -- in the evidence --

8 ARBITRATOR ANAYA: Okay. So the --

9 it's not Contraband Laws also applies, I

11:09:26 10 understand. It's simply that possession or

11 transport or --

12 MR. WEILER: Possession -- trafficking

13 is the term they use.

14 So it's possession, transport,

15 certainly a sales transaction.

16 So it is about the brand entering into

17 the four corners of its borders.

18 ARBITRATOR ANAYA: The state?

19 MR. WEILER: The state.

11:09:43 20 And there's no recognition that that

21 doesn't include or does include Indian Country.

22 So the Contraband Law does apply to them.

1607

1 And the whole point that Mr. Luddy was
 2 trying to get at by --
 3 ARBITRATOR ANAYA: I understand. I
 4 think I understand what he's trying to get at.
 5 But simply put, transporting
 6 off-Reservation is illegal under the Contraband
 7 Law, right?
 8 MR. WEILER: Yes.
 9 ARBITRATOR ANAYA: So independently of
 11:10:10 10 whether or not there's a transaction on the
 11 Reservation, the Contraband Law, according to its
 12 terms, then what the state's positions are would
 13 apply?
 14 MR. WEILER: Yes. So based on -- so
 15 something coming from the Free Trade Zone in
 16 upstate New York controlled by NWS, which is
 17 shipped to the Creek Reservation and then -- or
 18 the Winnebago Reservation, and then transferred
 19 over the Creek Reservation, that may be grabbed
 11:10:32 20 and has been grabbed.
 21 ARBITRATOR ANAYA: Okay. So we could
 22 accept your proposition that the transaction

1609

1 going through, then we would say that's unlawful.
 2 Well -- my friend reminds me to refer
 3 you to the Oklahoma and California decisions which
 4 we have discussed the other day and which are at
 5 the back of your large three-ring binder and which
 6 I am going to speak to, which demonstrate that
 7 those two courts both agreed that extension of --
 8 well, we'll just get to -- this is the slide.
 9 So these slides are excerpts from the
 11:12:14 10 California case. So this is the California judge
 11 speaking. This case involves state laws which
 12 allow some cigarette manufacturers and not others
 13 to sell their cigarettes in California. The
 14 primary burden of these laws falls on the
 15 manufacturer to meet the financial responsibility
 16 requirements and ignition propensity standards.
 17 There is no evidence here NWS knew or should have
 18 known that Grand River, the cigarette
 19 manufacturer, or another Indian-owned entity
 11:12:48 20 operating in Canada was subject to or had not
 21 complied with these conditions.
 22 As the state's general civil regulatory

1608

1 on-reserve is exemption from state legislation,
 2 but still have to look at the possession of the
 3 cigarette off-reserve -- or the transport
 4 off-reserve, because the contract law applies
 5 there as well, as you say?
 6 MR. WEILER: Yes, it applies -- of
 7 course we would certainly submit that the shipment
 8 of -- by an Indian to an Indian from one Indian
 9 Territory to another Indian Territory that just so
 11:11:03 10 happens to use a highway does not make that
 11 highway non-Indian Country. As far as we're
 12 concerned --
 13 ARBITRATOR ANAYA: So you're saying
 14 whenever goods are transported in an interstate
 15 highway or other -- other avenue of commerce that
 16 that makes that Indian Country now?
 17 MR. WEILER: No, but it doesn't make
 18 the -- if the -- if the whole point of the
 19 enforcement of the measure is to affect the
 11:11:29 20 transactions of the wholesaler such -- I'm sorry,
 21 a distributor such as NWS on-reserve and they use
 22 that as the excuse to seize shipments as they're

1610

1 power does not extend to Indian Tribes, there is
 2 uncertainty as at the other end of the
 3 distribution as to whether the state's financial
 4 responsibility and other laws at issue in this
 5 case could be enforced against Big Sandy, which
 6 was an Indian entity.
 7 Down below. Plaintiff have not cited
 8 and this court is not aware of any authority
 9 permitting at state to regulate interstate
 11:13:23 10 commerce between Indian Tribes or Tribal entities.
 11 The court finds that the state cannot
 12 regulate the interstate commerce between NWS and
 13 Big Sandy.
 14 And then here. Recognition by the
 15 courts that states have the power to impose taxes
 16 on the on-Reservation sale of cigarettes to
 17 non-Indians is not authority that states may
 18 regulate on-Reservation sales in general or NWS
 19 sales to Big Sandy in particular.
 11:13:48 20 States are categorically barred from
 21 placing a tax as legal incidence on a Tribe or
 22 Tribal members for sales made inside Indian

1611

1 Country.
 2 And then at the bottom. Here the legal
 3 incidence of the statutes -- and they're referring
 4 to the contraband statutes -- at issue in this
 5 case would not fall on Indian -- non-Indian
 6 consumers. These statutes do not impose a tax
 7 that can be passed along to the non-Indian
 8 consumer. The code section imposes an absolute
 9 ban on the sales of certain brands of cigarettes
 11:14:23 10 that are not listed on the Attorney General's
 11 directory.
 12 PRESIDENT NARIMAN: So you say that if
 13 on-Reservation sales were exempted by this
 14 statute, then --
 15 MR. WEILER: It's not just that they
 16 were exempted. Constitutionally they're
 17 categorically barred from even trying to assert
 18 jurisdiction over them. They are definitely
 19 trying to. We have the Attorneys General all
 11:14:53 20 saying, yes, we think we can. And we have the
 21 courts now saying, no, you can't.
 22 Now, of course, Mr. Eckhart will say he

1613

1 then I'm going to get the regime that I pretty
 2 much expected.
 3 And at a constitutional level one is
 4 even more entitled to expect that it's going to be
 5 steady.
 6 ARBITRATOR ANAYA: What constitutional
 7 provision are you referring to?
 8 MR. WEILER: Indian commerce clause.
 9 The very -- the Supreme Court decisions that have
 11:16:22 10 addressed tax law did not give the jurisdiction to
 11 these states to impose their Contraband Laws on
 12 commerce -- interstate commerce generally, but
 13 also on Indian commerce. They are purporting to
 14 directly regulate Indian commerce. They're
 15 saying --
 16 MR. ROBINSON: The court cited Indian
 17 commerce clause in the subsequent pages. I would
 18 encourage you to read them.
 19 ARBITRATOR ANAYA: I understand that,
 11:16:45 20 but it's really a lot of judge-made law, isn't it,
 21 that can be altered by Congress that you're
 22 talking about?

1612

1 disagrees with this.
 2 PRESIDENT NARIMAN: No. And therefore
 3 it must fit into your 1103 or --
 4 MR. WEILER: 1105 argument.
 5 What we're saying when we -- there's a
 6 long history in this country of Native Americans
 7 and their relationship with the state, whether
 8 that be at the state government level or the
 9 federal government level. We haven't all --
 11:15:20 10 speaking for my clients, we haven't always liked
 11 where the local Indian law, which is
 12 constitutional law, has gone. We think it's gone
 13 way too far in many place. But at the very least
 14 we expect the state to honor the rules it set out
 15 for Indian commerce. And we say that when that
 16 expectation, which we believe is not only based
 17 on -- any normal investor can look at the state of
 18 the law and say, I expect this law to relatively
 19 be fairly stable. They can make changes here and
 11:15:51 20 there if necessary for good reason, but I expect
 21 that I'm going to -- if I'm going to make my
 22 investment, if I'm going to spend all this money,

1614

1 MR. WEILER: Sure. It can be altered
 2 by Congress. I mean, but the bottom line is
 3 that -- and actually good point, Professor Anaya,
 4 because --
 5 ARBITRATOR ANAYA: Under federal law.
 6 MR. WEILER: -- what we would have
 7 expected, and if we think of this case, the
 8 claimant -- I'm sorry, the Respondent states they
 9 went to the federal government and tried to get
 11:17:06 10 the federal government to take this bundle of MSA
 11 measures or strands and get them to pass it. And
 12 the federal government said, no, we're not going
 13 to do that.
 14 PRESIDENT NARIMAN: That's not because
 15 it affected Indian?
 16 MR. WEILER: No, it was because they
 17 thought it was completely uncompetitive and just a
 18 really bad deal.
 19 But the bottom line is that the federal
 11:17:29 20 government passed on the opportunity to put this
 21 regime in place.
 22 ARBITRATOR ANAYA: Just so I'm clear.

1615

1 This case is being appealed, right?
 2 MR. WEILER: Yes. I don't --
 3 What's the status of the Oklahoma case?
 4 MR. VIOLI: It's being appealed.
 5 MR. WEILER: It's being appealed as
 6 well.
 7 PRESIDENT NARIMAN: What's the
 8 citation?
 9 ARBITRATOR ANAYA: We have it.
 11:17:51 10 ARBITRATOR CROOK: We have it.
 11 ARBITRATOR ANAYA: We have it.
 12 And just one more thing. On the
 13 legitimate expectations thing, I assume what
 14 you're saying that your clients, with counsel --
 15 with the advice of counsel, made a determination
 16 that federal law protected the transactions
 17 on-Reservation early on?
 18 MR. WEILER: They did. Well, and
 19 obviously and Treaties as well. It's both that
 11:18:18 20 perform the expectation.
 21 But that is why, for example, they
 22 submitted to be paying federal excise tax, even

1617

1 jurisdictional hearing you will probably recall,
 2 as I do, you're asking for an explanation.
 3 ARBITRATOR ANAYA: I remember I asked
 4 it. I'm just wondering --
 5 MR. WEILER: Well, they -- so, yes,
 6 they were there. But at the jurisdictional phase.
 7 This is the merits phase. So this is where we put
 8 up or shut up. This is where we talk about it.
 9 ARBITRATOR ANAYA: I understand.
 11:19:52 10 MR. WEILER: It's amazing how our
 11 discussion presages the next slide in each
 12 occasion. I should jus remember to just hit the
 13 slide so you can already go to it.
 14 So we've pretty much covered these
 15 points here. I'll just go through them, read them
 16 myself to make sure. That's exactly what we were
 17 discussing.
 18 So the point is that, as Professor
 19 Anaya certainly demonstrated that he understands,
 11:20:19 20 but for the benefit of the other two arbitrators
 21 the point is that the legitimate expectation is
 22 informed both by the constitutional law and

1616

1 though as Mr. Montour, Arthur Montour said in his
 2 original affidavit, he didn't think he had any
 3 business doing so because he believes under his
 4 treaty rights he didn't have to. But they did, so
 5 he could obtain a federal license. So they did
 6 think they were operating under federal law.
 7 Again, under protest because they
 8 didn't believe they should have had that as well,
 9 either, but at the very least they did play by the
 11:18:48 10 federal rules. They paid the federal excise
 11 taxes. They got the license from the tobacco and
 12 firearms unit.
 13 ARBITRATOR ANAYA: Did you make the
 14 legitimate expectation based on federal law
 15 Treaties and their protection of Indian commerce
 16 and its connection with 1105 in the early stages
 17 of this litigation?
 18 MR. WEILER: Well, with respect to the
 19 application of the Contraband Laws, they couldn't
 11:19:16 20 have been because it didn't happen yet. But this
 21 is within the past two years, but we do certainly
 22 talk about legitimate expectations and at the

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1 federal law playing by those rules as they stand
 2 and also by their treaty rights, their
 3 long-established treaty rights.
 4 And to be clear the legitimate
 5 expectation argument -- while I'm talking about
 6 the Contraband Laws right now, the legitimate
 7 expectation argument is also there with respect to
 8 off-reserve sales.
 9 But when we're talking about the
 11:20:53 10 off-reserve sales in the five markets, the
 11 expectation with respect to Treaty laws is not
 12 applicable. It's simply the idea that these
 13 Claimants saw the regime as it stood. They saw
 14 the regime as it stood and they determined that
 15 the best way to comply with the regime's choice of
 16 pay escrow payments or join the MSA, their
 17 determination was, well, we're going to choose pay
 18 escrow payments because if we restrict ourselves
 19 to regions, we'll be able to get the rebate.
 11:21:30 20 So we say that that in and of itself,
 21 that regime, that that regime was our expectation.
 22 We expected to be treated in concordance with that

1619

1 regime. That didn't mean that we thought it would
2 never change. But we did certainly think that if
3 it did change, that they would -- they would do
4 what they did last time when they made a major
5 change, which is grandfather market shares accrued
6 under the previous regime.

7 So that was their expectation. You can
8 accept that argument or not. But for off-reserve
9 sales, that was their expectation.

11:22:05 10 For on-reserve sales it's not just one
11 statute. It's the whole and federal Indian law in
12 practice and it's the whole of our Treaty rights.

13 ARBITRATOR CROOK: Professor Weiler?
14 MR. WEILER: Yes.
15 ARBITRATOR CROOK: Two quick questions.
16 So is it your position then that the
17 Indian commerce clause applies to commerce as
18 between individuals who happen to be Indians as
19 opposed to, for example, tribal entities?

11:22:32 20 MR. WEILER: Yes.
21 ARBITRATOR CROOK: You're going to that
22 later on? Okay.

1621

1 that in close that he wanted me to talk about
2 the --

3 ARBITRATOR ANAYA: Not that question.
4 The first question.
5 MR. WEILER: Oh, the first question is
6 about individuals.
7 ARBITRATOR CROOK: Well, it might be
8 useful to have you address it so that these people
9 know what your argument is and be in a position to
10 respond to it.

11:23:29 10 MR. WEILER: Yes, and that's right --
11 ARBITRATOR ANAYA: That's a separate
12 question from the consultation. But I understand
13 the question to be with regard to the exemption
14 from state regulation for on-Reservation -- for
15 transactions between Native Americans or
16 indigenous people whether or not the exemption is
17 the same.
18 ARBITRATOR CROOK: That's the question.
19 Does the Indian commerce clause and the
11:23:49 20 other provisions of federal law, the Indian
21 commerce clause, number one; and two, the
22

1620

1 MR. WEILER: Well, not even later on.
2 Because we keep doing it.
3 ARBITRATOR CROOK: Right. Right.
4 We'll hear your argument then.
5 Next question. Will you be talking
6 about interpretation of the Jay Treaty?
7 MR. WEILER: I can at the close. I
8 wasn't here.
9 ARBITRATOR CROOK: Okay. Well, at some
11:22:47 10 point would you address the relevance of the
11 practice of the parties to that Treaty, that is to
12 say, the United States and Canada, to the Treaty's
13 meaning?
14 MR. WEILER: Certainly.
15 So we move on to my second point, which
16 was the question of consultation, the question
17 Professor Anaya asked which I think pertains
18 directly to professor -- I'm sorry, Mr. Crook's
19 argument.
11:23:12 20 ARBITRATOR ANAYA: Sorry. You were
21 going to address the first question, though?
22 MR. WEILER: No, I was going to address

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1 decisional law you're referring to apply to
2 commerce between individuals who are Native
3 Americans?
4 MR. WEILER: Yes.
5 ARBITRATOR CROOK: That's your
6 position?
7 MR. WEILER: That's our position.
8 ARBITRATOR ANAYA: And then so it
9 doesn't just apply to commerce as between
11:24:15 10 indigenous Tribes or Nations?
11 MR. WEILER: To use the international
12 law term, not just between Indian states, if you
13 will. So I use the term state because I'm
14 thinking of the -- in the political science sense,
15 a state isn't just a government. It's the courts,
16 it's the whole package.
17 So I do not interpret and we do not
18 interpret nor did the Claimants ever interpret
19 that federal Indian law only applied to states
20 within -- in the Indian sense of the term.
11:24:40 20 ARBITRATOR ANAYA: But some aspects of
21 the federal Indian law does.
22

1 MR. WEILER: Sure.
 2 ARBITRATOR ANAYA: The sovereignty of
 3 Tribes doesn't apply to individuals?
 4 MR. WEILER: No. No.
 5 ARBITRATOR ANAYA: So we're trying to
 6 figure out whether or not this exemption applies
 7 to individuals or not and what the authority is.
 8 MR. WEILER: Well, and it's the same --
 9 it's the principle that the WTO panel in section
 11:25:03 10 301 enunciated that -- where they said that with
 11 respect to WTO obligations, which were taken in
 12 between states in, between WTO members, that they
 13 had individual effect on individuals and were
 14 taken to the benefit of individuals.
 15 The very notion of state to state
 16 agreements, such as economic agreements such has
 17 this one, permit that.
 18 ARBITRATOR ANAYA: If you're looking at
 19 federal Indian law, that's just not the way it
 11:25:27 20 works. I mean individual Indians can be subject
 21 to state taxation whereas the Tribe can't --
 22 MR. WEILER: Certainly.

1 to belabor the point, but in the case that you
 2 gave us, the California case, Big Sandy, what kind
 3 of entity is that.
 4 MR. WEILER: Using the parlance I've
 5 been using, it's a state entity.
 6 ARBITRATOR ANAYA: So that's a
 7 Tribal --
 8 MR. WEILER: Tribal state entity. So
 9 it is the Tribe. It is a wholesaler which is
 11:26:51 10 doing business with NWS, because there's a --
 11 well, my next slide -- this is why I was going
 12 into the slide because I get to it here.
 13 Not all Indian Nations, and I know this
 14 is not -- this is for the benefit of all the
 15 Tribunal. Not all Indian Nations organize their
 16 affairs the same way. Some operate on a state
 17 basis, which you can say, to use colloquial terms,
 18 it's more social democratic or even socialist.
 19 Others are extremely capitalist in the way that
 11:27:28 20 they organize their states. So there's various
 21 ways in which -- and of course Indian Nations, the
 22 whole point of their sovereignty is that they get

1 ARBITRATOR ANAYA: -- depending on the
 2 circumstance.
 3 MR. WEILER: Certainly. But that -- we
 4 have no disagreement with that.
 5 But by the same token, we also thing
 6 that the Oklahoma Creek case which you have in
 7 the -- which this is an application made just last
 8 month which is in that binder, demonstrates how
 9 the Creek believe that individuals -- including
 11:25:51 10 NWS as a matter of fact, that these individual
 11 entities do receive the benefit of protection of
 12 Indian commerce because commerce, for the most
 13 part, particularly in the history of these
 14 particular Claimants, commerce is engaged in by
 15 individuals, not by states.
 16 There are some Tribes -- there are some
 17 Indian entities where it is primarily the state
 18 that does that commerce and the Claimants deal
 19 with people like that, for example, the Creek.
 11:26:23 20 But that doesn't mean that it's only states. It
 21 can be individuals.
 22 ARBITRATOR ANAYA: Well, I'm not going

1 to choose how they want to organize their affairs.
 2 And that could mean commerce being undertaken by a
 3 Tribe itself or on some Tribal entity or it could
 4 mean by individuals who essentially represent the
 5 Tribe.
 6 ARBITRATOR ANAYA: So it does make a
 7 difference. I mean a Tribal entity has sovereign
 8 immunity, for example --
 9 MR. WEILER: Yes.
 11:27:55 10 ARBITRATOR ANAYA: -- and individuals
 11 don't.
 12 MR. WEILER: Well, I'm not --
 13 ARBITRATOR ANAYA: And so this could be
 14 along the same lines or it could be determinative
 15 for this analysis. I don't know. I'll have to
 16 read the case. It could be determinative here in
 17 this case, this California case, that Big Sandy is
 18 a Tribal entity.
 19 MR. WEILER: I would ask you to read
 11:28:13 20 the analysis and come to your determination.
 21 Our position --
 22 ARBITRATOR ANAYA: Okay. I understand

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1 your position. I'm not getting much help with the
 2 analysis.
 3 I mean you're just telling me things
 4 that don't really go to the doctrine of Tribal
 5 immunities and exception from state law which
 6 typically attach to Tribal entities.
 7 MR. WEILER: And a Tribal -- there's a
 8 whole line of occasions in Canada that have to
 9 do -- they're con -- there's a reason for my
 11:28:41 10 explaining it, not just to waste my time, which I
 11 have very precious little of, I know.
 12 There's a whole string of cases in
 13 Canadian constitutional law from about the 1910s
 14 to about the 1980s before we had the charter of
 15 rights. And most of these cases ended up going to
 16 the judicial privy council -- the judicial
 17 privy -- the judicial committee of the privy
 18 council.
 19 What were these cases all about?
 11:29:03 20 Well, on their face they were about the
 21 separation of powers under the British North
 22 America Act which is now known as the Canada

1629

1 was responsible for what kind of regulation, was
 2 brought by individuals because how the answer was
 3 determined would affect those individual's rights.
 4 So in this context we have a state, if
 5 you will, a state Indian nation. Indian nation
 6 which is in itself is a state. It has a court.
 7 It has some sort of legislature. It has an
 8 executive. It has a set of -- so it's the
 9 province in my analogy.
 11:30:33 10 The federal government could be -- or
 11 you just have another state government, it could
 12 be the federal government in my analogy here. The
 13 bottom line is, the individuals who are going to
 14 test the rights of sovereignty and who has the
 15 right to overlap whom or to not overlap whom. But
 16 it's individual rights that are going to test
 17 that.
 18 So we're not saying that we have the
 19 right to assert the jurisdiction of that state
 11:30:56 20 ourselves, but it is through commerce, because it
 21 is an Indian commerce clause, so it's through the
 22 commerce of individuals through which we will see

1628

1 Constitution Act of 1867. And there was a very
 2 clear delineation of powers between provinces and
 3 between the federal government, Sections 92 and
 4 93.
 5 We have -- the way our system works is
 6 we have sovereigns both at the provincial level
 7 and at the federal level. So when we ask who the
 8 queen is, we say the queen in the right of Canada
 9 or is queen in the right of Ontario or the queen
 11:29:38 10 in the right of Alberta. That's why there's a --
 11 there's a Govern er General in Canada who
 12 represents the Queen's interests to that
 13 government and also at the provincial level there
 14 is a Lieutenant Governor who does the same thing.
 15 And they don't report to the Governor General,
 16 they report to the queen.
 17 The point of my explaining this is,
 18 those cases, that whole string of cases, they were
 19 brought by insurance companies. They were brought
 11:29:58 20 by bank companies. They were bought (sic) by
 21 manufacturers. Those cases which were about the
 22 separation of powers, which level of government

1630

1 where the regulation is or is not in force.
 2 So these Tribes very clearly have
 3 sovereignty to regulate tobacco sales, to decide
 4 which brands do or don't enter their territory.
 5 The state governments are saying, oh,
 6 well, you may have that but if we say that that
 7 brand is not allowed in our state and you so
 8 happen to be in our state, forget it, Charlie,
 9 because we can seize them. We won't go on your
 11:31:35 10 land to seize them because we're scared. And
 11 actually we have two Attorneys General saying
 12 basically that. So we're not going to interfere
 13 with you on your land, not because we don't think
 14 we can enforce it, but because we're scared.
 15 But their position is very clear that
 16 our independent complementary statutes apply to
 17 the whole state, including you guys.
 18 And that's where cases like ours come
 19 up and say, no.
 11:32:01 20 And so we're not asserting the
 21 sovereignty of the Tribe to do that. We're
 22 demonstrating that there is a balance in

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1 separation of powers and it has to be respected.
 2 Otherwise there's no certainty.
 3 PRESIDENT NARIMAN: But the case you
 4 cite, the Creek Nation, they're the plaintiff or
 5 federally recognized Tribe.
 6 MR. WEILER: Yes. Yes.
 7 PRESIDENT NARIMAN: Yes. Correct. But
 8 it was not a case where there was a corporate
 9 entity or individual like Mr. Montour or anyone
 11:32:30 10 else.
 11 MR. WEILER: Please read the remainder
 12 of the case at your leisure, Mr. President. You
 13 will see that what it is articulating are the
 14 interests of actually Mr. Montour himself.
 15 The nexus of the dispute is Seneca
 16 cigarettes that the Creek are trying to sell
 17 without having Oklahoma tell them whether or not
 18 they can sell them.
 19 PRESIDENT NARIMAN: I see.
 11:32:51 20 MR. WEILER: So it is about -- with
 21 respect, it is about the individuals.
 22 MR. VIOLI: Mr. President, there is

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1 four documents were the ones that I was going to
 2 talk to. So there's an Oklahoma one there.
 3 MR. FELDMAN: Counsel, where in the
 4 record is that decision?
 5 MR. WEILER: This one -- the Oklahoma
 6 decision and the two California decisions and this
 7 Creek application all fall under the category of
 8 the first day when we discussed which new cases
 9 could come in because they speak to the law. The
 11:34:00 10 Chairman said, bring them in.
 11 MR. VIOLI: H. H. H, Mr. President.
 12 PRESIDENT NARIMAN: H.
 13 Journal entry of judgment, State of
 14 Oklahoma.
 15 MR. WEILER: Yes. And so that case is
 16 actually cited in the Creek application. They
 17 actually explain that this -- it's demonstrating
 18 the relationship between the Native sovereign
 19 trying to assert its own regulatory authority and
 11:34:25 20 being unable to within the context of the sale of
 21 Seneca cigarettes.
 22 MR. VIOLI: I'll read that into the

1632

1 another opinion. There was a case that predated
 2 the one you just referred to. It was the case
 3 where the State of Oklahoma Attorney General sued
 4 NWS.
 5 Mr. Montour saying, you were selling
 6 contraband cigarettes under the complementary
 7 legislation and we defended that action, NWS
 8 defended that action and we have a decision in the
 9 record where the court agreed with us that because
 11:33:19 10 where the Indian commerce clause --
 11 PRESIDENT NARIMAN: Where is that?
 12 MR. WEILER: It's either right before
 13 or right after.
 14 MR. VIOLI: There's a second one where
 15 NWS was sued and the right of the individual --
 16 PRESIDENT NARIMAN: People of the State
 17 of California --
 18 MR. WEILER: It's Oklahoma.
 19 PRESIDENT NARIMAN: -- versus Native
 11:33:35 20 Wholesale Supply.
 21 MR. WEILER: It's not that one. But if
 22 you -- it's right around there. It's the last

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1 record, if I may, Mr. President.
 2 It says here, the court further finds
 3 that plaintiff's amended petition -- that
 4 plaintiff is the Oklahoma Attorney General --
 5 seeks relief that is barred by the Indian commerce
 6 clause which cannot be cured by amendment. The
 7 case against Native Wholesale Supply under the
 8 complementary legislation was thus thrown out by
 9 the court in Oklahoma.
 11:34:56 10 PRESIDENT NARIMAN: There's no
 11 judgment?
 12 MR. VIOLI: That is the judgment.
 13 MR. WEILER: That is the judgement.
 14 MR. VIOLI: There's no decision. It
 15 was delivered from the bench but this is the
 16 transcript of the judgment.
 17 MR. WEILER: And just one point,
 18 Mr. Crook and President Nariman.
 19 The story of this Oklahoma pursuit of
 11:35:15 20 the Seneca cigarettes is then retold in the
 21 application of the Creek. And the Creek explain
 22 that after the Attorney General lost that case,

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1 they tried to amend their legislation itself.
 2 That legislation came into force in early January
 3 and immediately there after the Creek is going to
 4 try to strike that regulation. Not with respect
 5 to Native Wholesale Supply alone, but rather with
 6 respect to the ability of the Creek to do business
 7 with whomever they choose. It just so happens
 8 that that's Native Wholesale Supply right now.
 9 I'm sorry, Mr. Crook, you've been
 11:35:50 10 trying to ask a question for a while.
 11 ARBITRATOR CROOK: Well, housekeeping
 12 thing.
 13 At some point could somebody get me one
 14 of the nifty binders with all of the cases in
 15 them?
 16 MR. WEILER: Isn't it on your --
 17 ARBITRATOR CROOK: This is a different
 18 thing, I think.
 19 MR. VIOLI: No, it's H.
 11:36:06 20 ARBITRATOR CROOK: Okay. Fine. Thank
 21 you very much.
 22 Now, I wondered if we could ask the

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1 on into the afternoon; is that the implication?
 2 MR. WEILER: I don't want to make
 3 any -- I don't infer or imply anything, but we do
 4 plan to use our two hours and we will do our
 5 best -- you know, that's why I provided these to
 6 you in writing so we could move quickly. So I'm
 7 doing my best to move as quickly as I can,
 8 Mr. President.
 9 ARBITRATOR CROOK: Well, the
 11:37:14 10 implication is that I guess the Tribunal better
 11 stop asking questions.
 12 MR. WEILER: I would never tell you to
 13 stop asking questions.
 14 ARBITRATOR CROOK: Well, we have basic
 15 issue of fairness here that these people have
 16 relative little time in which to get in their 14
 17 or 12 or ten or whatever many hours of argument,
 18 and I think we need to be focusing on time
 19 management here.
 11:37:34 20 MR. WEILER: I agree that we need to
 21 manage time. I would also submit that I don't
 22 think it would be fair to say that all of the

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1 secretary to tell us where we stand on time.
 2 We've used a lot of time with questions,
 3 Mr. Weiler, which is fine and good, but I think
 4 it's -- ought to be for you to decide or your side
 5 to decide how you use what's left.
 6 SECRETARY YANNACA-SMALL: A little less
 7 than two hours.
 8 ARBITRATOR CROOK: They have two hours.
 9 MR. WEILER: Yes. Your questioning
 11:36:29 10 doesn't count for the time --
 11 SECRETARY YANNACA-SMALL: With the 75
 12 minutes.
 13 ARBITRATOR CROOK: That raises a
 14 question of Mr. Violi's 75-minute answers then,
 15 because we get into a practical problem where the
 16 Respondents are actually going to have time to
 17 prepare their case.
 18 MR. WEILER: We're prepared to go as
 19 late as necessary all of these days --
 11:36:48 20 ARBITRATOR CROOK: Well, perhaps the
 21 Tribunal is not in a position to do that.
 22 So I take it then you want to continue

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1 questions that have been asked of the Claimant to
 2 clarify and improve and they have challenged their
 3 case are necessarily only for the benefit of the
 4 Claimant.
 5 I think that the Tribunal's -- the
 6 whole exercise of the Tribunal engaged in is to
 7 find the right answer and they're not going to
 8 stop when they get to the other side. We're all
 9 here to do the same thing.
 11:38:00 10 PRESIDENT NARIMAN: Move on.
 11 ARBITRATOR CROOK: But we have
 12 something of a force majeure situation and I think
 13 we need to deal with that.
 14 MR. KOVAR: Just for the record,
 15 Mr. President, if I may, if the Claimants go on
 16 into the afternoon, we don't see how we can
 17 complete our case. This is their fifth day.
 18 MR. WEILER: Then let's move on
 19 quickly.
 11:38:19 20 MR. KOVAR: And so we think the clock
 21 should end at lunchtime. They've had more than
 22 their time. They don't -- they're not always the

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1 most organized. You have to ask a lot of
2 questions.

3 MR. WEILER: Please, there's no need
4 for that.

5 MR. KOVAR: I'm not -- I'm not -- I'm
6 saying you have to ask lot of questions.

7 MR. WEILER: Well, there's no need to
8 say we're not always organized.

9 MR. KOVAR: We just want it to be clear
11:38:40 10 we don't think there will be enough time to give
11 us an opportunity to put on our full case and to
12 have five hours of closing.

13 MR. WEILER: The longer we talk about
14 it, the harder this is going to be to do, unless
15 that's your point.

16 I think we should try to run it out now
17 and not simply talk about it to the point that
18 we're not able to finish it.

19 MR. KOVAR: And we'd ask you to finish
11:38:59 20 your case by lunchtime and give us -- to be able
21 to start clean --

22 MR. WEILER: Well, then stop objecting

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1 MR. WEILER: So with respect to the
2 consultation question and again some of the other
3 material we've just covered within this other
4 context will have been covered here.

5 So there's a question. And then
6 correct me if I'm wrong, because this is a
7 question from Professor Anaya. I take the point
8 here to be asking whether or not these Treaty
9 rights can actually be assumed by individuals.
11:40:20 10 That the very -- the question there about, you
11 know, are we saying that GRE or NWS are somehow
12 represented institutions of the Mohawk Nations.

13 So again the question essentially is,
14 wait a second, can you individuals expect rights
15 because of this. This is in a consultation
16 context. But again it's the same thing. At least
17 in the nature of the question.

18 So our position, to be clear, is that
19 we don't think that these business entities are in
11:40:51 20 and of themselves a representative political
21 institution of the Nations or of the
22 Haudenosaunee.

1640

1 to the things I can do to speed it up.

2 PRESIDENT NARIMAN: Speaking for
3 myself, I don't want anybody to stop.

4 You carry on as much as you can. And
5 if -- well if they find insufficient time, we can
6 meet again. That's all. What else can we do?
7 Because of this force majeure, we never
8 anticipated all this. So you cannot be pressed
9 for time. They cannot be pressed for time. We
11:39:34 10 can use your time as either you or them.

11 You will take your full time and so on.
12 Th time is only for allocation. There's no such
13 thing that everything is ended, therefore we must
14 stop you or stop we must stop them.

15 If they find they don't have full time,
16 they don't have full time, and they have to make
17 arrangements to see we meet again. That's all.

18 MR. WEILER: Thank you, Mr. President.
19 I'm going still, nonetheless, move as quickly as I
11:39:57 20 can.

21 PRESIDENT NARIMAN: Well, thank you.
22 That's all --

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1 However, as I'm sure you've been
2 reading while I was talking, there is very strong
3 evidence in our record concerning the nature of
4 Haudenosaunee trade practice and political
5 philosophy with respect to how they conceive of
6 their state.

7 So you see here in the -- these are the
8 consult notes. The longer version of what I've
9 just got presented there, I describe the
11:41:28 10 Haudenosaunee Confederation's great law of peace,
11 which some date to be between 800 and 500 -- I'm
12 sorry, 500 and 900 years old, which creates a
13 participatory democracy. Doesn't create a
14 representative one. The very nature of the way
15 it's created is both retold here and also in
16 Professor Clinton -- Professor Clinton gets into a
17 little bit, as do Professors Brandale and Warrick.

18 So if I turn to page two of the notes,
19 these are the basic points that they make.
11:42:07 20 Historically commerce engaged in by both
21 Haudenosaunee individuals and groups. That's the
22 way they did their commerce historically. Even

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1 before contact with the Europeans, we already see
 2 individuals who are engaging in trade and we also
 3 know from these reports -- which you can read at
 4 your leisure -- that the very notion of trade
 5 amongst -- trade and commerce amongst Nations is a
 6 political function to the Six Nations as well.
 7 So -- actually at the time they were Five Nations.
 8 So the Haudenosaunee take commerce to
 9 be an act of state but they do organize and expect
 11:42:51 10 themselves to be organized on individual and group
 11 bases.
 12 So that's why we -- and we see below
 13 there, and we saw this also in Arthur Montour's
 14 testimony, that tobacco is integral to every
 15 conceivable segment of their culture and that it
 16 was traded commercially, but that it was also
 17 considered a wealth item.
 18 We have in these reports documentation
 19 that owners of a trade route would gain material
 11:43:20 20 wealth. It was custom that they would share that
 21 wealth, that they would share it both in terms of
 22 the jobs to do, the tasks to assign, but also with

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1 in their community.
 2 We know from the video presentation you
 3 saw and from the affidavits that have been put in
 4 by the Claimants and by Arthur Montour's testimony
 5 that they are heavily engaged in promoting the
 6 economic welfare of their people. We know that
 7 the largest Reservation in Canada by population is
 8 the Six Nations. We know that by far the largest
 9 employer on that reserve is Grand River. We know
 11:45:04 10 that we have -- and, Professor Anaya, you had
 11 asked me --
 12 ARBITRATOR ANAYA: Maybe sort of -- I
 13 hope this is in the interest of time or helps us
 14 along that way, but can you link this to -- what
 15 part of the case is this related to?
 16 MR. WEILER: This is trying to explain
 17 how in Haudenosaunee tradition --
 18 ARBITRATOR ANAYA: I understand that,
 19 how you're trying to explain.
 11:45:31 20 But how does that relate to the --
 21 MR. WEILER: Well, it relates to the
 22 expectation of Treaty rights. It relates to -- it

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1 respect to charity. But -- so it's not new for
 2 the Haudenosaunee to see trade as a political
 3 device, a political means, but have individuals
 4 run it.
 5 Today those trade routes are
 6 essentially the tobacco brands. Because you
 7 don't -- you know, there's -- these special trade
 8 routes, you know, I know how to get from one place
 9 to the other and I've got it, it's mine, and
 11:44:01 10 you're going to pay me if you want to use it.
 11 Well, that's what branding is, effectively.
 12 So today we don't have trade routes
 13 that are zealously guarded by local clan or
 14 family. Instead we have the brand, the tobacco
 15 brand which is zealously guarded by a small group
 16 of people of the same clan and some of them of the
 17 same family.
 18 So we have this uncontroverted evidence
 19 that it does generate wealth for them and status
 11:44:27 20 in their community. We can see that in the news
 21 reports, even the slanderous ones from the Buffalo
 22 News. We can see that these are important people

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1 relates to -- well, primarily it's to Treaty
 2 rights. It's the notion of how can a Treaty such
 3 as the 19- -- the 1794 Treaty, which talks about
 4 the federal government staying off of and
 5 giving -- you know, I can't remember the exact
 6 language, but not interdicting with the affairs of
 7 the Haudenosaunee, why that's relevant to
 8 individual Haudenosaunee. It's not just about the
 9 Haudenosaunee Nation, because the way they
 11:46:01 10 organize their Nations is by individuals acting
 11 essentially as part of the sovereign. They assert
 12 their sovereignty as individuals and collectively.
 13 That's how they do it. That's what these reports
 14 say. You had asked me earlier in these hearings,
 15 do you have evidence on the record of that and
 16 I've --
 17 ARBITRATOR ANAYA: No, no, no. No. I
 18 asked you -- if you're quoting here, I asked you
 19 if you have evidence or anything to support that
 11:46:31 20 the duty to consult applies to individuals --
 21 MR. WEILER: Yes. And what we're --
 22 ARBITRATOR ANAYA: -- under customary

1 international law --
 2 MR. WEILER: And what we're --
 3 ARBITRATOR ANAYA: -- if a customary
 4 international law norm exists.
 5 MR. WEILER: Well, the customary
 6 international law norm of sovereignty, we would
 7 say, does not just apply to Nations states in the
 8 west valience(ph) sense, but also to Native
 9 Tribes. And so the very notion of sovereignty --
 11:46:55 10 ARBITRATOR ANAYA: Okay. I understand.
 11 MR. WEILER: Okay. And so we have an
 12 organization of this state in that way.
 13 So how does this apply to consultation
 14 in the specific case?
 15 Well, you have a letter from the Seneca
 16 Attorney General. It's probably about I or H. I
 17 don't have the exact number but you've seen it
 18 before. It's in the record. It was, I think,
 19 attached to the particularized statement of claim.
 11:47:16 20 Do you have which -- what tab is it at? The
 21 Seneca Attorney General two-page letter.
 22 I. It is at I. Well, I got lucky.

1 case, this one is Idaho, the Coeur d' Lane Tribe,
 2 cigarettes that are distributed on-reserve to the
 3 Coeur d' Lane Tribe, when they find themselves --
 4 because of their price when they find themselves
 5 taken off-reserve and resold, we will have escrow
 6 obligations.
 7 And who's going to pay the escrow
 8 obligations? Well, it's going to have to be Grand
 9 River if they want to submit to the jurisdiction,
 11:48:46 10 and they're not going to say that there's no
 11 personal jurisdiction against them because they
 12 already agreed to be part of the Contraband Laws.
 13 They're already listed. So because they're
 14 listed, they going to have to pay the escrow
 15 payments.
 16 Where do they go? Well, they go for 25
 17 years in case -- as my friend said earlier, in
 18 case some legitimate reason to take that money by
 19 each state is dreamed up because none exists right
 11:49:08 20 now.
 21 Well, why isn't that -- why is that
 22 contraband -- I mean it would be perfect sense if

1 And what does the letter say? Well, it
 2 says that no state government has ever contacted
 3 the Nation about these measures. Any of them.
 4 That no state government has suggested that maybe
 5 as for payments or penalties could be collected
 6 and distributed for the benefit of Native American
 7 communities.
 8 MR. FELDMAN: Counsel, this letter is
 9 attached to your particularized statement of
 11:47:48 10 claim?
 11 MR. WEILER: Yes. That's correct, it
 12 is.
 13 MR. FELDMAN: Okay.
 14 MR. WEILER: And this, again, this is
 15 why Mr. Luddy was perhaps trying your patience a
 16 little bit was getting into the questions with
 17 Mr. DeLange. Because if the Contraband Law is
 18 allowed to apply to the distribution efforts of
 19 the NWS, i.e., they have to register, they have to
 11:48:09 20 take jurisdiction, then that means that cigarettes
 21 that are sold at wholesale distributed to the
 22 Creek Nation or whichever Nation it is in that

1 they had only talked to the Indian Tribes in the
 2 first place, they could have at least negotiated
 3 some sort of arrangement where escrow fees would
 4 be saved for the benefit of Native Americans. But
 5 we don't have that. We have nothing like that
 6 because they never consulted.
 7 So we also have here a confirmation
 8 that the Attorney General, speaking for the
 9 Nation -- he's very clear -- he says he's speaking
 11:49:36 10 for the Nation. He says that they endorse whole
 11 little the Claimants' investment enterprise and
 12 their activities.
 13 So we know -- and this specifically
 14 confirms the sociohistorical record that Nations
 15 of the Haudenosaunee actually do see individuals
 16 conducting commerce as part of their state craft.
 17 And that's why Treaty obligations are relevant to
 18 their individual expectations.
 19 The record also demonstrates -- I'm
 11:50:09 20 sorry, do you --
 21 ARBITRATOR CROOK: Well, I was going to
 22 hazard the observation, Professor Weiler, that

1651

1 perhaps you could be a little more succinct in
2 your answers.

3 We have a situation where you -- if we
4 allow Mr. Violi 75-minute answer to questions and
5 the kind of lengthy answers we just had here, it
6 may be three or four o'clock this afternoon before
7 we get Respondents on.

8 MR. WEILER: I don't think it will take
9 that long, but thank you for your concern about
11:50:40 10 the time.

11 The evidence on the record also
12 demonstrates how no state government has ever
13 engaged in consultations in good faith with the
14 Claimants either with respect to on-reserve or
15 NWS -- I'm sorry, NWS distribution on-reserve or
16 their off-reserve brands. We just don't see it.

17 And we do -- what we do see in the
18 record, what we have lots -- the record is replete
19 with is cooperation and consultation between
11:51:13 20 NPMs -- I'm sorry, between OPMs and SPMs with the
21 State Attorneys General. It seems the state is
22 always ready for them to call -- we even have --

1653

1 appropriate comparatives in light of the treatment
2 according and they then searched for a
3 nondiscriminatory or nonarbitrary explanation for
4 the difference in treatment received.

5 So here's the first one. So I'll read
6 just the highlighted part. Why don't just I tell
7 you with about it because it's easier.

8 So with respect to -- there's two basic
9 claims in the UPS case concerning the treatment.
11:52:50 10 The one is that Canada Post basically got a much
11 better deal the way that it would take small
12 packages into the country than did UPS. And
13 everyone agreed, including the Tribunal, that it
14 was better. They didn't have to pay the fees.
15 They didn't have to pay for the cost of the
16 customs guards that were on site. It was much
17 more expedited. It was really quick. So it was
18 clearly much better.

19 But it turns out that the Tribunal then
11:53:17 20 goes on and says, well, there's a reason for that.
21 Canada under international obligations has to
22 maintain a certain kind or -- or at least has the

1652

1 well, I want to save time, but we even have the
2 example of the -- it's a -- it was a New York
3 Times article we attached to our particularized
4 statement of claim. It refers to Mr. Baillie.
5 And it describes in the article how private jets
6 flew out with the lawyers who negotiated the MSA
7 and they flew out to various places and had
8 actually chats with people and invited them to
9 join the MSA. Nobody flew up to the Haudenosaunee
11:51:55 10 Territory.

11 The final thing that I wanted to get to
12 back to was the question about UPS Canada versus
13 Pope and Talbot. Mr. Crook asked that question.

14 Our submission is that while the UPS
15 Tribunal articulated a test which uses different
16 language, the bottom line is, they applied the
17 same test. So that's the test they laid out
18 there, paragraph 83. I'll let you read it at your
19 leisure and I'm sure by closing if you have any
11:52:23 20 questions you can get back to it. That I submit
21 they did at the bottom there.

22 What did they do? They've defined

1654

1 authority to maintain -- I don't think they said
2 has to. I think it's really that they had the
3 authority to maintain a separate postal stream for
4 small packages from courier packages.

5 So because these international Treaty
6 rights existed, there was a good reason for
7 treating them differently. But there was -- it
8 was also very clear that there was no problem with
9 the notion that even though we're talking about
11:53:51 10 package streams that one could say, well, wait a
11 second. Isn't the measure about goods, isn't it
12 about packages, or at least the service of
13 packages?

14 The Tribunal said, no. This is
15 clearly -- these package streams have an impact
16 upon the two different companies involved. Canada
17 Post, which is a government-owned corporation and
18 UPS.

19 So the bottom line is they did find
11:54:14 20 comparators, Canada Post and UPS. And they did
21 conclude that the treatment was worse. One had a
22 better customs regime than the other did. And

1655

1 they then decided, nonetheless, they're not really
2 like circumstances even though they weren't a
3 prima facie basis because one had to be put there
4 in place by Treaty obligations and the other
5 didn't.

6 So it's the same result. I would say
7 it's arguably the same test.

8 The one thing that the UPS Tribunal
9 made clear, and which I already made clear in my
11:54:43 10 earlier presentation, is in that case, the
11 Claimant went too far and said that there was
12 actually a legal burden shift, that when they
13 presented the prima facie case that the legal
14 burden shifted to the other side to be able to
15 prove that it wasn't a problem, while I submitted
16 that there's no such thing as legal burden shift.
17 It's just a strategic burden shift.

18 If I put on a really good prime fair
19 case that demonstrates that I had decent
11:55:11 20 comparators, that they get the same treatment and
21 there doesn't seem to be a good reason, well, then
22 I'm going to win unless the other side puts in

1657

1 The publications assistance program was
2 a rejigged version of a previous version that had
3 fallen afoul of WTO rules challenged by the United
4 States successfully.

5 So they came up with this new system.
6 And the new system was that basically all Canadian
7 manufacturers of magazines are entitled to use
8 Canada Post, and if they do so they will get a big
9 discount in terms of how much it cost to ship.

11:56:49 10 UPS says, well, wait a second. We want
11 to do that too. And UPS makes the actual
12 allegation that not only is this differential
13 treatment that violates the fair and -- I'm sorry,
14 the most favored Nation treatment or the national
15 treatment standard.

16 They both step further and say, this
17 sucker isn't just de facto discriminatory. It's
18 de jure discriminatory. On its face it protects
19 Canadians only, Canadian manufactures of magazines
11:57:15 20 or publishers of magazines for Canada Post.

21 That's why this Tribunal says two
22 offhand statements about nationality. And you can

1656

1 evidence. That's all the UPS Tribunal is saying.

2 I used the phrase like circumstances
3 exemption up there because that's what the
4 trucking and Myers Tribunals both led by Martin
5 Hunter used. Essentially that's the hook, that's
6 the link for creating an exception in the
7 mechanism, in the mechanism of fair and -- I'm
8 sorry, of more favored or less favored treatment.
9 So this is the other one.

11:55:50 10 That's the customs one I told you
11 about. Okay. And so -- I already covered that
12 slide.

13 Next one. This is the other one that
14 they had. So the first claim was about the
15 customs. The other claim that they had was about
16 the Department of Canadian Heritage program, which
17 was -- essentially it's a publication assistance
18 program.

19 The Department of Canadian Heritage
11:56:16 20 protects Canadian culture. And it does its very
21 best to do, though it often runs afoul of
22 international trade obligations.

1658

1 see in both of them, one says as an aside on
2 paragraph 177 and the other says 181, they have
3 the part that they add or treated differently
4 because of nationality.

5 So the reason why you see nationality
6 references in this decision and why they're obiter
7 clearly by the way they're phrased is because of
8 Mr. Appleton, the counsel for that particular
9 Claimant, went a step further and said he had on
11:57:55 10 their face discriminatory measures for the benefit
11 of Canadians.

12 So what was the -- what did they do
13 about this one, though? What was the decision?

14 Well, the decision here was, again,
15 they looked at Canada Post and they looked at UPS
16 and they said, okay, you're generally in
17 competition with each other and we can see how you
18 would both deliver magazines. However, these guys
19 deliver magazines to one hundred percent of the
11:58:22 20 country. You guys, you only do it to about 80 --
21 70 -- I think it's about 80 percent.

22 So the reason that you -- that there's

1659

1 no breach here is because you guys can't do what
2 these guys do. You can't deliver to every single
3 person in the country and that's the nature of the
4 program. So because you are, therefore, not
5 yielding the right circumstances, you use -- I
6 would submit that UPS versus Canada is just like
7 and completely consistent with all the of other
8 national treatment cases, Feldman, Pope & Talbot,
9 there's a little bit of one in the ADF versus U.S.
11:59:03 10 case, it's very small. There's even a small
11 amount, one paragraph, in the Lowen case. The
12 three biggies, though, are Feldman Pope & Talbot
13 and this one, UPS. These are the points they
14 think this helps us with.

15 Quoting from them, so long as there's a
16 financial gain or loss associated with the choice
17 of the treatment provided, in other words, as long
18 as somebody gets better treatment as a result, the
19 person who's affected is entitled to a remedy.
11:59:27 20 And I think it's also very clear that
21 this case says that the evidence must demonstrate
22 that there was a reasonable means to achieve a

1661

1 therefore, it couldn't obtain that level of
2 treatment. It couldn't obtain the subsidy that
3 was being offered to Canada Post.

4 And by the way, the reason the subsidy
5 was offered to Canada Post rather than to the
6 publishers is because when it was offered to the
7 publishers in the old version of the statute, it
8 violated WTO rules. That's why they gave it to
9 Canada Post instead because it protected it from
12:00:56 10 further challenge.

11 So in this case are the Claimants
12 prepared to take on the obligations about which
13 they complain?

14 So to use example of off-reserve sales,
15 we say that we are in like circumstances with
16 exempt SPMs. We say that before they change the
17 Allocable Share regime, we were competing fairly.
18 We say that as a result of them changing the
19 regime, now our cigarettes on a -- on a per -- on
12:01:28 20 an average basis are our costs cost -- it costs
21 too much now. So it's hurting us.
22 We have the economic witness for the

1660

1 rational policy objective.

2 They don't use the words reasonable
3 means to obtain a rational policy objective. But
4 I submit, read the case again for yourselves.
5 You'll see, that's what they were looking for with
6 the Treaty obligation. They were looking for a
7 legitimate, nonarbitrary, nondiscriminatory reason
8 for saying that this different treatment for
9 customs was okay.

11:59:58 10 And the final point, and this one is
11 very useful for us, I think, with respect to this
12 whole idea of the publications assistance program.

13 Again, where it says, if you can
14 deliver magazines to a hundred percent of Canada
15 then you can also, UPS, be entitled to be one of
16 the deliverers and benefit from this program.

17 So, in other words, if you are willing
18 to take on the obligations that come with the
19 better treatment accorded, then you can
12:00:27 20 participate in it.

21 UPS was not willing to extend its
22 network to cover a hundred percent of Canada and,

1662

1 U.S. admitting at least that that's a windfall for
2 them. He claims that they would never use it or
3 it would be economically irrational to use it to
4 lower the prices, even though the evidence on the
5 record is that that's exactly what they did, but
6 he's saying it's not economically rational. But
7 what he does admit is that that was a big windfall
8 for them.

9 We now know from our testimony earlier
12:01:59 10 today that every time that there's an NPM
11 adjustment there's another potential windfall for
12 an exempt SPM. So they have the advantage of
13 these windfalls. And why do they have the
14 advantages? Because they join the MSA.

15 Well, we say, and we said, let us join
16 the MSA. Let us join the MSA on fair terms.
17 Don't make us pay for all of our cigarettes that
18 were distributed on-reserve because you have no
19 business trying to regulate there anyway, but for
12:02:29 20 every stick that we've sold off-reserve, we'll
21 pay, we'll actually join and, by the way, if
22 you're going to give General Tobacco extra time to

1663

1 pay, well, we'd like some extra time to pay too
 2 but we're willing to pay on the same terms that
 3 General Tobacco did. Give us the same windfall.
 4 Give us the same entitlement that you're giving to
 5 our competitors.
 6 We don't have to prove, by the way --
 7 and this is one thing -- and this is actually my
 8 last point. To be clear this is not a competition
 9 law case. We don't have to prove that better
 12:03:03 10 treatment resulted in a competitive advantage in
 11 the way that a competition law Tribunal does. We
 12 just have to prove that better treatment was
 13 afforded than we received. So because we have
 14 heard a law in that conversation --
 15 PRESIDENT NARIMAN: That's your 1102.
 16 MR. WEILER: Yes, that's our 1102.
 17 Because you've heard a lot with
 18 Mr. Gruber talk about, yeah, yeah, yeah, but, you
 19 know, you didn't -- with respect, I think
 12:03:32 20 Mr. Gruber didn't realize that we weren't here for
 21 a competition law case. We're here for an 1102
 22 case and we submit that that's what UPS tells us.

1665

1 jurisdictional decision by the Tribunal that makes
 2 us look at the market as of March 12, 2001. We
 3 cannot complain about measures before then. We
 4 can only speak to the issues as of March 12, 2001
 5 and thereafter.
 6 So that's what we've done and where we
 7 focused our claims on in the hearings and since
 8 the jurisdictional decision.
 9 We are looking at, according to the
 12:08:13 10 jurisdictional decision, the impact to
 11 on-Reservation sales and off-Reservation sales.
 12 We looked at the Claimants' business at
 13 of that time as of March 12, 2001. We don't
 14 present a but for world that the economists have
 15 presented or theoretical world. What we want to
 16 present to you is just the facts, straightforward
 17 the facts as of March 12, 2001 and thereafter. We
 18 make comment on what is known as the but for world
 19 that the economists have used, but only for
 12:08:43 20 purposes of clarification.
 21 So with that, the first thing that the
 22 record shows that the Claimants' investments in

1664

1 And with that, I'm finished, and I'll
 2 turn it over to my friend, Mr. Violi, if there
 3 aren't any questions.
 4 PRESIDENT NARIMAN: Violi, keep it
 5 short.
 6 MR. VIOLI: I'll try.
 7 (Pause in the Proceedings.)
 8 (Discussion off the record.)
 9 PRESIDENT NARIMAN: I'm told you've
 12:06:16 10 taken extra -- off the record.
 11 (Discussion off the record.)
 12 MR. VIOLI: What I've tried to -- not
 13 what I've tried.
 14 What I've done is synthesize the facts
 15 that we have seen and synthesize the facts that in
 16 the records. Put it in a bullet form.
 17 PRESIDENT NARIMAN: We can read all
 18 this. Be assured, we're going to read it.
 19 Just sum up in your head far more
 12:07:40 20 important. Still talk about what you want to say.
 21 MR. VIOLI: If I may, the slides helped
 22 put it altogether. What we have here, we have a

1666

1 the U.S. market are well established as of March
 2 12, 2001.
 3 We have procurement -- the Seneca
 4 brand, for example, is an established brand by
 5 March 12, 2001, did not come on to the scene
 6 thereafter. In fact, it came on in 1999.
 7 We have the acquisition of land and
 8 warehouses by NWS and leasing of warehouses for
 9 the distribution of that brand and for the
 12:09:16 10 capitalization of that investment.
 11 We have a manufacturing and trademark
 12 licensing agreement between NWS and Grand River.
 13 We have an equipment loan as well as an inventory
 14 loan, delivery vehicle used by Grand River for NWS
 15 in the U.S. and we have sales of Seneca brands
 16 since 1999 throughout Indian Country.
 17 Also as of 2001 we have the
 18 commencement of private label manufacturing by
 19 Grand River. That's the Capital and the Scenic
 12:09:50 20 101 brand.
 21 So with specific reference, we have a
 22 1999 cigarette manufacturing agreement we see in

1667

1 the record. That manufacturing agreement
2 acknowledges that at the second highlighted
3 paragraph there, that NWS is the owner of
4 trademarks and proprietary interests. But it also
5 acknowledges and confers that Grand River is the
6 joint owner of such proprietary interests.
7 These are trademarks -- if we look at
8 the next slide, these are U.S. trademarks recorded
9 in the U.S. patent and trademark office, which the
12:10:22 10 next slide shows. We have the Seneca record with
11 U.S. patent and trademark office being owned by
12 Native Wholesale Supply. That is the -- and being
13 first used in the United States in June of 1999.
14 That's the trademark and proprietary right that
15 was assigned partially to Grand River, licensed to
16 Grand River.
17 We have the Opal Mark in March 2002
18 which is only owned by Grand River.
19 So, clearly we have investments, we
12:10:50 20 have assets in the United States of these
21 Claimants, both before 2001 and thereafter.
22 That's the status as of -- the Claimants' business

1669

1 PRESIDENT NARIMAN: This one?
2 MR. VIOLI: Yes, you can see the full
3 document in those records. All these are in full.
4 What I did was put them together. You see how I
5 merged them together?
6 PRESIDENT NARIMAN: Okay. Carry on,
7 please.
8 MR. VIOLI: Okay. So tab -- that
9 binder also has an index which tells you where to
12:12:01 10 find this in the record.
11 So if you look at the right side of the
12 page we have receipts -- various receipts for that
13 vehicle evidencing the distribution of the Seneca
14 brand throughout the United States in 2000 and
15 2001. We have New Mexico receipt. We have
16 Arizona. We have Kansas. We have Oklahoma. If
17 you look in the binder you'll see Idaho. You'll
18 see Indiana, Colorado. So as of 2001 we have a
19 major distribution network, a plan -- a business
12:12:26 20 plan for the Seneca brand and the venture that's
21 referenced in our Memorial and reply Memorial.
22 Again evidencing the investment in the U.S.

1668

1 as of 2001 and the jurisdictional decision in this
2 case.
3 The next slide shows that on the
4 left-hand side, a Volvo truck which is paid by GRE
5 but used by NTD and NWS. And then there's the
6 payment of a lease. There's a payment of --
7 MR. FELDMAN: Counsel, is this in the
8 record?
9 MR. VIOLI: It is indeed. It's in --
12:11:22 10 this is -- I'll get you the reference. I'm trying
11 not to slow down. But these are all in the
12 record. Everything is in the record.
13 We have --
14 MS. MONTGOMERY: Tab three of the binder
15 and it refers to the place where is it in the
16 record.
17 MR. VIOLI: I should have said that.
18 I'm sorry, I went too quickly.
19 Yeah, I had given you the big binder
12:11:41 20 which takes all of these evidence in full form,
21 not in abridged form. I abridged these. I put
22 them -- all condensed them in PowerPoint and --

1670

1 clearly established as of 2001.
2 The next slide is the NWS balance
3 sheet. Shows a substantial business. Total
4 current assets of 1.8 million dollars as of
5 December 31, 2001. And it also shows -- evidences
6 the inventory --
7 PRESIDENT NARIMAN: Is this audited or
8 unaudited?
9 MR. VIOLI: This is audited. This is
12:12:55 10 audited.
11 It also shows accounts payable of
12 2.2 million dollars. Those are the amounts that
13 Grand River allowed to be carried as an inventory
14 loan for NWS for this venture to get off the
15 ground, to finance its initial operations.
16 I mentioned before the private
17 manufacturing agreement because the NWS -- the
18 distribution of the Seneca brand with NWS was
19 pursuant to a venture relationship with both
12:13:25 20 parties owned the proprietary rights in one form
21 or another.
22 If you look at the private

1671

1 manufacturing relationships that Grand River had
 2 entered into for the independent brands where they
 3 did not have trademark rights, you'll see it on
 4 the next slide where on paragraph three, this is
 5 an agreement between USA Tobacco and Grand River,
 6 where Grand River manufactured for USA Tobacco.
 7 It says USA and its customers shall be the owner
 8 of all trademarks. And I'll read further.
 9 It says GRE shall not at any time
 12:13:56 10 during the term of this agreement claim any
 11 ownership interest in the trademark or
 12 intellectual property related to the brand and
 13 products.
 14 So we see -- by the next page, we see
 15 that as of 2001, the Seneca brand had achieved 523
 16 million sticks of distribution throughout Native
 17 American land in the United States. We have to a
 18 lesser extent the private labeling of Capital and
 19 the private label production of Scenic 101.
 12:14:23 20 The private labeled production are the
 21 brands that Grand River does not own or have a
 22 proprietary interest in or in its distribution.

1673

1 sold in an MSA state must either join the MSA as
 2 an SPM or remain an NPM and fund escrow accounts
 3 for the state's benefits.
 4 We know or what we believe at that time
 5 is that the statutes generally do not apply to
 6 sales in Indian Country. And we also believe
 7 that -- or we also understand from the Escrow
 8 Statutes that provided the manufacturer does not
 9 expand its business nationwide, a portion of the
 12:15:51 10 escrow funds can be returned under what's called
 11 the Allocable Share release provisions. So that
 12 is the picture, the snapshot of the regulatory
 13 climate 2001.
 14 PRESIDENT NARIMAN: Where do you get
 15 this provided manufacturer does not extend it. Is
 16 that part of the --
 17 MR. VIOLI: The Allocable Share
 18 release, if you do business in the whole country,
 19 you get less money back or no money back under the
 12:16:16 20 Allocable Share release provision or under the
 21 Escrow Statute -- the original Escrow Statute.
 22 If you concentrate just in the few

1672

1 It's a straightforward manufacturing group.
 2 The Seneca brand, however, is the brand
 3 that Grand River has invested significantly and
 4 substantially in both before and after 2001.
 5 And I make that for the point of
 6 reference to show the establishment of the
 7 Claimants' investment as of the time -- certainly
 8 as of the time of the jurisdictional decision's
 9 reference.
 12:14:56 10 What I move on now to is a snapshot of
 11 the regulatory climate in 2001. And this is the
 12 key, one of the bullet points I think the
 13 President is looking for.
 14 Because of the jurisdictional award, we
 15 must look at what the investors are facing at that
 16 time. And that will lead to the expectations that
 17 give rise to the expectations or the requirements
 18 and the treatment that is at issue.
 19 So if we look at the regulatory
 12:15:20 20 environment as of 2001, the day of the decision,
 21 we have Escrow Statutes adopted in all 46 MSA
 22 states. Any manufacturer whose cigarettes are

1674

1 state, your sales, you can get some money back
 2 under the Allocable Share release provisions. So
 3 the choice that's facing a manufacturer in 2001 --
 4 PRESIDENT NARIMAN: Your own says, is
 5 provided manufacturer does not expand business
 6 nationwide is your comment, not -- it's not part
 7 of the regulatory statute.
 8 MR. VIOLI: Well, I'll focus on the
 9 particular statute language that provides for
 12:16:41 10 that, yes. That's my --
 11 So we look to the Idaho Escrow Statute
 12 as an example. And it says any tobacco product
 13 manufacturer selling cigarettes to consumer within
 14 the state shall do one of the following: Become a
 15 participating manufacturer, an SPM, or put money
 16 in through escrow account by April 15th of the
 17 following year. And there's a schedule of
 18 amounts.
 19 So again, as of March 2001, the
 12:17:06 20 manufacturer whose cigarettes are sold in an MSA
 21 state faces two choices.
 22 According to the MSA, the purpose of

1675

1 the Escrow Statute is stated quite succinctly.
 2 The MSA states that a qualifying statute, an
 3 Escrow Statute, means a settling state statute
 4 regulation law and/or rule that effectively and
 5 fully neutralizes the cost disadvantages that
 6 participating manufacturers experience vis-à-vis
 7 nonparticipating manufacturers. It says, each
 8 participating manufacturer in each settling state
 9 agree that the model statute in the form set form
 12:17:40 10 in Exhibit T, if enacted without modification or
 11 addition, and not in conjunction with any other
 12 legislative or regulatory proposal, shall
 13 constitute a qualifying statute.
 14 So what we have then, as part of this
 15 regulatory environment, you look at the Escrow
 16 Statute. It says, join the MSA or pay escrow.
 17 What is the purpose of the Escrow
 18 Statute? According to the MSA, when you look to
 19 the MSA, it tells you the Escrow Statute is
 12:18:05 20 supposed to neutralize the cost disadvantages that
 21 you would experience if you don't join -- if you
 22 don't join the MSA. And this is the original

1677

1 doesn't apply on-Reservation. Because it says
 2 units sold.
 3 Units sold, as the definition reports
 4 there, is only calculated or determined if there
 5 is a state tax imposed or required on the
 6 cigarettes sold.
 7 On Indian Reservations, generally there
 8 is not the imposition of a state excise tax and
 9 the stamping of excise tax stamp. In fact, even
 12:19:34 10 in those states that are compacts there is what's
 11 called a compact stamp. So that's the first base
 12 for understanding when making the decision what to
 13 do in the regulatory environment. We have to look
 14 to the words of the statute. And by definition it
 15 does not apply anywhere there is no state tax
 16 collected.
 17 The next thing we have for --
 18 ARBITRATOR CROOK: Mr. Violi, very
 19 quick question.
 12:19:52 20 MR. VIOLI: Yes.
 21 ARBITRATOR CROOK: Is a pack with a
 22 compact stamp a unit sold? Yes or no would be

1676

1 statute that allowed Allocable Share release
 2 provisions.
 3 Under this statute -- under this
 4 statute or the purpose of the statute is to
 5 neutralize the cost disadvantages, the parties
 6 agreed -- if we're talking about parties, I heard
 7 mentioned before the mention of parties, what they
 8 understood when they're dealing with Treaties, the
 9 parties understood and agreed under the MSA that
 12:18:35 10 the original Escrow Statute was a qualifying
 11 statute. It was, with its Allocable Share release
 12 provisions, a statute that neutralized all the
 13 cost disadvantages. Performed everything it was
 14 supposed to do. That's under the original Escrow
 15 Statute, with the Allocable Share release
 16 provisions.
 17 I mentioned before it doesn't apply
 18 on Reservations. And we've had the discussion
 19 over the last -- well, last week or so why it
 12:19:01 20 doesn't apply on Reservations or why Grand River,
 21 when making the decision in 2001 what to do,
 22 looking at the statute comes to the conclusion it

1678

1 good.
 2 MR. VIOLI: Depends on the state. I
 3 believe Oklahoma thinks it is or says it is but
 4 other Tribes -- other states do not.
 5 PRESIDENT NARIMAN: Okay.
 6 MR. VIOLI: The second thing that gives
 7 us some insight is that NAAG frequently asked
 8 questions memo. We've seen that. So there where
 9 they talked about if it's not taxed, it's not a
 12:20:24 10 unit sold.
 11 We then have as a slide Escrow
 12 Statute's application to foreign manufacturers is
 13 uncertain. Grand River is in Canada, now faced
 14 with a decision. And we'll take it at March of
 15 2001. Do I or do I not join the MSA or do I
 16 comply with the Escrow Statutes.
 17 Well, if I'm Grand River I'm in a
 18 foreign country. I don't do business with the
 19 particular states, particularly myself. The way I
 12:20:52 20 read the statute it says, if I sell to a consumer,
 21 as I pointed out before, Grand River doesn't sell
 22 to a consumer. The statute says, well, if you

1 sell to a consumer through an intermediary, it
2 doesn't define what intermediary is. These are
3 all issues that need to be decided or resolved
4 when trying to make that decision on how to comply
5 with the regulatory regime as of March 2001.
6 We have the memo from NAAG itself
7 where -- or the members or the states putting the
8 memo together, in the case of a foreign
9 manufacturer, do the states have jurisdiction to
12:21:19 10 require the foreign manufacturer to make escrow
11 payments. This is a legal determination that we
12 cannot make.
13 The next part of the -- the next part
14 of the -- further down in the memo it says, if the
15 manufacturer is out of state, we may not have
16 jurisdiction. And may not be able to require the
17 manufacturer to pay escrow payments. And the
18 answer is correct. That's a question that a state
19 is posing and the answer is correct.
12:21:46 20 So at that time, Grand River, again
21 faced with the decision what to do, does it apply
22 to me, how shall I proceed.

1 signed on to the MSA and one is not.
2 As far as the payment burdens, as far
3 as the payment burdens, currently now they're
4 about the same. The payment requirements are
5 about the same, without getting into some of the
6 particularities about making back payments and
7 what have you if you join the MSA.
8 PRESIDENT NARIMAN: Do you have the
9 numbers on the OPs, exempt SPMs, nonexempt and
12:23:23 10 NPMs. If both of you can give me roughly the
11 numbers. I saw some numbers somewhere.
12 MR. VIOLI: We know that there are
13 15 -- there were four -- well, now there are three
14 because they were merged.
15 There were four OPs. They merged.
16 There are now three. There are 15 exempt SPMs.
17 And then there's some more nonexempt SPMs but some
18 of them have gone bankrupt. Some of them aren't
19 operating. So I can't tell you who is operating
12:23:44 20 in the market at any -- I know who asked to join
21 but --
22 MR. LUDDY: We will point to a table,

1 Let's take a snapshot of the U.S.
2 market participants. We looked at the regulatory
3 environment. Now let's look at the market
4 participants as of March 12, 2001.
5 The market consists of OPs, who
6 negotiated and first signed the MSA; exempt SPMs,
7 who signed the MSA within 90 days; nonexempt SPMs,
8 signed the MSA after 90 days; and NPMs, those who
9 don't sign the MSA. And that would include Grand
12:22:21 10 River at that time.
11 So a smaller manufacturer like Grand
12 River is faced -- as the Respondent's openings
13 pointed out, Grand River faced a choice like all
14 manufacturers are required to face. And to face
15 the choice in March 2001, how do you want to
16 comply with this regulatory regime.
17 Your first choice is --
18 PRESIDENT NARIMAN: Next question,
19 nonexempt SPMs and NPMs are treated the same or
12:22:48 20 different? Nonexempt SPMs and NPMs.
21 MR. VIOLI: Nonexempt are approximately
22 the same. They have different -- I mean one is

1 though, in the record from the Eisenstadt report
2 that shows that the exempt SPMs comprised the vast
3 majority of the sticks sold by all SPMs.
4 MR. VIOLI: Ninety-nine percent.
5 MR. LUDDY: The non SPM group was a
6 very -- the nonexempt SPM group was a very small
7 group.
8 MR. VIOLI: 99 percent of all SPM sales
9 of cigarettes is done by exempt SPMs. Only one
12:24:15 10 percent of SPM sales is nonexempt SPMs. And that
11 would include roll your own tobacco too. It does
12 not include -- I mean it's not just cigarettes.
13 So the smaller manufacturers must make
14 a choice. Join as a nonexempt SPM and make
15 payments without any credits or reductions or
16 offsets. Or the manufacturer can remain an NPM
17 whose products are sold nationwide. And if they
18 make that decision then they don't get any refunds
19 or reductions or offsets either.
12:24:46 20 Or thirdly, the NPM can remain an NPM,
21 but develop a limited regional distribution to
22 reduce its cost through the Allocable Share

1683

1 release provisions of the statute. If we look to
 2 the original Escrow Statute --
 3 PRESIDENT NARIMAN: This is what led to
 4 the amendment according to them.
 5 MR. VIOLI: Indeed. Indeed. The next
 6 slide points out the language in the original
 7 statute. It says, to the extent that a tobacco
 8 product manufacturer establishes that the amount
 9 required to place into escrow in a particular year
 12:25:17 10 was greater than the state's Allocable Share of
 11 the total payments that such manufacturer would
 12 have been required to make in that year under the
 13 Master Settlement Agreement, the excess shall be
 14 released from escrow and revert back to such
 15 tobacco product manufacturer.
 16 What it says basically is if your
 17 cigarettes are sold in Idaho, you have to make
 18 escrow payments pursuant to the statute under
 19 schedule. You make those escrow payments then
 12:25:42 20 what the Idaho law did, the original Escrow
 21 Statute did is okay now we're going to look at
 22 what Idaho would have received from you if you

1685

1 the market.
 2 At that time NPMs roughly 50 percent
 3 less they were at four percent of the market, NPMs
 4 sold four percent. So exempt SPMs are
 5 substantially higher, significantly higher than
 6 NPMs at that time 2001, Grand River is at about
 7 quarter percent of the marketplace. So if you
 8 have four hundred billion sticks Grand River is at
 9 a billion sticks. So it's .22 percent of the
 12:27:38 10 market, if you look down follow the yellow line
 11 across you see where Grand River was in 2001. The
 12 time it has to make this decision.
 13 So it is certain that NPMs increase
 14 their market share from the OPMs. We know that.
 15 We see that. The graph shows that. We also see
 16 the exempt SPMs increased their market share after
 17 the MSA. Substantially. It was trajectory. NPMs
 18 also were going up not nearly at the rate of
 19 exempt SPMs or NPMs but nonexempt SPMs also went
 12:28:15 20 up at that time.
 21 What does Grand River do? Looks at the
 22 statute, it looks at the Allocable Share release,

1684

1 joined the MSA, and what you put into escrow. If
 2 what Idaho would have received from you is less
 3 than what you -- than what you paid under the
 4 Escrow Statutes, you can get the difference
 5 refinance.
 6 So join the MSA, make payments, Idaho
 7 gets a piece of it or don't join the MSA, put this
 8 money into escrow we then look to see what Idaho
 9 would have gotten you joined the MSA if it's less
 12:26:20 10 we'll give you a refund of the Escrow Statutes.
 11 That's how the Escrow Statutes originally worked.
 12 What I'd ask you to focus on is the
 13 blue highlighted area.
 14 The market shares as of 2001 exempt
 15 SPMs sold 6.2 percent of the entire volume of
 16 cigarettes sold in the United States. 6.2
 17 percent. They started, they are the dark blue.
 18 They started at roughly 2.5 percent in 1997 and
 19 it's trajectory. Their rise, exempt SPMs
 12:26:59 20 increased from the time of the escrow -- excuse me
 21 the time of the MSA to 2001. Again focusing on
 22 the 2001 decision making process of a company in

1686

1 it looks at the MSA, the 16 billion stick
 2 exemption at that time given to Liggett and
 3 Commonwealth, the pricing in the market, and it
 4 decides I'm facing demands from MSA states to
 5 comply with the Escrow Statutes. This is Grand
 6 River speaking now.
 7 The regulatory regime is such as I just
 8 explained what do I do if I'm Grand River. In
 9 response to the states' demands and remember how I
 12:28:50 10 said there was uncertainty with Grand River
 11 whether the law should have been applied to them
 12 even their own memo said it shouldn't apply to a
 13 foreign manufacturer.
 14 There was uncertainty with respect to
 15 on-Reservation sales. All these uncertainties in
 16 March 2001 one thing was certain; however, is that
 17 the states were making demands on Grand River pay
 18 and pay now or face lawsuits. What does Grand
 19 River do? Accepting the regulatory regime, it
 12:29:16 20 undertakes to begin to resolve escrow claims of
 21 the MSA states under a Reservation of rights. It
 22 refocuses its business strategy on marketing and

1687

1 distribution of Seneca brand on-Reservation with
 2 Native Wholesale Supply and off-Reservation with
 3 Tobaccoville.
 4 Grand River chooses to remain an NPM
 5 and comply with the escrow requirements and
 6 Allocable Share release provisions to maintain its
 7 ability to compete with its principle competitors
 8 exempt SPMs in the market. That's the decision it
 9 made, those were the choices it faced.
 12:29:48 10 So the next slide shows Claimants'
 11 undertakings as I just described. How does it put
 12 that decision making process into play? As I
 13 mentioned before, Claimants entered into a
 14 manufacturing and licensing agreement with
 15 Tobaccoville in 2002. The states are saying
 16 wherever your cigarettes are sold Grand River or
 17 cigarettes manufactured by you, you have to pay
 18 escrow.
 19 So Grand River says let's focus on
 12:30:15 20 having one company do the distribution
 21 off-Reservation. That's Tobaccoville. They
 22 entered into a manufacturing and licensing

1689

1 other states. When they had to make the decision
 2 to comply whether to join the MSA or pay the
 3 escrow, they decided to focus on paying the escrow
 4 and regrouping to just five states which makes the
 5 escrow payments lower. If you sell just in five
 6 states and stop the sales everywhere else in the
 7 country, under the Allocable Share release
 8 provisions you could reduce your escrow payments
 9 by way of the rebate provision.
 12:31:44 10 PRESIDENT NARIMAN: And you get a
 11 larger release.
 12 MR. VIOLI: You do. Precisely. So NWS
 13 is given a royalty --
 14 ARBITRATOR CROOK: Mr. Violi, quick
 15 question. These are the five states that are the
 16 basis of your damage calculations?
 17 MR. VIOLI: I believe so.
 18 ARBITRATOR CROOK: There was confusion
 19 on that, as you know.
 12:32:01 20 MR. VIOLI: Well, I think there was a
 21 reduction in Tennessee and then there's Kansas,
 22 but yeah, those are the five in the damages,

1688

1 agreement with Tobaccoville for that purpose.
 2 Grand River also enters into initial escrow
 3 settlements with five states.
 4 So part of this plan coming into the
 5 regime and complying with it, Grand River's escrow
 6 disputes are settled with North Carolina, South
 7 Carolina, Oklahoma, Arkansas and Georgia. Roughly
 8 in that order. Beginning in 2002 and 2003. The
 9 Claimants and Tobaccoville agree the distribution
 12:30:52 10 will only take place in the initial five states I
 11 just mentioned. That reduces the per carton
 12 escrow liability through the Allocable Share
 13 release provision.
 14 PRESIDENT NARIMAN: Does this mean you
 15 consciously did not sell in other states?
 16 MR. VIOLI: Correct.
 17 PRESIDENT NARIMAN: You had a market in
 18 other states?
 19 MR. VIOLI: There was a market in other
 12:31:13 20 states Grand River was facing escrow for.
 21 PRESIDENT NARIMAN: I'm just asking.
 22 MR. VIOLI: Yes, there were sales in

1690

1 right.
 2 MR. LUDDY: Yes. Off-reserve.
 3 MR. VIOLI: Off-reserve.
 4 ARBITRATOR CROOK: Thank you.
 5 MR. VIOLI: So part of this plan is
 6 that NWS was giving a royalty for the Tobaccoville
 7 sales off-Reservation. I think it was five
 8 dollars a case given to NWS for that. NWS
 9 continues only on-Reservation distribution.
 12:32:26 10 Tobaccoville does off-Reservation.
 11 Claimants launched the Opal brand and
 12 they phase out the private label brand. The
 13 problem with the private label brand is that
 14 states were demanding Grand River pay escrow for
 15 it even though it wasn't technically Grand River's
 16 brand. It was made by Grand River, but it wasn't
 17 Grand River's brand. So -- and the people who
 18 were importing it we told the states they should
 19 pay it. They're importers under the statute.
 12:32:46 20 The states would have none of it they
 21 wanted Grand River to pay. So Grand River said
 22 well, if these people aren't going to pay, it's

1691

1 not our brand, we're just going to stop making
 2 this private label brand and focus only on our
 3 brand which we invested heavily in.
 4 We also see -- and the launch of the
 5 Opal brand is a launch by Grand River. Grand
 6 River is the trademark owner for Opal. Without
 7 dispute it's only distributed through these
 8 channels Tobaccolville and NWS. NWS
 9 on-Reservation, Tobaccolville off-Reservation.
 12:33:18 10 Grand River proceeds to prosecute trademark
 11 infringement proceedings, jealously guarding its
 12 trademark.
 13 This is a valuable asset particularly
 14 at this time Grand River goes in has trademark
 15 infringement proceedings in Oklahoma against M.R.
 16 Campbell, which is referenced in the record,
 17 Tri-State Distribution in the South Carolina and
 18 Mid-Atlantic states. Evidencing its ownership,
 19 proprietary rights and protection of those
 12:33:41 20 investments.
 21 That's the status of the companies in
 22 or about 2002, 2003 right after the Jurisdictional

1693

1 this business plan and strategy allowed Grand
 2 River to do is also settle the demands of the
 3 other states because with the money that it got by
 4 way of releases for 2002 and 2003, it used that
 5 money to settle cases with or settlement escrow
 6 demands from Nebraska, Tennessee, Kansas and
 7 Louisiana.
 8 So we see a development in the market.
 9 Business plan put in place, a strategy. Deal with
 12:35:21 10 the regulatory regime as it's put in front of you
 11 and make it work. And try to compete, try to
 12 develop your investment, protect your investment
 13 under that business plan. And not just in the
 14 initial five states, but go to the five states who
 15 you're not going to sell initially or maybe one or
 16 two you will sell initially, but start paying off
 17 these states for the demands. And come into full
 18 compliance with the Escrow Statutes the other
 19 states are demanding.
 12:35:51 20 By every measure it was a success
 21 story. The next slide shows where Grand River,
 22 what this business plan or strategy, what it

1692

1 Award tells us we must look at the measures at
 2 issue.
 3 ARBITRATOR CROOK: Mr. Violi another
 4 quick one. You described the trademark
 5 litigation. I actually didn't recall seeing that
 6 before. You're assuring us if we look in the
 7 record we'll find documents of that?
 8 MR. VIOLI: Yeah, it's Tab 68 of
 9 Claimants' Reply Memorial evidenced Document No.
 12:34:16 10 68. It's a list of the attorneys fees Grand River
 11 paid into the United States for U.S. counsel in
 12 defending those trademarks, prosecuting trademark
 13 infringement actually.
 14 The next slide points out the
 15 Claimants' business plan and strategy was
 16 successful, very successful. Business plan and
 17 strategy successful and growing sales of Seneca
 18 brand and good will in on-Reservation market
 19 throughout the U.S. and off-Reservation market in
 12:34:44 20 five initial states that were focussed on pursuant
 21 to this plan.
 22 This is also important because what

1694

1 allowed and what it resulted in. It results in
 2 the growth of the Seneca market or business in
 3 that investment in the Seneca brand. From 2001
 4 the Seneca brand goes from 523 million sticks to
 5 2002 is 960 million sticks. 1.4 billion sticks,
 6 2.1, 3.5, in 2005.
 7 The other brands the private label
 8 because Grand River was being asked to pay for
 9 those brands and disputes with the importers, the
 12:36:40 10 importers wouldn't pay for them, they started to
 11 get phased out almost to nothing. Zero by 2005.
 12 So we see the focus of the Seneca brand, we see
 13 the focus on-Reservation and we see the focus
 14 off-Reservation in five states as well as the
 15 efforts by these Claimants to comply and resolve
 16 disputes with the MSA states.
 17 So the next slide basically shows and
 18 we'll get to it later, but it shows I highlighted
 19 in red what the sales volumes were under the
 12:37:23 20 Allocable Share release regime. And the growth of
 21 the brands where they were in each of the five
 22 states previously mentioned. We have Arkansas,

1695

1 Georgia, North Carolina, Oklahoma and South
2 Carolina.

3 As I mentioned before, the success of
4 Grand River under this regime is evidenced by the
5 statistics and the facts. I'm not trying to color
6 the facts, I'm trying to present them in exactly
7 the light they were presented for Claimants at
8 that time. We have a report from the Respondent's
9 expert Professor Gruber which he submitted in
12:38:04 10 another proceeding which we were able to obtain
11 and use here.

12 The chart from that report is in the
13 record here at the next slide and we asked
14 Professor Gruber some questions about it. What
15 this chart shows is the growth of NPMs, and
16 particularly Grand River. It mentions Grand River
17 by name in Canada where there is no MSA, there is
18 no OPM, there is no SPM, there is no exempt SPM
19 and there is no imposition of a regulatory regime
12:38:36 20 under the Escrow Statutes or MSA. It's just not
21 there.

22 Everybody is performing or competing at

1697

1 Grand River makes its decision in 2001 and
2 proceeds in 2002, 2003, at or about the time and
3 it's growing, we have the report from the National
4 Association of Attorneys General and this was
5 Attorney General Sorrell I believe. He writes on
6 behalf of all the Attorneys General and NAAG, to
7 the President of the Council State Governments.

(Discussion off microphone.)

8 PRESIDENT NARIMAN: Yes?

12:40:26 10 MR. VIOLI: We see the letter there and
11 the Council of State Governments say maybe the MSA
12 wasn't that great we got reductions in payments
13 and there's a growth of NPMs and what the
14 Attorneys General said candidly again outside the
15 context of the litigation let's forget about for
16 the moment what Respondent is charged here with or
17 what the states are charged with in other
18 litigations, outside the context of litigation
19 they state clearly.

12:40:52 20 In fact, the major cigarette
21 manufacturers raise prices by several multiples of
22 their MSA costs. The price increase that created

1696

1 the same level vis-à-vis whether or not there's an
2 MSA. And it shows the growth -- actually Grand
3 River grew more. It grew to 2.4 percent by 2003
4 in Canada. It grew substantially less, but it
5 grew in the U.S.. And Professor Gruber said what
6 we're trying to do here is show because the
7 participating manufacturers, the OPMs, who wanted
8 money back under the NPM adjustment of the MSA,
9 they're trying to show they lost market share
12:39:07 10 because of Grand River and NPMs.

11 And what the states try to show in
12 those proceedings is no, no, no. Look when
13 there's no MSA, what happens when there's no MSA.
14 So you don't need to raise NPMs' cost to the level
15 of non except SPM. It says what it says. It
16 shows the growth of NPMs particularly Grand River
17 in a market where no one is burdened by MSA or
18 escrow.

19 And that's what the next slide shows
12:39:37 20 Professor Gruber's testimony. You heard it.

21 PRESIDENT NARIMAN: Yes.

22 MR. VIOLI: At or about the time that

1698

1 the market opportunities for NPMs is not
2 attributable to the MSA, but rather to the
3 decision by the OPMs to inflate per pack profit
4 margins at the cost of losing market share.

5 Finally, the report correctly notes
6 that the market share of NPMs has risen. As noted
7 previously the increase is principally the result
8 of price increases by the OPMs far in excess of
9 cost imposed by the MSA and the decision by the
12:41:22 10 OPMs to widen the margin.

11 PRESIDENT NARIMAN: What does this
12 show?

13 MR. VIOLI: It shows the states
14 acknowledging, the Attorneys General people
15 entering the MSA, that the MSA -- the cost
16 disadvantages of the MSA are not the reason for
17 Grand River growing or NPMs growing. It has to do
18 with the OPMs, Philip Morris raising its price by
19 18 dollars a carton or 15 dollars a carton when
12:41:45 20 the MSA for example -- at this time it was 12
21 dollars a carton and the MSA cost was roughly
22 three and change. Three dollars and change.

1699

1 There were multiples -- Philip Morris
2 companies, the big guys, the OPMs they raise the
3 price by multiples of what the MSA requires.
4 That's why they lost market share. Not because of
5 the MSA or the cost imposed by MSA. If the MSA
6 impose \$3.89 cost on you, why do you raise your
7 cost by 12 dollars?
8 That's what the cause of the market
9 share, and that's what the states are saying.
12:42:14 10 That's what the Attorneys General are saying, when
11 there's nobody in the room when there's not a
12 Tribunal sitting in front of them. That's what
13 the states are saying.
14 What we also see at or about which is
15 prior to that letter the June 18th letter by
16 exempt SPMs to Attorney General Edmonson who's the
17 chair of the tobacco committee on NAAG. It notes
18 during our joint meeting with OPMs we suggested
19 several changes to the model act. We have SPMs
12:42:46 20 meeting with OPMs, meeting with the states
21 suggesting a change to the Escrow Statute. Did
22 they ask NPMs?

1701

1 meeting with the SPMs and they're discussing,
2 discussing many things. One of the things they're
3 discussing is the fate of NPMs under the Escrow
4 Statute. Should we change the Escrow Statute.
5 But this letter is not sent to NPMs nor
6 are NPMs invited these meetings that are mentioned
7 here, but they're talking about changing our
8 payment under the Escrow Statute.
9 PRESIDENT NARIMAN: According to you
12:44:18 10 this was achieved through Allocable Share Release
11 Amendment.
12 MR. VIOLI: The concept was conceived.
13 It was ill-conceived by exempt SPMs who wrote this
14 letter and the OPMs as we'll later see.
15 It was there and the states of course
16 would go along with it because they received more
17 money if NPMs lose market share to the people
18 writing the letter and dreaming up these ways to
19 change the law.
12:44:53 20 The next table shows what is the
21 average payment an NPM must make without an
22 Allocable Share release provision comparing it to

1700

1 PRESIDENT NARIMAN: No, but was this
2 change accepted? No.
3 MR. VIOLI: The change here says
4 elimination or modification of the requirement
5 that NPM escrow liability be limited to the
6 payment such NPM would be -- would make as a
7 participating manufacturer. So the exempt SPMs
8 and OPMs are thinking we need another way to
9 reduce competition from NPMs. The way to reduce
12:43:22 10 it is by limiting the release under the escrow
11 Escrow Statutes.
12 So we have the states, the OPMs and
13 SPMs meeting for this purpose deciding our fate.
14 Did they ask us to come to the table? Did they
15 give us this letter at that time?
16 PRESIDENT NARIMAN: Apart from that I
17 wanted to know this wasn't achieved, was it?
18 MR. VIOLI: It was eventually through
19 the Allocable Share release provision. This is
12:43:49 20 the precursor. What happens, Mr. President, is
21 that the states are meeting, and this was pointed
22 out. They're meeting with the OPMs, they're

1702

1 exempt SPMs. So in 2003, an NPM without a release
2 would pay \$3.90 a carton. Exempt SPMs paid \$1.87
3 per carton. Little less than half. In 2004
4 without an Allocable Share release, an NPM has to
5 pay \$4.02 per carton, exempt SPMs paid \$1.81 per
6 carton again less than half. 2005 NPMs without
7 Allocable Share release paid \$4.16 a carton,
8 exempt SPMs paid \$2.11 a carton.
9 PRESIDENT NARIMAN: Where is that?
12:45:49 10 MR. VIOLI: If you look at the
11 highlight across the top, it says, pre tax NPMs
12 statutory escrow rate per pack, then you compare
13 that to the volume weighted average sums. So if
14 you look at the body of the table, look for
15 example Premier Manufacturing, Premier
16 Manufacturing paid zero it's an exempt SPM. These
17 are only exempt SPMs, the 15 companies who
18 received the favorable treatment we talked about.
19 Exempt SPM Premier paid zero in 2003,
12:46:18 20 zero in 2004, zero in 2005. It paid, I guess,
21 that would be 50 cents a carton in 2006.
22 MR. LUDDY: Five cents.

1703

1 MR. VIOLI: Sorry five cents a carton,
2 not 50 cents a carton. Let's look at Japan
3 Tobacco. Japan Tobacco paid nine cents a carton
4 in 2003, seven cents a carton in 2004, five cents
5 a carton 2005. Liggett, one of the other
6 companies we talked about, Liggett paid \$1.11 a
7 carton in 2003. That's 11 cents per pack. \$1.11
8 per carton.

9 Liggett paid 70 cents per carton in
12:47:05 10 2004, 40 cents per carton in 2005 and so on. So
11 this shows you, remember, that an NPM has a
12 choice; join the MSA with Liggett and you will pay
13 roughly \$3.90 a carton and Liggett pays less than
14 a third of that almost 25 percent -- 75 percent
15 less.

16 So Grand River you can join the MSA and
17 you'll have to pay \$3.90 a carton. Liggett pays
18 \$1.11 a carton or you cannot join the MSA, you
19 could remain an NPM and sell nationwide, don't get
12:47:48 20 an Allocable Share release under the Escrow
21 Statute, you're still paying \$3.90 and Liggett is
22 still paying \$1.11 or you can join the MSA --

1705

1 It should be stressed and this is the
2 language we've see before all states have interest
3 in reducing NPM sales in every state.

4 PRESIDENT NARIMAN: This was only for
5 revenue loss there was a --

6 MR. VIOLI: Right, this is what the
7 Attorney General said here, all the Attorneys
8 General; we're losing money. They're not saying
9 we're losing money because NPM prices are low or
12:49:37 10 NPM prices are high. They're taking advantage of
11 a loophole. They're just saying we are losing
12 money. What do we do about it.

13 And the answer is complementary
14 legislation and Allocable Share legislation
15 because that will increase the market share of the
16 OPMS and SPMS. Now the next slide and we'll deal
17 with this also in the closing. I want to get
18 through this quickly now. We talked about was
19 there a change, when was the change.

12:50:07 20 Well in fact, they didn't just change
21 the Escrow Statutes. The people to the MSA
22 changed the MSA. The OPMS, SPMS and the states.

1704

1 excuse me or you can remain an NPM, do a regional
2 distribution plan and reduce your escrow payment
3 on an average cost basis by limiting your sales in
4 just a few states.

5 As we mentioned before, the states did
6 not initially blame the loss of payments on NPMs
7 and the loss of market share by OPMS. In the
8 later memo of Attorney General Sorrell, which is
9 in the record, it's an alert on a NAAG memo. The
12:48:38 10 complete memo is in the record. These are the
11 excerpts.

12 Increasing sales by NPMs will sharply
13 reduce the next scheduled payment. It says there.
14 One of the principle contributors to the loss of
15 revenue is the increase of sales by NPMs. These
16 results they underscore an urgency. There's an
17 urgency now, frantic, all states take steps to
18 deal with the proliferation of NPM sales including
19 enactment of complementary legislation and
12:49:08 20 Allocable Share legislation and consideration
21 other measures that may avoid reductions in
22 settlement payments.

1706

1 And they said, basically what the amendment says
2 is notwithstanding, we have an Escrow Statute an
3 original Escrow Statute and it's an exhibit to the
4 MSA and it's a model statute, and we agreed that
5 that neutralized the cost disadvantages, not
6 withstanding all that, we will agree to amend the
7 MSA, to include a model statute that does not
8 allow Allocable Share release.

9 PRESIDENT NARIMAN: What date is it?
12:50:46 10 MR. VIOLI: This was provided by --
11 PRESIDENT NARIMAN: What date is it?
12 MR. VIOLI: You have to ask the
13 Respondent.

14 PRESIDENT NARIMAN: That's what I will
15 ask them. Have you got the date for this?
16 MR. VIOLI: It was signed by the
17 manufacturers at different points in time.

18 PRESIDENT NARIMAN: This an Amendment,
19 so what date would you attribute to it?
12:51:16 20 MR. VIOLI: There are about 20 of these
21 documents. This one was signed by Liggett.
22 PRESIDENT NARIMAN: I want to know the

1 date. Later.
 2 MR. VIOLI: There are 20 of these
 3 documents signed by various manufacturers. This
 4 one was Liggett, this one document that has a fax
 5 saying it was faxed, that's the only one I can
 6 find that had a date reference to it, but we can
 7 give you all of them signed or they can tell you
 8 when they received them.
 9 Now this is something I mentioned
 10 before. The process by which the Allocable Share
 11 Amendment came about, it was conceived, how was
 12 reared and how it came to full fruition is one
 13 we're not fully apprised of nor is the Tribunal.
 14 We have a little insight from memos we received,
 15 how this amendment to the MSA came about by
 16 inference. They'll give us the date, but we also
 17 have some insight how it came about in each of the
 18 respective states vis-à-vis the Attorneys General.
 19 What you see in the next slide is an
 12:51:45 20 e-mail from Alan Shachnus(ph) at Wachtel, Lippman,
 21 Rosen and Katz the attorneys for the OPMS, and
 22 particularly Philip Morris.

1 under the MSA and meet with this amendment
 2 language. Right? Asking for approval.
 3 PRESIDENT NARIMAN: (Off microphone)
 4 The language to which you objected that has been
 5 removed. Where is that language.
 6 MR. VIOLI: I don't have the whole -- so
 7 the next, one I fax the latest version of the
 8 bill. Right? Below is the version that you --
 9 that will be sent to the House today for a vote
 10 one way or the other. The language to which you
 11 objected, Phillip Morris and the OPMS, has been
 12 removed. Please send your concurrence.
 13 Why does the Attorney General of Oklahoma
 14 need occurrence (sic) or approval from the OPMS
 15 when they are passing legislation that affects us?
 16 The next e-mail dated May of 2003.
 17 Again -- and this is an e-mail that went to
 18 everyone. It went to Phillip Morris, which is
 19 Altria; RJR, Michael Hering at NAAG. It went to
 20 Brown and Williamson or BAT Tobacco. Yeah,
 21 Virilard (ph). Alex, the house staff has made
 22 additional changes to HP 1359. Good news is that

1 It's an e-mail from Attorney Shachnus
 2 OPM Attorney Shachnus, to Phil Stanbeck at the
 3 Oklahoma Attorney General's Office and the subject
 4 is the Oklahoma Allocable Share Amendment. So now
 5 we see the statute start to take form, at least in
 6 draft form, for submission to the legislature.
 7 And we see this e-mail, and it says I can give you
 8 an assurance, if we look at the e-mail trail below
 9 it, this e-mail respond to an e-mail by Mr.
 10 Stanbeck, Assistant Attorney General Stanbeck, to
 11 Mr. Shachnus, and he writes, and it also was
 12 copied to Mr. Hering of NAAG.
 13 Alex, we have made the changes you
 14 suggested to our bill. Would you, on behalf of
 15 the OPMS and SPMs, send a letter stating that the
 16 proposed changes meet with your approval and that
 17 if the bill is passed, Oklahoma will still have a
 18 qualifying model statute as required by the MSA.
 19 Assistant Attorney General of Oklahoma
 12:53:34 20 saying to Philip Morris, we're going to change our
 21 law, we made the changes you suggested and we want
 22 to make sure that it does what it's supposed to do

1 the proposed changes deal only with the effective
 2 date. He says, I extend a continuing apology for
 3 seeking your assistance in this matter; however,
 4 it is unavoidable. I previously faxed the entire
 5 bill in its current version to you. I await your
 6 blessing of the latest and hopefully final changes
 7 so that I might tell the House staff that it is
 8 safe to run the bill.
 9 PRESIDENT NARIMAN: Who is Alex?
 10 MR. VIOLI: He is the attorney for
 11 Phillip Morris and the OPMS. Here is the
 12 Assistant Attorney General from Oklahoma. Here is
 13 the Assistant Attorney General asking for a
 14 blessing, asking the Attorney General for a
 15 blessing saying is it safe to run with this bill,
 16 this Allocable Share.
 17 I'll try not to color the -- okay.
 18 The next slide tell us a little bit more
 19 about the process. We have a meeting with Phillip
 20 Morris, state representatives and SPMs,
 21 specifically the counsel that represents the
 22 exempt SPMs, Latham and Watkins. And they're

1711

1 talking about the equity assessment fees and the
 2 Allocable Share legislation. And there's a
 3 statement there that during our meeting in
 4 November, the AG said nine states were critical,
 5 meaning the meetings between the tobacco
 6 manufacturers and the MSA in the states. Nine
 7 states were critical. RJR worked our buns off to
 8 accomplish this goal. We did so. What is next?
 9 PRESIDENT NARIMAN: Okay.
 10 MR. VIOLI: The next one that's
 11 highlighted in red: The Attorney General Jerry
 12 Kilgore, Virginia, has got a political situation.
 13 The AG's in this -- or the -- what Philip Morris
 14 says -- or actually Mr. Greenwald is quoted as
 15 saying the wolf is at the door.
 16 PRESIDENT NARIMAN: Where is all this?
 17 MR. VIOLI: Sorry, my apologies.
 18 PRESIDENT NARIMAN: (Off microphone)
 19 Yes, meeting with OPMs regarding Core Document 10.
 20 Yeah okay. They would have --
 21 MR. VIOLI: I'll read it: Mark, Mark
 22 Greenwald saying what are we doing in Virginia?

1713

1 general invitation to meet with Mr. Kilgore on the
 2 basis and on the scale that apparently these
 3 individuals were meeting with Mr. Kilgore.
 4 PRESIDENT NARIMAN: Okay.
 5 MR. VIOLI: Which brings me to the next
 6 point -- -- I'll just go through this testimony
 7 by Mr. Hering where the President asked Mr.
 8 Hering, "May I ask one question. I just want to
 9 know one thing? Why weren't the NPMs requested to
 10 attend this or any other meeting? Is there any
 11 particular reason?"
 12 And Then the answer was by the witness, "the NPMs
 13 had no interest in passing this legislation, as
 14 I've explained." Mr. President says, "Yes, but
 15 they had an interest in it. I mean, ultimately it
 16 went past." The witness says, "I suppose that's
 17 correct, but Professor Nariman, we were very much
 18 in favor of this legislation for all the reasons I
 19 described."
 20 PRESIDENT NARIMAN: Okay.
 21 MR. VIOLI: I need to fix the problem?
 22 We have April 8, 2004 e-mail from Mr. Hering --

1712

1 The wolf is at the door. We cannot leave this
 2 room without deciding what we're going to do. The
 3 AG wants an answer. John Rainey, and I believe
 4 he's a representative of the tobacco companies, he
 5 says this is purely a political situation for
 6 Jerry Kilgore. Jerry Kilgore's the Attorney
 7 General of Virginia. He wants all the companies
 8 to come meet with him including NPMs.
 9 PRESIDENT NARIMAN: Including NPMs.
 10 MR. VIOLI: Right.
 11 PRESIDENT NARIMAN: You're saying no NPM
 12 was invited --
 13 MR. VIOLI: Apparently the Attorney
 14 General is telling R.J. Reynolds, lobbyists is --
 15 which is then telling NAAG, which is then telling
 16 all these other companies, NPMs.
 17 Now there may have been one company in
 18 Virginia, Baileys, who operates in Virginia, who
 19 may have been complaining vehemently about this,
 20 but he wants all of them to meet. One thing I
 21 know is that we were not invited - this is January
 22 of '04. We were not invited and there was not a

1714

1 PRESIDENT NARIMAN: (Off microphone.)
 2 MR. VIOLI: I'll get through this
 3 quickly. So, we have an April 2004 memo which
 4 followed the one before, the meetings with the
 5 OPMs and Phillip Morris and their attorneys and
 6 lobbyists, where NAAG says, we don't recommend the
 7 equity assessment bill, that's the one that's in
 8 Michigan, Utah, and Alaska. It will be difficult
 9 to attend when challenged.
 10 He says, the bottom line, none of these
 11 bills are appropriate at this time to protect star
 12 star. We need to pass the Allocable Share and
 13 complementary legislation this year. We need to
 14 fix the problem we have the statute with the model
 15 Escrow Statutes, then we can work on a replacement
 16 for future year.
 17 PRESIDENT NARIMAN: What are the stars?
 18 MR. VIOLI: That's the question I have:
 19 What are the stars? Does it say to protect public
 20 health; does it protect against youth smoking;
 21 what does it say? It says, star star. Are they
 22 speaking in code?

1 Mr. Greenwald --
 2 PRESIDENT NARIMAN: Yeah looks like.
 3 Okay. Who's Michael?
 4 MR. VIOLI: Michael Hering is the --
 5 PRESIDENT NARIMAN: Yes, yes, yes, the
 6 gentleman that gave evidence.
 7 MR. VIOLI: Right. We've asked for the
 8 document and they could not locate it; however,
 9 there's a brief if the Tribunal would like that
 10 the -- one of the states wrote explained what
 11 they -- that meant.
 12 PRESIDENT NARIMAN: Okay.
 13 MR. VIOLI: But it wasn't put in the
 14 record and it wasn't -- I still haven't seen it.
 15 PRESIDENT NARIMAN: Leave that. Leave
 16 that.
 17 MR. VIOLI: Okay.
 18 PRESIDENT NARIMAN: Yeah.
 19 MR. VIOLI: Now, description of the
 20 purpose became blatant. Mr. Greenwald in January
 21 of that year -- remember, that's at the same time
 22 they had the meeting with Phillip Morris and the

1 MR. VIOLI: Okay, thank you.
 2 PRESIDENT NARIMAN: Okay.
 3 MR. VIOLI: So they're going to have a
 4 conference call regarding State legislation to
 5 protect the MSA states against increasing NPM
 6 sales.
 7 Now we have -- the next slide --
 8 PRESIDENT NARIMAN: No, no. It says to
 9 protect MSA states against OPM bankruptcy --
 10 MR. VIOLI: OPM bankruptcy, OPM
 11 bankruptcy. They were worried about Phillip
 12 Morris going bankrupt.
 13 PRESIDENT NARIMAN: (Off microphone.)
 14 MR. VIOLI: NPM sales, yeah. Phillip
 15 Morris was facing some tough times with litigation
 16 and they were worried they were going to go --
 17 PRESIDENT NARIMAN: This letter is from
 18 whom?
 19 MR. VIOLI: Mr. Greenwald of NAAG.
 20 PRESIDENT NARIMAN: Oh, NAAG.
 21 MR. VIOLI: To all the tobacco contacts.
 22 PRESIDENT NARIMAN: To you also?

1 lobbyists -- says we're going to have a
 2 conference, tobacco contacts. The entire document
 3 is in that binder I just gave you. It says we're
 4 going to have a conference call regarding
 5 legislation, state legislation against increasing
 6 --
 7 PRESIDENT NARIMAN: What document is
 8 this? It's not mentioned.
 9 MR. VIOLI: It's in the record. It's the
 10 e-mail.
 11 PRESIDENT NARIMAN: It doesn't matter.
 12 Description of purpose became blatant.
 13 MR. VIOLI: Right. It's in the binder.
 14 I have the whole e-mail in the binder. I
 15 truncated it so you can see --
 16 MS. MONTOUR: 24.
 17 PRESIDENT NARIMAN: Document 24.
 18 MR. VIOLI: 24 in the --
 19 MS. MONTOUR: In the binder.
 20 MR. VIOLI: 24 in the binder, okay.
 21 MS. MONTOUR: And inside it's referenced
 22 --

1 MR. VIOLI: No. No.
 2 PRESIDENT NARIMAN: Okay.
 3 MR. VIOLI: Okay.
 4 The next slide is a transcript, a part of
 5 a transcript from a Nebraska State Senate hearing
 6 on the Allocable Share legislation, and we have a
 7 very objective question posed by Senator Urdman in
 8 Nebraska, and this is in January of '04 again:
 9 Okay, other question that I had so I guess as I
 10 listen to the reason behind this is it's in the
 11 states' interest or in the best interest of the
 12 states to do what we can to protect those who are
 13 participating manufacturers, to protect the
 14 payments that we receive that we receive to the
 15 State of Nebraska for the purpose that we have.
 16 Ms. Fritts, who's the Assistant Attorney
 17 General of Nebraska says: The amendment is
 18 necessary in order for the State of Nebraska to
 19 receive the benefit of the bargain that we entered
 20 into with the MSA. It's in the best interests of
 21 the people of the State of Nebraska to receive the
 22 MSA money to the fullest extent that we bargained

1 for when we entered into the MSA.
 2 Senator Urdman candidly states that,
 3 which is areally nice way of saying we got to
 4 protect big tobacco so we get our money.
 5 PRESIDENT NARIMAN: This is on the
 6 record.
 7 MR. VIOLI: This is on the record.
 8 Senate hearing on the record. State Senator of
 9 Nebraska.
 10 Also on the record is a seminar, a NAAG
 11 MSA seminar or meeting given by the NAAG Tobacco
 12 Project in September of 2004. It's at or about
 13 the same time of all these events I've just been
 14 describing a few months later. So the tobacco
 15 project notes significant trends. One of their
 16 PowerPoint slides, it says: Passage of the
 17 Allocable Share legislation in 38 states:
 18 Significant. NPM sales in most states that have
 19 enacted the Allocable Share legislation have
 20 generally fallen dramatically.
 21 PRESIDENT NARIMAN: Your case is this was
 22 the purpose.

1 MR. VIOLI: Start -- okay.
 2 PRESIDENT NARIMAN: The exempt SPMs start
 3 from --
 4 MR. VIOLI: From 2.54, correct.
 5 PRESIDENT NARIMAN: Going up to --
 6 MR. VIOLI: 7.21, that's there. See
 7 that? In 2002.
 8 PRESIDENT NARIMAN: Okay.
 9 MR. VIOLI: And then it goes down. Then
 10 it goes down, and then let's go to 2004 where the
 11 two red lines -- I've added two red lines, because
 12 the statutes were passed significantly as Mr.
 13 Hering -- excuse me, as NAAG noted -- in 2004 and
 14 then in 2005. You see the red line, and at that
 15 red line exempt SPMs still have more market share
 16 than NPMs -- but they're roughly -- they're within
 17 a half percentage point of each other.
 18 PRESIDENT NARIMAN: And where do the NPM
 19 line start?
 20 MR. VIOLI: That starts at point --
 21 PRESIDENT NARIMAN: At the bottom.
 22 MR. VIOLI: .37 percent, I believe.

1 MR. VIOLI: This was the purpose and the
 2 effect.
 3 If you look at the next slide, you see
 4 what the effect --
 5 PRESIDENT NARIMAN: It is the same chart.
 6 MR. VIOLI: It is indeed, but the point
 7 that I'm making is don't stop at 2001 at this
 8 point. See, at 2001, the NPMs were at 3.8 -- 3.9
 9 percent of the market and the exempt SPMs were at
 10 6.2. And you see how the exempt SPMs and the NPMs
 11 are growing roughly at the same rate but certainly
 12 in the same direction. (Off microphone.) These
 13 two lines green and blue. Green which is here see
 14 and blue they both grow at the same -- roughly the
 15 same rate but certainly the same direction.
 16 PRESIDENT NARIMAN: You said the exempt
 17 SPMs.
 18 MR. VIOLI: Exempt SPMs at the top and
 19 NPMs are at the bottom. They're the next lowest
 20 ones.
 21 PRESIDENT NARIMAN: Which start from
 22 2.54.

1 PRESIDENT NARIMAN: .37?
 2 MR. VIOLI: .51, sorry. .51. 1998 is
 3 MSA .51.
 4 PRESIDENT NARIMAN: Where is that?
 5 MR. VIOLI: Well, if you go to '98, it's
 6 3 per --
 7 PRESIDENT NARIMAN: Starts 0.37.
 8 MR. VIOLI: Indeed. That's where --
 9 PRESIDENT NARIMAN: And goes to 0.51.
 10 MR. VIOLI: And then goes up --
 11 PRESIDENT NARIMAN: And then goes up --
 12 MR. VIOLI: And in 2004 it goes up
 13 to -- in 2004 --
 14 PRESIDENT NARIMAN: It goes up to six
 15 percent.
 16 MR. VIOLI: Yes, a little over 6
 17 percent.
 18 PRESIDENT NARIMAN: Then comes down
 19 again.
 20 MR. VIOLI: Well, that's the point,
 21 yes.
 22 MR. FELDMAN: Mr. President, I'm sorry,

1723

1 we need to clarify the. Chart you're looking at,
2 it is only Tobaccoville sales and counsel is
3 representing Tobaccoville sales as Grand River
4 sales when in fact Grand River sales, through
5 Native Wholesale Supply, exploded during this
6 period.
7 MR. VIOLI: Right. This is where the
8 Allocable Share Amendment is effective, where you
9 make sales and get money back.
13:07:13 10 (Discussion off microphone.)
11 MR. VIOLI: Yes, okay. Okay.
12 PRESIDENT NARIMAN: I get the point.
13 MR. VIOLI: So, we're looking at
14 off-Reservation sales where the Allocable Share is
15 in effect. Because the Allocable Share, there's
16 no escrow --
17 PRESIDENT NARIMAN: This is not a
18 correct representation, then, because it doesn't
19 deal with NPMs and exempt SPMS.
13:07:27 20 MR. VIOLI: No, it does.
21 PRESIDENT NARIMAN: It only deals with
22 your group.

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1 MR. VIOLI: The red line is
2 post-Allocable Share Amendment.
3 PRESIDENT NARIMAN: Post-Allocable
4 Share Amendment.
5 MR. VIOLI: Yes. And it is the
6 performance of the brands in the market,
7 essentially, of exempt SPMS.
8 PRESIDENT NARIMAN: Okay, okay. Fine.
9 MR. VIOLI: So, the point is that we
13:08:39 10 see where the Grand River is in 2001 at the
11 bottom. That's the point where it starts in the
12 marketplace; per the jurisdictional award, right?
13 We have to start at 2001. That's the blue
14 highlighted line. So we start at what these NPMs
15 and exempt SPMS are facing, looking at, as a
16 regulatory regime in 2001. This is the principle
17 point of this. Then we have --
18 PRESIDENT NARIMAN: Yes, but this is a
19 chart within a chart, a separate thing --
13:09:11 20 MR. VIOLI: Yes, but what it shows is
21 that post-Allocable Share in 2004 and 2005, what
22 happened to the NPM market share? It was as

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1 MR. VIOLI: No, no, no, no. What he
2 said was wrong as far -- this chart shows all, it
3 shows NPMs and exempt SPMS, all of them, not just
4 us on-Reservation and off-Reservation. What he's
5 focusing on here -- what he's focusing on here is
6 the bottom line -- the bottom line, which I
7 haven't referenced yet, that's Grand River. See,
8 now, I'm talking about the market generally. I'm
9 talking about what these e-mails talk about and
13:07:59 10 what everything --
11 PRESIDENT NARIMAN: So, this chart does
12 reflect, according to you the SPMS, exempt SPMS,
13 shares going up, slightly down, and then up again
14 --
15 MR. VIOLI: Correct.
16 PRESIDENT NARIMAN: -- in 2005 and the
17 NPM share going up, up, up and down again.
18 MR. VIOLI: Indeed, post-Allocable
19 share.
13:08:23 20 What happens is, in 2004 --
21 PRESIDENT NARIMAN: The red line is
22 post-Allocable Share.

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1 forecasted and intended. Sharp decline. What
2 happened to exempt SPMS? They go up significantly
3 post-Allocable Share.
4 Now, the Grand River sales
5 off-Reservation in the five original states,
6 that's the next slide.
7 PRESIDENT NARIMAN: You must finish,
8 because we have to --
9 MR. VIOLI: Okay. I'll go quickly.
13:09:41 10 This chart here shows the dramatic fall-off in
11 Grand River sales off-Reservation post-Allocable
12 Share.
13 PRESIDENT NARIMAN: But these are all
14 unaudited accounts.
15 MR. VIOLI: No, no, no this is
16 accountant -- this is Mr. Wilson who testified,
17 went in got all of their sales records, audited
18 financial statements -- if I showed you audited
19 financial statements it'll say you sold a
13:10:03 20 billion--
21 PRESIDENT NARIMAN: I don't want to
22 know what audited financial -- please don't tell

1 me what audited financial -- I'm asking a
 2 question. Is this audited or unaudited? Please,
 3 let us have a clear answer?
 4 MR. VIOLI: This was neither audited or
 5 unaudited. This was in the next --
 6 PRESIDENT NARIMAN: Unaudited, I say.
 7 MR. VIOLI: Okay. It was -- the expert
 8 did this. He went in and --
 9 PRESIDENT NARIMAN: You can't get
 13:10:25 10 damages on non-audited statement. You must get
 11 audited statement; surely you know that.
 12 MR. VIOLI: The audited statements
 13 would not show the damage, as Mr. Wilson
 14 testified. They don't show sales in each state.
 15 Okay. So, what this shows is the sales
 16 volumes that Mr. Wilson, in taking all of the
 17 sales documents for Tobaccoville and Grand River,
 18 analyzing them and coming up with the sales volume
 19 in each state per year, and we see in Arkansas,
 13:10:55 20 Grand River, after Allocable Share is out of the
 21 Arkansas market. In Oklahoma, it's out of the
 22 Oklahoma market off-Reservation and we see the

1
 2 AFTERNOON SESSION
 3 ARBITRATOR CROOK: Okay Mr. Feldman,
 4 are your troops ready?
 5 MR. FELDMAN: Yes.
 6 MR. VIOLI: I'll move quickly. I do
 7 have a few slide, but I'll do them by group. I
 8 just want to go back to this chart and note, and
 9 just note for the record, that the chart notes at
 13:58:57 10 the bottom the Grand River share that reflects
 11 only the off-Reservation distribution. With
 12 respect to the other, the classes, NPMs and exempt
 13 SPMs and OPMS, that's based on data provided by
 14 the Respondent in the PricewaterhouseCoopers data.
 15 With that, I would like to go to, I'll
 16 do these slides consecutively or try to deal with
 17 them in a combined form. We have proof in the
 18 record of Grand River's Seneca sales actually
 19 losing sales off-Reservation because of the
 13:59:32 20 Allocable Share Amendment and the price increase
 21 that Grand River and Tobaccoville had to instill
 22 after the allocable share.

1 decline in Georgia --
 2 PRESIDENT NARIMAN: I don't know how
 3 long you're going to take because we're past
 4 lunchtime.
 5 MR. VIOLI: I will do 15 minutes from
 6 now.
 7 PRESIDENT NARIMAN: You're eating into
 8 their time, we can reduce the lunchtime to 45
 9 minutes if everybody agrees, if everybody doesn't
 13:11:30 10 then is that all right? 45 minutes for lunch? Or
 11 are you having lunch outside.
 12 MR. VIOLI: Whatever you prefer.
 13 (Discussion off microphone.)
 14 SECRETARY YANNACA-SMALL: Lunch is
 15 here.
 16 MR. FELDMAN: 45 minutes is fine.
 17 PRESIDENT NARIMAN: So start at 2:00
 18 and finish at 2:15, then give them a chance to
 19 start. Thank you. 2:00.
 13:11:58 20 (Whereupon, at 1:11 p.m., the hearing
 21 was adjourned until 2:15 p.m., the same day.)
 22

1 First, here, we have Piggly-Wiggly
 2 that's a distribution chain in the South, in South
 3 Carolina predominantly, noting here that they're
 4 switching to the Shield brand, which is
 5 manufactured by Premier. Premier is an exempt
 6 SPM, and they note here they're putting the Shield
 7 brand on the store shelves where the Seneca used
 8 to be because Shields are four dollars per carton
 9 less than Seneca and MSA compliant.
 14:00:11 10 The second slide here is an affidavit
 11 from David Cohen, the principal of Forest City
 12 Grocery, another major distributor; he's in
 13 Arkansas. And he notes here he's paying \$8.50 a
 14 carton for Liggett product and he was advised by
 15 Tobaccoville that the prices are going to have to
 16 go up \$2.00 per car ton if Arkansas passes the
 17 Allocable Share Amendment and Arkansas did pass
 18 the Allocable Share Amendment and he noted that,
 19 in his experience, with that two dollar increase,
 14:00:50 20 that would effectively put Seneca out of the
 21 market, and we have evidence in the record,
 22 indeed, Seneca did leave the market after the

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1 Allocable Share Amendment was passed in Arkansas.
 2 We had the, next -- the affidavit of
 3 Tobaccoville Larry Phillips who goes into detail
 4 -- and I won't here because of the time -- but he
 5 goes into detail on the costs facing all
 6 manufacturers and then he talks about the escrow
 7 payment. Without allocable share releases, the
 8 escrow payment is \$5.00 per carton. [REDACTED]
 9 [REDACTED]
 14:01:23 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 14:01:56 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]

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1 off-Reservation share due to allocable share
 2 appeal, and he concluded -- calculated that the
 3 lost was approximately half, so that Claimants'
 4 lost approximately half their market share by
 5 reason of the allocable share release amendment
 6 with a 95 percent degree of confidence.
 7 He notes that's also that is also the
 8 lost -- it's similar to the loss experienced by
 9 all NPMs off-Reservation. And finally, he notes
 14:04:07 10 that -- the statistical significance -- the
 11 statistical correlation between the loss of market
 12 share by NPMs and Grand River in particular and
 13 the gain in market share by exempt SPMs.
 14 Next chart is basically showing that we
 15 are out of the Arkansas and Oklahoma market and
 16 the numbers are lower post ASR in the other
 17 off-Reserve markets.
 18 Now, I don't want to focus too much on
 19 these, so I'll go through them quickly, but the
 14:04:41 20 states admit that the exempt SPMs has a cost
 21 advantage. In the Kentucky brief, which is now
 22 the next slide, state admits exempt SPMs have cost

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1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED].
 4 So, the Wild Horse brand is being
 5 offered in Georgia at \$3.00 below Seneca's cost,
 6 and of course Premier has an exemption.
 7 Presumably, they're not avoiding their obligation
 8 under the MSA, so you see that the exemption, when
 9 we looked at that chart before, we saw a whole
 14:02:56 10 bunch of zeroes next to Premiere, payment under
 11 the MSA. Whatever their payments might have been,
 12 it allowed them to price their product in Georgia
 13 at \$3.00 below our cost, even without overhead and
 14 profit.
 15 Dr. Eisenstadt, the economist that
 16 Claimants retained, in his report, which the
 17 excerpts are here, notes that there's been an
 18 interference or an expropriation with respect to
 19 Claimants' investment off-Reservation; it's
 14:03:24 20 off-Reservation markets share. With confidence
 21 level of 95 percent, he has concluded the Claimant
 22 suffered a significant decline, their

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1 advantage. State admits exempt SPMs have cost
 2 advantage.
 3 In there, we have the Kentucky Attorney
 4 General and NAAG brief. We have excerpts where
 5 they go onto say that, basically, the exempt SPMs
 6 have more favorable -- enjoy far more favorable
 7 terms than those enjoyed by general tobacco.
 8 General tobacco is non-exempt SPM and we looked at
 9 the chart that shows non-exempt SPM pays
 14:05:20 10 approximately the same as an NPM without an
 11 allocable share release.
 12 So, taking the reasoning of the NAAG
 13 and the states that they took in that case in
 14 Kentucky and their statements there, essentially
 15 it's an admission that exempt SPMs have a cost
 16 advantage, Liggett itself.
 17 So, we look at the regulators in the
 18 market. Which are the states. They are saying
 19 that exempt SPMs have a cost advantage.
 14:05:43 20 We look at the participants in the
 21 market. You have the view of the competitors, and
 22 that's Grand River; you have the view of the

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1 states, that's the regulator; and now, you have
 2 the view of the favored entity under this
 3 regulatory regime, Liggett, in their public
 4 statements that they have a sustainable cost
 5 advantage by reason of the favorable terms they
 6 received under the MSA.

7 Professor Gruber's testimony, he
 8 commented that what the exempt SPMs have is a
 9 subsidy or windfall. He wouldn't say they have a
 14:06:20 10 cost advantage in this Tribunal proceeding. When
 11 asked about Professor Anaya whether he knows
 12 whether or not they use that cost advantage to
 13 price, he said I don't know that. And he said
 14 they could use it to lower their price, and what
 15 we've seen from the documents in the record, the
 16 pricing that Mr. Cohen -- distributor Cohen in
 17 Arkansas informed us of the Premiere price
 18 negotiate South Carolina and the Liggett 10K, they
 19 are using their cost advantage in fact. It's just
 14:06:57 20 not theoretical.

21 I'll just touch upon briefly -- I think
 22 Mr. Luddy pointed this out in the

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1 they've provided in the record, we see a complete
 2 lack of evidence, a whole lot of argument but
 3 complete lack of evident.

4 Particularly, if the arguments -- they
 5 raise the arguments about cheap cigarettes and
 6 price sensitive youths are going to be infected by
 7 cheap cigarettes, but they failed to address that
 8 the cheapest cigarettes, as the evidence just
 9 showed in these slides -- the cheapest cigarettes
 14:08:42 10 are provided by exempt SPMs, 13 billion currently.
 11 There were 16 billion they provided in about 2001,
 12 but the exemption, although it increases in
 13 volume, the windfall increases in dollars. It
 14 actually decreases in volume. So they get to sell
 15 about 13 billion according to the Pricewaterhouse
 16 documents -- 13 billion cigarettes last year
 17 without paying any. And the record also shows
 18 they are the cheap --

19 PRESIDENT NARIMAN: They are cheaper
 14:09:07 20 than yours?

21 MR. VIOLI: Yes. That subsidy allows
 22 them to lower their price, which made us lose

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1 cross-examination, but as I said in this
 2 proceeding, Professor Gruber would not commit that
 3 the windfall provide cost advantage; however, in
 4 the proceedings where the states were fighting
 5 with the OPMS, he admitted as much that increasing
 6 the NPMs marginal cost to the marginal cost of the
 7 non-grandfathered SPM results in a situation where
 8 NPMs face a cost disadvantage with respect to an
 9 average SPM. So, in those proceedings he said
 14:07:34 10 something quite different.

11 Again, he also noted that raising the
 12 costs of an NPM to a non-grandfather SPM, which is
 13 what the Allocable Share Amendment des, it tilts
 14 the field decidedly against NPMs; these are
 15 Professor Gruber's statements.

16 Now, in response to all of this, we
 17 note that there's a complete lack of evidence
 18 either statistical -- and we hear the states
 19 telling us -- they give at least words but not
 14:08:06 20 necessarily substance to their claims of public
 21 health and what-have-you, because if we really
 22 look at it, look at what they've told us or what

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1 those sales which the slides, the e-mails, and the
 2 affidavits showed. So, the cheapest cigarettes
 3 are by exempt SPMs. So, if it's really a
 4 justification about, we need allocable share
 5 because we want to raise the price of cigarettes,
 6 well, then take away the exemptions and have them
 7 raise their price too.

8 The other thing is that, in the
 9 testimony of Peter Levin, the NAAG deposition
 14:09:40 10 which was provided today -- I'll read it in
 11 quickly -- if it's really about price, raising
 12 prices, then the states would be involved in the
 13 market, looking at what we showed here. They
 14 would look at the price of exempt SPM cigarettes
 15 and say, your cigarette prices are too low. You
 16 have to raise them. But as Mr. DeLange testified,
 17 they don't do that. They can't do it. The MSA
 18 doesn't do that. So, it's ironic that they say,
 19 well, we can't raise the exempt SPM prices because
 14:10:05 20 the MSA doesn't give us an ability to, but we can
 21 raise your prices, NPM, by changing the allocable
 22 share release provision. In the NAAG deposition,

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1 it was plainly stated, does NAAG monitor the
 2 pricing -- has NAAG ever monitored the pricing of
 3 participating manufacturers under the MSA?
 4 Does it ever keep track, report, engage
 5 studies? The answer is no.
 6 Has it ever monitored the pricing of
 7 NPMs? No.
 8 To your knowledge, has any state
 9 monitored the pricing of participating
 14:10:34 10 manufacturers under the MSA? Not to my knowledge.
 11 To your knowledge, does any state
 12 monitor the pricing of NPMs? No, not to my
 13 knowledge.
 14 So, the justification of keeping prices
 15 high, it doesn't fit either with the record or the
 16 testimony.
 17 With respect to the on-Reservation,
 18 that chart I presented before, where it talks
 19 Grand River at 0.22 percent was off-Reservation --
 14:10:53 20 with respect to on-Reservation, excuse me, the
 21 arbitrariness, we view this as being manifest with
 22 respect to on-Reservation sales. We have three

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1 said, look, we think the complementary legislation
 2 applies on-Reservation/ what did Oklahoma do? It
 3 sued NWS. Perfectly logical. You sue NWS and you
 4 try to get a declaration and NWS wins. NWS,
 5 Claimant, convinces the court that it doesn't
 6 apply on-Reservation. So, why then does the New
 7 Mexico, the Idaho, the Nevada, and the California
 8 Attorney General get together, all send letters to
 9 a foreign trade zone, which is no longer now doing
 14:12:46 10 business with NWS, send letter saying, you're
 11 dealing in contraband cigarettes for the
 12 complementary legislation applies? That is
 13 arbitrary, that's capricious. If you think your
 14 law applies to a company, go to court like
 15 Oklahoma, did get an independent arbiter to make
 16 that decision, and then, if you are victorious, go
 17 to the people with whom we deal and tell them it's
 18 contraband or it's illegal.
 19 PRESIDENT NARIMAN: Who are these three
 14:13:12 20 out of four Attorneys General?
 21 MR. VIOLI: Nevada, New Mexico, Idaho,
 22 and California.

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1 attorneys general for the first time now -- first
 2 time on the record. One thing that this Tribunal
 3 has been able to discern and get is something they
 4 have never told us on record, that they don't
 5 charge taxes or ask for escrow on-Reservation;
 6 that was California, Idaho or New Mexico. Why
 7 then seek the application of the complementary
 8 legislation to NWS for on-Reservation sales? I
 9 mean, the escrow, if it's not due, and the
 14:11:35 10 complementary legislation served the purpose of --
 11 they told the legislatures we needed to enforce --
 12 enhance the enforcement of the Escrow Statute. If
 13 escrow is not due, then why put the complementary
 14 legislation in effect which requires Grand River
 15 to comply with both on- and off-Reservation,
 16 subject to the jurisdiction of the state, pay past
 17 escrow, and be guided by a list that the AG says
 18 it binds sales in Indian Country.
 19 Remember, they did not enforce the
 14:12:08 20 complementary legislation until only relatively
 21 recently. And Oklahoma -- Oklahoma is a good
 22 point -- we have the case in the record. Oklahoma

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1 PRESIDENT NARIMAN: Yes.
 2 MR. VIOLI: Towards the end of what I'd
 3 like to talk about is the MSA conduct
 4 restrictions. The Respondent focussed on the
 5 public health justifications, but they're not a
 6 justification for the exemptions, as I mentioned
 7 before.
 8 Claimants don't advertise in the manner
 9 prohibited by the MSA and the Claimants offered
 14:13:39 10 to join the MSA on the same favorable terms in
 11 2006. So, Grand River, which is the company that
 12 has to join the MSA according to the states would
 13 be agreed to the conduct of -- the letter, the
 14 application for the MSA that Grand River
 15 submitted, it never said oh, but, we don't want to
 16 abide by the conduct restrictions. The only thing
 17 it said is, we want the same favorable terms, the
 18 financial payment terms, as the exempt SPMs or
 19 others, General Tobacco, which had 12 years to
 14:14:11 20 pay. The states don't claim that the Claimants'
 21 marketing violates the MSA. We have the
 22 transcript of the hearing of Mr. Hering. He says,

1 I don't know about the advertising and market
 2 practices to offer that opinion, no. And that was
 3 in response question -- is, well, are they doing
 4 anything wrong under the MSA?
 5 PRESIDENT NARIMAN: That quote was
 6 taken as an exempt SPM.
 7 MR. VIOLI: Non exempt SPM, but it was
 8 given 12 years to make -- 12.5 years to make back
 9 payments, and we asked for that. We asked for
 14:14:41 10 that. We said look, if we're going to -- without
 11 prejudice, we'll join the MSA. We want certain
 12 terms and we want certain rights, but we never
 13 said we want to be exempt from the advertising or
 14 marketing restrictions, and in fact the record
 15 showed that the states don't have -- haven't
 16 objected to our advertising or said we've
 17 advertised in a way that violates the MSA.
 18 Now, regarding the specific provisions,
 19 and I'll go through this quickly, of the MSA.
 14:15:14 20 Respondent points to Section 3 of the MSA, which
 21 says that you can't use cartoon, and I'll go
 22 through these, but if you look at the record, the

1 carved out for Brown & Williamson, no one else,
 2 not even exempt SPMs, they get an exemption for
 3 that brand name sponsorship. So, what can happen
 4 at those brand name sponsorship events? Well,
 5 that's just concerts. Then, the MSA says, we're
 6 giving concerts, specific concert series to Brown
 7 & Williamson. Everybody else, you can't do
 8 concerts, but you can do --
 9 ARBITRATOR ANAYA: Only specific
 14:16:56 10 concerts, not concerts generally.
 11 MR. VIOLI: Those two concerts: The
 12 Country Music Festival and the Jazz Kool Festival,
 13 Brown and Williamson got grandfathered; they're
 14 grandfathered under the MSA.
 15 There is a section that says no
 16 concerts where youth may be or athletic events,
 17 but Brown and William son got an exemption for
 18 that.
 19 So, but let's talk about the brand name
 14:17:18 20 sponsorship. It also says if you're in the MSA
 21 you're entitled to one brand name sponsorship a
 22 year; it doesn't say no brand name sponsorship.

1 only person advertising by cartoon was R.J.
 2 Reynolds, the Camel brand, the famous Joe Camel,
 3 but the negotiations -- during the negotiation of
 4 the MSA, it was made evident that RJR had already
 5 abandoned the cartoon campaign. Nobody advertises
 6 by cartoons, or did, and Joe Camel was on its way
 7 out. So, that wasn't such a big deal. And by the
 8 way, let's talk about what else is in section
 9 three. So, we can't look at cartoon advertising
 14:15:55 10 but let's talk about what else is in Section 3.
 11 Section 3 says brand name sponsorship, but if you
 12 look closely -- and this is really what we're
 13 asking the Tribunal to do, is to look closely at
 14 this MSA conduct restriction. It doesn't prohibit
 15 brand name sponsorship; it only limits it.
 16 So. For example. Brown & Williamson,
 17 even though everybody else is prohibited from
 18 advertising at concerts where kids may be or youth
 19 may be, Brown & Williamson may advertise at
 14:16:23 20 concerts of the Country Music Festival, the Jazz
 21 and Country Music Festival, and the Kool Jazz
 22 Festival. These are two events that the MSA

1 So, they talk about public health and, oh, you
 2 can't advertise. Grand River doesn't brand name
 3 sponsorship, not even one, but the OPMS and the
 4 SPMs do, right?
 5 So now, what can happen at those brand
 6 name events? Well, the OPM is allowed to
 7 advertise those events, can put it on a billboard
 8 90 days before -- they tell -- well, the
 9 billboards came down -- 90 days before an event
 14:17:49 10 and 10 days after, billboards can go up. Apparel
 11 and merchandise, no brand name apparel and
 12 merchandise, they say. Well, if you look closely
 13 what the MSA says, it says no apparel or brand
 14 name merchandise at those sponsored events if
 15 they're distributed by the manufacturer. They can
 16 be distributed by the event holder or third
 17 parties who don't get money directly from Phillip
 18 Morris or those companies, right?
 19 It also says -- you saw a chopper --
 14:18:13 20 you saw a chopper up on the screen. If you look
 21 closely, the MSA allows the use -- may use a brand
 22 name on a vehicle used in the brand name

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1 sponsorship event. So they made it sound like,
2 well, you got your brand -- you're giving away a
3 chopper. You got your name on it; that's a brand
4 name sponsorship.
5 Phillip Morris can do -- if you go to
6 Newport Rhode Island to the Jazz Kool Festival,
7 you'll see a vehicle, PT Cruiser, with the Kool
8 logo on the side, and the MSA allows it. They
9 didn't tell you about that. And again, I talked
14:18:46 10 about the billboard advertising.
11 The next thing, if you look closely at
12 the MSA, the OPMs can sponsor anything, teams,
13 events, name it, in their corporate name. So,
14 instead of saying Marlboro, they can say Phillip
15 Morris; instead of saying Camel, they can say R.J.
16 Reynolds.
17 They say no out door advertising.
18 Well, if you look closely, outdoor advertising is
19 anything over 14 square feet. That means, you can
14:19:09 20 put sign this high -- I'm kind of short -- seven
21 feet by two feet -- although I'm probably wider
22 than two feet these days -- seven feet by two feet

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1 media, completely unregulated. The merchandise?
2 Completely unregulated if it's only to advertise.
3 Decals, bumper stickers, not prohibited under the
4 MSA. They pointed out Seneca -- you bought
5 \$100,000 dollars worth of bumper stickers or
6 whatever they came up with, that crazy number,
7 well, is that prohibited under the MSA?
8 PRESIDENT NARIMAN: Your real point is,
9 I take it, that the MSA was a specially tailored
14:20:43 10 agreement to suit the OPMs.
11 MR. VIOLI: Indeed.
12 PRESIDENT NARIMAN: That's your case?
13 MR. VIOLI: It is. And they're --
14 though they're saying these public health -- if
15 you look closely, there's no statistics. They can
16 say a lot, and I heard this for ten years, but
17 when you asked them to point to chapter and verse
18 and really look at it closely, you'll see that
19 there are a lot of exceptions, a lot of loopholes,
14:21:04 20 but only our loophole, alleged loophole, gets
21 closed.
22 PRESIDENT NARIMAN: You've got five

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1 anywhere you want on the grounds of a place that
2 sells tobacco. So, they tout, oh, no -- that's
3 why when you go to upstate New York you'll see
4 Marlboro signs all over the place, big huge
5 Marlboro -- they get 14 feet, square feet,
6 unlimited size, inside the tobacco serving
7 establishment. Also, unlimited size in an
8 adult-only facility, a bar or place which is going
9 to regulate youth attendance, unlimited apparel,
14:19:41 10 merchandise distribution, signage, anything you
11 want.
12 If you look closely at the ban on
13 merchandise and apparel, other than adult-only
14 facilities -- and it also allowed to be given by
15 people other than the manufacturer, it says that
16 the manufacturers can do -- can give out brand
17 name merchandise and apparel -- or brand name
18 merchandise, excuse me -- if the sole function of
19 the merchandise is to advertise the tobacco
14:20:09 20 product or if it's a written publication. So,
21 when you see the coupons for R.J. Reynolds
22 product, three for the price of two, or electronic

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1 minutes.
2 MR. VIOLI: Gifts. If you look at the
3 gifts, the only limitation in the MSA on gifts is
4 that you can't give them to minors. You can give
5 away a chopper, vehicle, clothes, maybe the
6 clothes can't say Marlboro unless they're going in
7 an adult-only facility, but you can give away that
8 motorcycle. You just can't give it away to a
9 minor. So, what did the MSA say? You have to
14:21:33 10 require proof of age.
11 Mr. Montour testified -- are these
12 promotions that you give, are there any youths
13 allowed to participate? No. Is that chopper
14 allowed to be given to a youth? No, over 18.
15 And if you look at these -- I have them
16 here, but you can look at them at your leisure,
17 the highlighted provisions --- where it says "MSA
18 conduct provisions" that talk about -- see, it
19 says limited sponsorship. It doesn't say, no
14:21:55 20 sponsorship.
21 And then, ban on tobacco brand name
22 merchandising, it says "other than tobacco product

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1 items, the sole function of which is to advertise
2 tobacco products."

3 And bans on gifts, that's the last one
4 up on the right, it only says you can't give a
5 gift unless you ask for proof of age.

6 Now, I pointed out the statistic here.
7 I did white out the product, this one here, for
8 ease of reference, because it dealt with exports
9 and production. The real point of the statistic
10 14:22:25 is the decline in cigarette consumption. There's
11 a miracle of economics afoot here. Respondent is
12 claiming that the 20-year reduction in cigarette
13 consumption is due to the ten year lifespan of the
14 MSA. Cigarettes have been reduced in sales about
15 2.5 percent a year since 1990. The MSA comes
16 along here. The statistical trend is virtually
17 linear. The MSA didn't cause a reduction. The
18 other thing that the states didn't point out is
19 they say, well, there's a 25 percent decline in
14:22:58 20 the last ten years. That's right, 2.5 percent.
21 That's roughly the same as the ten years prior
22 where there was no MSA, but did the state look at

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1 executed this scheme for more than 50 years, and
2 that this scheme continues to this day, that's was
3 as of August of '05, 6 years after the MSA -- 7
4 years after the MSA. This scheme continues to
5 this day with devastating consequences for the
6 health of the American public.

7 The point is, as the President pointed
8 out before, this MSA was tailored to the OPMs and
9 those who would live by its terms and --
10 14:24:22 supposedly live by its terms in the go along and
11 get along atmosphere. What the Department of
12 Justice -- I understand it is not the State
13 Department, who's litigating -- the Department of
14 justice went on at length in their brief --
15 pointed out all these instances of Phillip Morris
16 using their parent company, Altria, to advertise
17 and sponsor the Indy car races or the NASCAR.
18 PRESIDENT NARIMAN: USA versus Phillip
19 Morris before significant factor arbitration or
14:24:49 20 no? What happened to USA versus Phillip Morris?
21 MR. VIOLI: It's still ongoing and it's
22 the USA, so it has nothing to do with the NPM

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1 small cigars? Small cigars have exploded in this
2 country and it's completely outside the
3 restriction of the MSA, right?

4 They don't include in the statistics to
5 consumption of -- so, while you'll see a decline
6 in cigarettes, you'll see a rapid increase in the
7 product of small cigars which are being
8 substituted.

9 So, there are a lot of things that the
10 14:23:26 states aren't bringing to the Tribunal's
11 attention.

12 Now, the last point -- and they're
13 quite lengthy, these slides, but they are the last
14 slide before I get to the MSA application.

15 Respondents, and I would direct at
16 their leisure, their time -- Respondents -- the
17 Federal Government, the Department of Justice,
18 sued Phillip Morris and the tobacco companies, and
19 it says that the evidence deduced at trial
14:23:51 20 establishes that OPMs and Liggett -- these are
21 exempt SPM Liggett -- devised an extensive scheme
22 to defraud the public of money, that they have

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1 proceedings. The Federal was not --

2 PRESIDENT NARIMAN: Right. It's going
3 on. Where?

4 MR. VIOLI: Federal Court in D.C.,
5 here. Federal Court in D.C. went up to the
6 circuit court, the appeals court a couple of
7 times. Now, there's a petition to go to the
8 Supreme Court because the OPMs were not happy with
9 the decision that they were found to be a RICO
10 14:25:16 enterprise and so that's still going on, but it's
11 back in for remedies before the district court.
12 The district court has found that there's been a
13 RICO -- there's fraud that they say is ongoing.
14 So, the district court now needs to put in some
15 remedies, monitoring of advertising, all kinds of
16 things.

17 PRESIDENT NARIMAN: What was this
18 finding, roughly which year?

19 MR. VIOLI: I think '06 or '07.

14:25:35 20 PRESIDENT NARIMAN: After the amendment
21 or before?

22 MR. VIOLI: After, after.

1 The last slide is Grand River's MSA
 2 application, and that was touched on by my
 3 colleagues here, but it really goes to --
 4 PRESIDENT NARIMAN: What was your point
 5 about domestic cigarette consumption?
 6 MR. VIOLI: That the MSA, Mr. Chairman
 7 -- the MSA came in in 1998, right?
 8 PRESIDENT NARIMAN: MSA, 19 -- yes --
 9 MR. VIOLI: Exactly. Right there.
 14:26:06 10 If you look at that statistical trend,
 11 it's virtually linear. The MSA did not cause an
 12 increase in the rate of the decline or anything.
 13 It's statistically insignificant in the 20-year
 14 reduction in cigarette sales. The MSA was a blip,
 15 if anything, on the screen there.
 16 And the point is the States have said
 17 time and again, look what we did: We reduced
 18 cigarette consumption by 25 percent in 10 years
 19 from the MSA but that's a trend that predated the
 14:26:38 20 MSA by 10 years. The 10 years prior it reduced 25
 21 percent, too. After the MSA, another 25 percent.
 22 The MSA had nothing to do with the reduction.

1 We've got two choices: Join the MSA -- we've been
 2 down the road with you, man, for six months.
 3 We've got 13 days. Either let us on the MSA or
 4 we're going to have to deal with this some other
 5 way, and we went to court. But the point is, at
 6 that time, we said, give us an answer. NAAG
 7 didn't even give that application to the states.
 8 Did not -- that letter said, before we can give it
 9 to the states, you have to meet these other
 14:28:08 10 conditions. By God, this law says we have to join
 11 the MSA by April 15th or pay escrow. We want to
 12 join the MSA. We want to work out these
 13 conditions, and the NAAG Association doesn't even
 14 give it to the states, the states who are
 15 enforcing their laws which say we have to join the
 16 MSA. This is the regulatory environment regime to
 17 which we're subjected to and we think the evidence
 18 clearly shows that we don't have, even under that
 19 circumstance, a treatment no less favorable than
 14:28:39 20 the exempt SPMs.
 21 PRESIDENT NARIMAN: That is all?
 22 MR. VIOLI: That is all.

1 But the last point I wanted to make was
 2 with the MSA application. As it's in the record
 3 and as pointed out by my colleagues, Grand River
 4 did make the application, wanted treatment no less
 5 favorable than the exempt SPMs.
 6 And we have a letter from NAAG. It
 7 says that we didn't even distribute your
 8 application because we don't even think you meet
 9 our standard. Mark Greenwald's letter said,
 14:27:08 10 before we'll distribute it you have to meet some
 11 other conditions here. So, we have a screening
 12 device in play here, this regulatory regime, where
 13 you have NAAG, this National Association of
 14 Attorneys General, and their staff, where they
 15 look at our application.
 16 To comply with Idaho's law, I have to
 17 do one of two things, join the MSA or pay escrow,
 18 remain an NPM. Well, in August of '05 we asked to
 19 join, we started the negotiation process, in
 14:27:36 20 December they give us stick counts, they don't
 21 break it down by number, a six-month process.
 22 Finally, we say, look, April 15th is our deadline.

1 PRESIDENT NARIMAN: I have two
 2 questions, and don't answer them now. Answer them
 3 in your reply when you conclude.
 4 One is, is there anything to show that
 5 the federal legislature could not pass the
 6 legislation -- this is prior to the MSA --
 7 because of its possible applicability to Indian
 8 tribes? That is, anything from the proceedings.
 9 Second, I want you to tell us what
 14:29:19 10 could have been done by states to achieve the
 11 stated intended purpose of the MSA -- stated
 12 intended purpose of the MSA, which would have
 13 caused least loss to all concerned, including NPM.
 14 Don't answer now.
 15 MR. VIOLI: Okay.
 16 PRESIDENT NARIMAN: Thank you very
 17 much.
 18 MR. VIOLI: Thank you Tribunal.
 19 PRESIDENT NARIMAN: Okay. Who wants to
 14:30:03 20 do it? How are you proceeding now?
 21 MR. FELDMAN: Okay.
 22 First, Mr. Kovar will be providing a

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1 brief overview of our presentation and we've
 2 prepared a list of documents that have been
 3 requested by the Tribunal which we'll be
 4 circulating, that includes the Idaho Statement of
 5 Purpose for both the complementary legislation and
 6 the Allocable Share Amendment, and also, as
 7 requested by the Tribunal a list of our recently
 8 introduced documents from last week, and we've
 9 also compiled a list of actions in state and
 14:30:40 10 Federal Court involving Grand River Native
 11 Wholesale Supply and/or Tobaccoville. So, we also
 12 have a list of those actions.
 13 PRESIDENT NARIMAN: Is this a reply by
 14 the Respondent?
 15 SECRETARY YANNACA-SMALL: Just one
 16 thing for the record: You have 13 hours and 10
 17 minutes.
 18 PRESIDENT NARIMAN: And you can take
 19 all of them.
 14:31:05 20 Okay. Mr. Kovar.
 21 MR. KOVAR: Mr. President, Members of
 22 the Tribunal, over the next few days we will be

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1 elements which must be met by a Claimant to
 2 establish a breach of these two provisions,
 3 namely, treatment with respect to a foreign
 4 investor's investment, the existence of a
 5 comparator and like circumstances with investor or
 6 investment, and then, less favorable treatment of
 7 the foreign investor or investment on account of
 8 nationality.
 9 As Ms. Cate will discuss, Claimants
 14:32:36 10 have failed to satisfy any of these three required
 11 elements and their claims under Articles 1102 and
 12 1103 should be dismissed.
 13 Next, we will address Claimants'
 14 contention that their alleged investments have
 15 been expropriated in violation of Article 1110.
 16 As we addressed in our written submissions, none
 17 of the factors analyzed when determining questions
 18 of regulatory expropriation, namely the economic
 19 impact, the challenged measure, the character of
 14:33:08 20 the challenged measure, and the extent to which
 21 the challenged measure interferes with the
 22 Claimants' reasonable investment-backed

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1 presenting our jurisdictional and merits defenses
 2 in this case. We've had to alter the order of our
 3 presentations because of the delays in the
 4 hearing, which means that today is unfortunately
 5 the last day that Ms. Cate can be with us. She's
 6 done a lot of work on the case and we want her to
 7 be able to present that work to you today, but we
 8 also want --
 9 (Discussion off microphone.)
 14:31:44 10 MR. KOVAR: We have a couple slides.
 11 PRESIDENT NARIMAN: Doesn't matter.
 12 Carry on.
 13 MR. KOVAR: We still want to preserve a
 14 sensible organization for you, so we've tried to
 15 reorganize things to make it coherent for you.
 16 So, our presentation will proceed as follows:
 17 First, we'll begin our presentation on
 18 liability by responding to Claimants' allegations
 19 of discrimination under the national treatment and
 14:32:05 20 most favored nations obligations under Articles
 21 1102 and 1103.
 22 Ms. Cate will address the three

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1 expectations supports Claimants' expropriation
 2 claim .
 3 Now, we're going to start with the
 4 third factor first, the third factor for analyzing
 5 the regulatory expropriation claim, namely
 6 Claimants' alleged expectations, both with respect
 7 to their off-Reservation and their on-Reservation
 8 claims. We recognize that in their more recent
 9 submissions Claimants' appeared to have limited
 14:33:37 10 expro claim to only their off-Reservation market,
 11 but as part of the our regulatory expropriation
 12 analysis, we will analyze alleged expectations
 13 both off- and on-Reservation for two reasons.
 14 First, Claimants' expropriation claim
 15 has been a moving target throughout this
 16 arbitration. For example, Claimants at times
 17 alleged that their entire investment both
 18 off-Reservation and on-Reservation has been
 19 expropriated. At the hearing, they seemed to have
 14:34:06 20 focused more on their off-Reservation sales;
 21 however, in the interest of completeness, we will
 22 address their reservations both on and

1 off-Reservation.
 2 Second, within the context of NAFTA
 3 Chapter 11, the analysis of the Claimants'
 4 expectations properly falls within the larger
 5 analysis of a regulatory expropriation claim under
 6 article 1110. By contrast as we discuss in our
 7 submissions and we will address for you in these
 8 next two days, the frustration of the Claimants'
 9 expectation does not give rise to a claim under
 14:34:44 10 NAFTA's minimal standard of treatment provision in
 11 Article 1105 Subparagraph 1.
 12 Contrary to Mr. Weiler's suggestion,
 13 Article 1105.1 and Article 1110 do not create
 14 together some sort of continuum for reviewing
 15 challenged measures under an expectations
 16 standard. In fact, we submit that the analysis of
 17 the Claimants' frustrated expectations has no
 18 place under the minimum standard of treatment
 19 under 1105.1. For those reasons, we will examine
 14:35:14 20 Claimants' alleged expectations both on- and
 21 off-Reservation in our presentation on Article
 22 1110. We will of course refer back to that

1 giving rise to breach of that Article, as part of
 2 a larger discussion of the scope of the Article
 3 1105.1 obligation.
 4 I will then respond to Claimants'
 5 argument that the MSA states breached article
 6 1105.1 when failing to affirmatively consult with
 7 Grand River prior to the adoption of the Allocable
 8 Share Amendments.
 9 Then, Ms. Thornton will discuss
 14:36:35 10 Claimants' allegation that the challenged measures
 11 have denied them justice in violation of 1105.1.
 12 As we hope we demonstrated in our submissions and
 13 as we hope to demonstrate over the next two days,
 14 none of Claimants alternative arguments under
 15 1105.1 withstand scrutiny.
 16 Now, after we finish on liability we
 17 will turn to a discussion of two jurisdictional
 18 questions under NAFTA Article 1101, which
 19 Mr. Feldman will address: First, whether
 14:37:07 20 Claimants Grand River, Jerry Montour, and
 21 Kenneth Hill have an "investment" in the United
 22 States, as that term is defined under Article 1139

1 analysis when we get whack back to article 1105.1.
 2 Ms. Cate will address the Claimants'
 3 on-Reservation expectations under U.S. Federal
 4 Indian law. I will then address Claimants'
 5 alleged on-Reservation expectations under the Jay
 6 Treaty. I know you've been waiting to talk about
 7 the Jay Treaty. And Mr. Feldman will address
 8 Claimants' alleged off-Reservation expectations.
 9 Ms. Morris will then address the remaining factors
 14:35:48 10 for analyzing a regulatory expropriation claim,
 11 namely the economic impact and the character of
 12 the challenged measure.
 13 PRESIDENT NARIMAN: Who's going to
 14 address on national treatment?
 15 MR. KOVAR: Ms. Cate. That will be
 16 first.
 17 PRESIDENT NARIMAN: Okay.
 18 MR. KOVAR: Following Article 1110, we
 19 will address Claimants' various arguments under
 14:36:04 20 1105.1 minimum standard of treatment obligation.
 21 Ms. Thornton will first respond to the
 22 Claimants' argument about frustrated expectations

1 hand is required by 1101; second, whether the
 2 challenged escrow statutes "relate" to the
 3 remaining Claimant, Arthur Montour, also as
 4 required by article 1101.
 5 As Mr. Feldman will discuss, we believe
 6 Claimants have failed to show that Grand River,
 7 Jerry Montour, and Kenneth Hill have a U.S.
 8 investment, and thus those Claimants do not
 9 qualify as investors under Article 1101, and their
 14:37:41 10 claims should be dismissed in their entirety.
 11 With respect to Arthur Montour,
 12 Claimants have failed to show that the challenged
 13 escrow statutes, either in their original or
 14 amended form relate to Mr. Montour as required by
 15 Article 1101 and thus his claim should be allowed
 16 to proceed only to the extent that it challenges
 17 the MSA states come complementary legislation, not
 18 the Escrow Statutes. Finally --
 19 PRESIDENT NARIMAN: Repeat that,
 14:38:13 20 please.
 21 MR. KOVAR: So, as respect to Arthur
 22 Montour, we believe that the Claimants have failed

1 to show that the challenged Escrow Statutes either
 2 in their original or amended form relate to him as
 3 required by Article 1101. He doesn't pay escrow,
 4 Grand River does. And thus, his claim should be
 5 allowed to proceed only to the extent it
 6 challenges the complementary legislation.
 7 Finally, we'll ask Mr. Sharp to come
 8 back and address the question of damages.
 9 Mr. Sharp will address Claimants' demand for
 14:38:50 10 hundreds of millions of dollars rests on flawed
 11 valuation theories and incomplete and unreliable
 12 evidence.
 13 Even if, for the sake of argument, one
 14 can make a finding of liability in this case,
 15 which we will vigorously contest, no award of
 16 damages can be made on the record before the
 17 Tribunal.
 18 With that, Mr. Chairman, I would like
 19 to request that you invite Ms. Cate to take the
 14:39:12 20 floor and begin the decisions of Articles 1102 and
 21 1103.
 22 Thank you.

1 NAFTA Article 1103 claim.
 2 With regard to national treatments, I
 3 would first like to briefly provide the text of
 4 NAFTA Article 1102, Paragraphs 1 and 2, for your
 5 review.
 6 As you can see, similar terms appear in
 7 Paragraphs 1 and 2, namely, treatment, in like
 8 circumstances, and less favorable. In the NAFTA
 9 context, these terms form the basis of the
 14:41:05 10 three-part test for the national treatment claim.
 11 The three-part test is set forth in UPS v.
 12 Canada.
 13 The UPS Tribunal noted that, "there are
 14 three distinct elements which an investor must
 15 establish in order to prove that a party has acted
 16 in a manner inconsistent with its obligations
 17 under Article 1102. These are, A, the foreign
 18 investor must demonstrate the party accorded
 19 treatment to it with respect to the establishment,
 14:41:34 20 acquisition, expansion, management, conduct,
 21 operation, and sale or other disposition of
 22 investments."

1 PRESIDENT NARIMAN: Thank you very
 2 much.
 3 MS. CATE: Mr. President, Members of
 4 the Tribunal, I will now address Claimants'
 5 allegations that the United States Government has
 6 breached its obligations under NAFTA Article 1102,
 7 the NAFTA provision of the treaty and NAFTA
 8 Article 1103, the most favored nation provision of
 9 the treaty. Claimants make this 1102, 1103 claim
 14:39:51 10 in the context of their off-Reservation sales and
 11 with respect to the escrow statutes as amended by
 12 the Allocable Share Amendment.
 13 I will discuss each NAFTA Article and
 14 the three elements of the legal standard for each,
 15 namely: Treatment, in like circumstances, that is
 16 less favorable.
 17 Failure to prove even one of these
 18 elements is fatal to Claimants' NAFTA Article 1102
 19 and 1103 claims. After clarifying the applicable
 14:40:25 20 legal standards, I will demonstrate how Claimants
 21 have failed to establish any of these required
 22 elements for either its NAFTA Article 1102 or its

1 "B, the foreign investor or investment
 2 must be in like circumstances with local investors
 3 or investments; and, C, the NAFTA party must treat
 4 the foreign investor or investment less favorably
 5 as it treat the local investor or investments."
 6 In short, the Claimant must prove, one,
 7 that it received treatment with respect to foreign
 8 investor or its investment, prove that as the
 9 foreign investor or investment it is in like
 14:42:08 10 circumstances with the domestic investor or
 11 investment; and, three, prove that it has received
 12 less favorable treatment than a domestic investor
 13 or investment comparator; that is, those in like
 14 circumstances.
 15 As further found by the UPS Tribunal,
 16 failure by the investor to establish one of those
 17 three elements will be fatal to its case. This is
 18 a legal burden that rests squarely with the
 19 Claimant. The burden never shifts to the party.
 14:42:36 20 As you heard here on day one of this
 21 hearing, Claimants agreed to this point: There is
 22 no automatic burden shift. The Tribunal has

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1 rightly pointed out that the Claimants and the
2 United States differ with respect to the legal
3 standard proffered for the Article 1102, 1103
4 analysis. The United States has maintained, and
5 continues to maintain, that the UPS v. Canada
6 standard is the relevant standard to be applied
7 here. While the Pope and Talbot standard is
8 similar, it contains the additional step
9 determining whether there is a reasonable nexus to
10 rational policy and the context of an in like
11 circumstances analysis.

12 As was noted by the Pope & Talbot
13 Tribunal, this additional analytical step is only
14 relevant when a Tribunal needs to determine
15 whether investors and investments subject to the
16 challenged measures are in like circumstances with
17 investors or investments that are not subject to
18 the challenged measure.

19 Here, the Tribunal need not reach this
14:43:33 20 additional analytical issue, because, one, the
21 grandfathered exemption that the Claimants have
22 focussed so much of their time on during this

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1 As noted in our brief and as will again
2 be noted here during the course of this hearing by
3 my colleague, Mr. Feldman, Grand River is a
4 manufacturer and exporter of cigarette located in
5 Oswego, Canada. Grand River has not establishment
6 an investment in the territory of the United
7 States. Having summarily failed to demonstrate
8 the existence of an investment in the United
9 States --

14:45:02 10 PRESIDENT NARIMAN: According to you,
11 Ms. Cate, what is the -- who has deposited the
12 escrow, according to the United States? Who has
13 deposited the escrow amount? Which of the
14 Claimants?

15 MS. CATE: Grand River.

16 PRESIDENT NARIMAN: Isn't that an
17 investment? That's what I wanted to know.

18 MS. CATE: My colleague, Mr. Feldman,
19 will be addressing that in his presentation.

14:45:26 20 Having summarily failed to demonstrate
21 the existence of an investment in the United
22 States to which the challenged measure, the Escrow

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1 hearing is not a challenged measure, nor could it
2 be by the time-barred determination. And two,
3 Grand River was not even in the U.S. market when
4 the exemption was offered.

5 With respect to treatment, we have
6 thoroughly addressed Claimants' failure to meet
7 this requirement in our Counter Memorial in pages
8 74 to 75, and in our Rejoinder at pages 61 to 62.
9 The treatment alleged by Claimants are here are
10 the escrow deposit obligations applicable to
11 non-participating tobacco manufacturers under the
12 Escrow Statutes as modified by the Allocable Share
13 Amendments. As we have explained, the Allocable
14 Share Amendments apply only to tobacco
15 manufacturers and not to importers and
16 distributors. So, the focus of the analysis here
17 is on any treatment that may have been accorded to
18 Grand River, but that treatment, the Escrow
19 Statutes as modified by the Allocable Share
14:44:36 20 Amendments, has not been accorded with respect to
21 any investment held by Grand River and the United
22 States.

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1 Statutes as amended would be accorded treatment
2 under NAFTA Chapter 11, Grand River failed to meet
3 one of the three required elements for an Article
4 1102 claim and the claim should be dismissed.

5 As to in like circumstances, here again
6 we have thoroughly addressed Claimants' failure to
7 meet this requirement in our Counter Memorial at
8 pages 75 to 78, and our Rejoinder at pages 62 to
9 66.

14:45:55 10 Even assuming arguendo that an
11 investment as that term is defined under NAFTA
12 Chapter 11 does exist to which treatment could be
13 applied -- and again, the United States maintains
14 that Grand River does not have such an investment.

15 Claimants have failed to identified an
16 appropriate domestic comparator for purposes of
17 the in like circumstances analysis under Article
18 1102. Claimants' entire focus of their
19 presentation before this Tribunal is that they are
14:46:21 20 in like circumstances with grandfathered SPMs.
21 Grandfathered SPMs are not the appropriate
22 comparator as are not in most like circumstances

1 with Grand River.
 2 As we have addressed at pages 81 to 82
 3 of our Counter Memorial, grandfathered SPMs such
 4 as Liggett group PLC are particularly
 5 inappropriate as comparators for a number of
 6 reasons. Grand River -- grandfathered SPMs are
 7 not in like circumstances with Grand River for a
 8 most basic reason, that is, that grandfathered
 9 SPMs were active in the U.S. market in 1998 when a
 14:46:59 10 partial payment exemption or grandfathered share
 11 was offered to tobacco manufacturers as an
 12 incentive to join MSA within the first 90 days.
 13 In contrast, Grand River was not active in U.S.
 14 market at that time; moreover, Grand River was not
 15 even exporting cigarettes to the U.S. market in
 16 1997 and 1998. So, any partial payment exemption
 17 or grandfathered share for Grand River would have
 18 been worthless.
 19 This point was made by Mr. Hering
 14:47:32 20 during his testimony. He stated, I suppose if we
 21 extended the grandfathered deal today, if we
 22 enacted as Mr. Violi suggested and extended it to

1 early 1999, nor could it have done so as it was
 2 not in the market at the time.
 3 Just as I cannot go back in time to
 4 purchase five cartons of Seneca cigarettes in
 5 order to take advantage of the opportunity to win
 6 a Seneca chopper motorcycle, Grand River cannot go
 7 back in time to take advantage of the incentive to
 8 join the MSA in order to become a grandfathered
 9 SPM and obtain a grandfathered share.
 14:49:10 10 The offer or incentive to enter the
 11 drawing to win that Senate chopper, motorcycle is
 12 no longer available; it ended on March 17, 2006,
 13 and so, too --
 14 ARBITRATOR ANAYA: Ms. Cate, just so
 15 I'm clear, aren't you -- it seems like you're
 16 suggesting that exempt SPMs are appropriate
 17 comparators but that the difference in treatment
 18 is justified, and that sounds, then, like
 19 Mr. Weiler's framework of analysis. You keep
 14:49:37 20 telling us how it was justified for them not to
 21 get the deal, that the exempt SPMs got it, because
 22 of the time factor. Is that right? You're

1 today, if Grand River accepted that, it would have
 2 zero grandfathered share because in 1997 and '98,
 3 it had no market share in the United States.
 4 Grand River argument that it should be given the
 5 same treatment as grandfathered SPMs who responded
 6 to the incentive to join the MSA within the 90
 7 daytime frame allotted is not so very different
 8 than if I were to argue today that I should be
 9 given the right today to enter the drawing for the
 14:48:08 10 Seneca chopper that was held back on May 29, 2006
 11 in Las Vegas, Nevada. There's a very important
 12 reason why I would be denied this opportunity to
 13 take advantage of the offer or incentive to win
 14 that Seneca chopper: I have not complied with the
 15 temporal requirements of the offer or incentive.
 16 That offer or incentive was only available until
 17 March 17, 2006.
 18 Similarly, here, Grand River has not
 19 complied with the temporal requirement of the
 14:48:37 20 offer and incentive. Grand River did not take
 21 advantage of the incentive to join the MSA within
 22 the 90-day timeframe allowed back in late 1998 and

1 acknowledging a difference, but you keep comparing
 2 Grand River to them so you're actually doing the
 3 comparison and justifying it. That's what I'm
 4 hearing.
 5 MS. CATE: I'm simply pointing out
 6 they're not the appropriate comparator. The
 7 appropriate comparator here is other NPMs.
 8 ARBITRATOR ANAYA: But then you're
 9 comparing, then saying there's a justification for
 14:50:08 10 the difference in treatment.
 11 MS. CATE: My point is simply to point
 12 out that Grand River was not in the market at the
 13 time to be able to take advantage of this, and so
 14 they can't be compared to other exempt SPMs.
 15 ARBITRATOR ANAYA: Okay. I'm just
 16 trying to figure out what the different in your
 17 framework of analysis is from that of Mr. We it
 18 seems quite similar, but go ahead. Sorry.
 19 MS. CATE: As a tobacco manufacturer
 14:50:37 20 that has not joined the MSA, Grand River is a
 21 non-participating manufacturer, an NPM, and is
 22 therefore subject to the Allocable Share

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1 Amendments just like all other NPMs.
 2 PRESIDENT NARIMAN: But they could not
 3 join the MSA, is what you said because they didn't
 4 -- they never exporter or did any business in '97,
 5 '98. So, they only came in later. So they had to
 6 be accommodated or they had to be left out
 7 totally. I mean, just conceptually, please look
 8 at that. This is a question we are asking you,
 9 not in accordance with what you're saying. We
 14:51:14 10 don't want to disturb you, what you are saying,
 11 but we do want some sort of an answer, at least I
 12 do. Therefore, Grand River was -- could not have
 13 joined the MSA because they didn't qualify at all,
 14 so it was only left the only other option, which
 15 was to pay the escrow. Would that be a correct
 16 summation?
 17 MS. CATE: Actually, Grand River --
 18 PRESIDENT NARIMAN: Any one of you can
 19 answer that.
 14:51:44 20 MS. CATE: No, Grand River could have
 21 joined the MSA. They've actually submitted an
 22 application; however --

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1 MS. CATE. That's correct. Would you
 2 not have been able to get -- the point I'm making
 3 is you wouldn't have been able to get the
 4 grandfather share.
 5 PRESIDENT NARIMAN: But, how was that
 6 later thing to be accommodated? Was that matter
 7 of negotiation or not, because that was not
 8 covered by the MSA; this is my problem? I'm
 9 asking you to please address it at any time now or
 14:52:50 10 later.
 11 MR. KOVAR: Mr. President, may I jus
 12 ask clarification.
 13 Your question is, how does the MSA
 14 address the case of manufacturers who want to join
 15 later?
 16 PRESIDENT NARIMAN: Yes. Who are not
 17 -- want to join -- who are not there at all as you
 18 say.
 19 MR. KOVAR: Who are not there in 1998.
 14:53:14 20 PRESIDENT NARIMAN: Or may want to or
 21 not want to join please address that later.
 22 MR. KOVAR: Okay. I mean, I think our

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1 PRESIDENT NARIMAN: That's much later.
 2 That's much later. Later.
 3 MS. CATE: Yes.
 4 PRESIDENT NARIMAN: I'm not talking --
 5 yes, but at the initial stage, since they --
 6 MS. CATE: They entered the market, my
 7 understanding, in 1999.
 8 PRESIDENT NARIMAN: Correct, long after
 9 97, 98.
 14:52:08 10 MS. CATE: Right.
 11 PRESIDENT NARIMAN: That's the point
 12 I'm on; therefore they would not have any
 13 grandfather share.
 14 MS. CATE: That's correct.
 15 PRESIDENT NARIMAN: Competitive
 16 grandfather share under the MSA at all because it
 17 was fortuitous that they weren't in the market and
 18 the MSA didn't exclude everybody who came later.
 19 MS. CATE: No, you could have joined
 14:52:29 20 the MSA if you came in later --
 21 PRESIDENT NARIMAN: You could join it,
 22 yes.

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1 point here is we needed to compare them in order
 2 to show they were different, and the most
 3 fundamental way they were different is that in
 4 1998 --
 5 PRESIDENT NARIMAN: You can't have it
 6 both ways. This is a problem I have; that's why
 7 I'm asking you for some clarification, because I
 8 find it difficult. You see, the whole MSA was
 9 tailored on 97, 98 sales, et cetera, and if you
 14:53:47 10 exceed 125 percent, something happens; if you
 11 don't, something else happens and so on.
 12 Therefore, they were not cut out for this at all
 13 because they came in much later so. How are they
 14 to be treated according to you? Treated ad hoc or
 15 treated according to some system or was it because
 16 the MSA didn't apply?
 17 MR. KOVAR: I was just going to say,
 18 Mark, you can fill in, but --
 19 PRESIDENT NARIMAN: Yes, please.
 14:54:18 20 MR. KOVAR: There are quite a number of
 21 manufacturers who are in similar circumstance.
 22 PRESIDENT NARIMAN: How we are they to

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1 be treated? They --

2 MR. KOVAR: They had a choice.

3 PRESIDENT NARIMAN: Was it at the

4 choice of the state that, yes we accept you or

5 don't accept you on these terms or we don't accept

6 you or we accept you on these terms? How does the

7 MSA at all come in?

8 MR. KOVAR: The terms of the MSA are

9 the terms of the MSA. They were agreed at that

14:54:43 10 early time, 1998. And for companies to join then

11 afterwards they had to meet the requirements of

12 the MSA, which had already been established. And

13 I think there's something like 34 SPMs who do not

14 have a grandfathered share who have joined the

15 MSA.

16 PRESIDENT NARIMAN: That are

17 non-exempt.

18 MR. KOVAR: And they're non-exempt.

19 But then, there are the other states that just

14:55:08 20 decided we would rather not join the MSA. We'll

21 stay out, we'll be NPMs. And for them, there's

22 different --

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1 made for a limited time to maximize participation

2 in the agreement.

3 PRESIDENT NARIMAN: And that covered

4 the OPMS and the exempt SPMs.

5 MR. FELDMAN: The offer was made to

6 anyone in the market other than the OPMS --

7 PRESIDENT NARIMAN: But that covered

8 the OPMS and the exempt SPMs, later exempt SPMs,

9 within the 90-day period.

14:56:37 10 MR. FELDMAN: Offer was made to all

11 manufacturers in the market at that time, in late

12 1998 early 1999. But the point I wanted to --

13 PRESIDENT NARIMAN: But these two sets

14 of people did have something to show for it for it

15 in '97 and '98.

16 MR. FELDMAN: Correct. That was the

17 incentive to join the agreement early on, but what

18 I want to emphasize is, in terms of manufacturers

19 going forward, the information is out there in

14:57:02 20 terms of, if I'm a manufacturers and I'm

21 considering, do I want to join, I know roughly

22 what my per carton obligation is going to be if I

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1 PRESIDENT NARIMAN: That's what I'm

2 saying, there was no system. There was no plan.

3 Nothing was planned as to what was to be done for

4 people who came later, for people who came much

5 later and so on. Was there anything that was

6 planned?

7 MR. KOVAR: Well, I defer to Mr.

8 Feldman, but I think what we will explain is the

9 MSA itself provided for how you would treat

14:55:35 10 non-participating members and it provided for this

11 escrow system.

12 MR. FELDMAN: Mr. President, I would

13 add, Professor Gruber addressed in his testimony

14 that when you look back over the years and you

15 compare the per carton amount for OPMS, the per

16 carton amount for SPMs above their grandfather

17 share, the per carton amount for NPMs, when you

18 track that over several years those three amounts

19 are pretty close together. NPMs tend pay a little

14:56:06 20 less. I think it's important we not place too

21 much emphasis on the market shares in 1997 and

22 1998. That was part of a special offer that was

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1 do join. And at times, depending on the

2 manufacturer there maybe issues involving back

3 payments, but that's a discussion that needs to be

4 held with the states. But in terms of going

5 forward, the agreement is he very open to any

6 manufacturer who wants to join, and the

7 information is public and available that these are

8 the terms by which I will be joining; this is the

9 per carton amount that I would be paying, and

14:57:33 10 those amounts are subject to adjustments every

11 year, but they're charted in such a way that the

12 amounts paid by OPMS, SPMs above the grandfather

13 share, and NPMs, are always tracking one another

14 and are always roughly equivalent.

15 PRESIDENT NARIMAN: Yes, but the back

16 payments could be made at the discretion of the

17 states over 5 years, 10 years, sometimes 12 years,

18 as was done in one case. That's why I'm saying

19 it's from state to state. Every state determines

14:58:02 20 whether -- it's a matter of negotiation with the

21 states. There's no set pattern as to on what

22 terms a later non-participating manufacturer

1 should be admitted to the benefits of this MSA and
2 the et cetera.

3 MR. FELDMAN: Well, I think the terms
4 that are somewhat set are the payment obligations
5 the manufacturer would be taking on, that you have
6 information looking forward that Professor Gruber
7 is able to estimate that, for example, next year,
8 the per carton payment amounts for OPMS will be
9 roughly X and for NPMs will be roughly Y. So,
14:58:37 10 that information is known, but then it's a
11 conversation with the particular manufacturer and
12 --

13 PRESIDENT NARIMAN: And the particular
14 state.

15 MR. FELDMAN: Well, it would be with --
16 I mean there are over 40 parties, over 40 state
17 parties, to the agreement. So, you're joining the
18 agreement. You're becoming a party -- you're
19 signing at agreement.

14:58:57 20 PRESIDENT NARIMAN: No, you're not
21 because it's open to you to sign or not sign.
22 MR. FELDMAN: Correct.

1 circumstances with grandfathered SPMs should be
2 dismissed.

3 Having briefly reviewed the first two
4 elements of an Article 1102 claim, namely
5 treatment with respect to investor or investment,
6 and the existence of a comparator in like
7 circumstances, I would like to focus on the most
8 glaring flaw of Claimants' Article 1102 claim,
9 which is their failure to even attempt to show
15:00:27 10 less favorable treatment, and in particular less
11 favorable treatment by virtue of their
12 nationality.

13 The parties to this dispute agree that
14 discriminatory intent is not a requisite condition
15 here. Where the parties to this dispute disagree
16 is with respect to whether the test includes less
17 favorable treatment accorded on the basis of
18 nationality. However, the three NAFTA parties as
19 well as Tribunal's interpreting Article 1102 of
15:00:54 20 NAFTA have come to the same conclusion. What is
21 required is that less favorable element includes a
22 showing by the Claimant of discrimination whether

1 PRESIDENT NARIMAN: Yes. Everybody
2 doesn't have to sign.

3 MR. FELDMAN: Correct. Correct.

4 MS. CATE: Which brings me to the point
5 of, again, those that don't sign and choose not to
6 sign are non-participating manufacturers and Grand
7 River is a non-participating manufacturer and is
8 subject to the Allocable Share Amendments just
9 like all other NPMs.

14:59:24 10 Grand River is therefore in like
11 circumstances with other NPMs. As both the UPS
12 and Pope & Talbot Tribunals have done, this
13 Tribunal should base its comparison on the
14 entities that is on most like circumstances.

15 As noted by the Methanex Tribunal, it
16 would be a forced application of Article 1102 if a
17 Tribunal were to ignore the identical comparator
18 and try to lever in an at best approximate and
19 arguably inappropriate comparator.

14:59:58 20 In light of the foregoing, Claimants'
21 Article 1102 claim, which is entirely premised on
22 the false assumption that Grand River is in like

1 de jure or de facto on the basis of nationality.

2 Under Article 1128 of the NAFTA, the
3 parties to the treaty may make submissions to a
4 Tribunal on a question of interpretation of the
5 agreement. Moreover, the Vienna Convention on the
6 Law of Treaties, Article 3103, requires when
7 interpreting a treaty, a Tribunal must take in
8 account any, A, subsequent agreement between the
9 parties regarding the interpretation of the treaty
15:01:32 10 or the application of its provisions; and B,
11 subsequent practice in the application of the
12 treaty which establishes the agreement of the
13 parties regarding its interpretation.

14 The NAFTA parties often file
15 interpretive submissions under NAFTA Article 1128
16 and have done so in a uniform and consistent
17 manner demonstrating both subsequent agreement and
18 subsequent practice on the issue whether Article
19 1102 requires showing by the Claimant of
15:02:00 20 discrimination on the basis of nationality.

21 As Canada stated in its fourth Article
22 1128 decision in Methanex v. United States, the

1 national treatment provision in Article 1102
 2 provides treatment -- prohibits treatment which
 3 discriminates on the basis of the foreign
 4 investment's nationality. Mexico in its
 5 supplemental Article 1128 submission in Pope &
 6 Talbot v. Canada stated, "Applying the ordinary
 7 meaning of the language of Article 1102, a finding
 8 of denial of national treatment, can be made only
 9 where the host country accords better treatment to
 15:02:38 10 investors who or its citizens." The finding
 11 realize upon truth of discriminatory treatment of
 12 investors based upon nationality.
 13 And in its first Article 1128
 14 submission of Pope and Talbot, the United States
 15 stated, "Article 1102, Paragraphs 1 and 2 were
 16 intended only to ensure that parties do not treat
 17 entities that are in like circumstances
 18 differently based on their NAFTA party
 19 nationality."
 15:03:07 20 PRESIDENT NARIMAN: What is the meaning
 21 of NAFTA party nationality in the case of, say,
 22 Grand River? What nationality are they according

1 methanol producers in the United States."
 2 And as the S.D. Myers Tribunal noted,
 3 in assessing whether a measure is contrary to a
 4 national treatment norm, the following factors
 5 should be taken into account: Whether the
 6 practical effect of the measure is to create a
 7 disproportionate benefits for nationals over
 8 non-nationals; whether the measure on its face
 9 prepares to favor its nationals who are --
 15:04:28 10 PRESIDENT NARIMAN: Excuse me for
 11 interrupting, but were the exempted SPMs -- were
 12 they all nationals or were they foreign nationals
 13 as well?
 14 MS. CATE: Both foreign nationals as
 15 well as domestic.
 16 PRESIDENT NARIMAN: They were both,
 17 those 34?
 18 MS. CATE: Yes. They were 15 exempt.
 19 PRESIDENT NARIMAN: Fifteen. Sorry,
 15:04:52 20 exempt is 15, non-exempt was 34, I think.
 21 MS. CATE: If you review our briefs,
 22 there are the various nationalities listed there.

1 to you?
 2 MS. CATE: Canadian.
 3 PRESIDENT NARIMAN: That's right. So
 4 they would be foreign nationals for the purposes
 5 of NAFTA.
 6 MS. CATE: That's correct. Yes.
 7 NAFTA Chapter 11 Tribunals have
 8 consistently rejected claims under Article 1102
 9 when domestic and foreign entities have been
 15:03:29 10 accorded identical treatment under the challenged
 11 measure.
 12 For example, in Pope and Talbot, the
 13 Tribunal rejected Claimants' Article 1102 claim
 14 because the Tribunal concluded there was no
 15 convincing evidence that the implementation of the
 16 softwood lumber settlement at issue was based on
 17 any distinction between foreign-owned and
 18 Canadian-owned. In Methanex, the Tribunal found
 19 that, "The California ban on the gasoline additive
 15:03:56 20 MTBE does not differentiate between foreign
 21 investors or investments and various MTBE
 22 producers in California or if it is relevant

1 PRESIDENT NARIMAN: Yes.
 2 MS. CATE: Claimants must therefore
 3 demonstrate that a measure, either on its face or
 4 as applied favors nationals over non-nationals.
 5 Based on legal argument made on day two
 6 of this hearing, it is clear that Claimants and
 7 the United States agree on the following: You
 8 don't need to look for specific intent, that the
 9 result is manifest in the facts.
 15:05:24 10 Claimants have not even attempted to
 11 make this showing of less favorable treatment on
 12 the basis of nationality, nor could they on the
 13 facts of this case. The facts are as follows:
 14 NPMs include any cigarette manufacturer that is
 15 not a signatory to the MSA.
 16 The second Declaration by Deputy
 17 Attorney General for the State of Idaho
 18 demonstrates that NPMs include both domestic and
 19 foreign investors. As he states therein, at
 15:05:51 20 present, on the Idaho tobacco directory are
 21 foreign NPM tobacco companies located in Canada,
 22 Choice, Tobacco, Inc.; Korea, KTING Corporation;

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1 Armenia, International Masses Tobac LLC (ph) and
 2 Indonesia, PT Gudang Guram TBK (ph).
 3 There are also a number of domestic NPM
 4 tobacco companies presently on the Idaho Tobacco
 5 Director, including Isla del Sol Tobacco Company,
 6 National Tobacco Company and Carolina Tobacco
 7 Company.
 8 Other examples of NPMs cited in our
 9 briefs included both U.S.- and foreign-owned brand
 15:06:34 10 tobacco manufacturers from Oklahoma, Delaware,
 11 Virginia, Spain and United Arab Emirates.
 12 As noted by Mr. Eckhart in his
 13 declaration, in enforcing the NPM Escrow Statute
 14 and the directory law over the years, California
 15 has not singled out manufacturers based on any
 16 other criteria other than whether or not they're
 17 compliant with the applicable state and federal
 18 law. Thus we have demanded compliance, sued and
 19 obtained penalty and injunctive judgments against
 15:07:03 20 domestic NPMs and foreign NPMs.
 21 For example, we sued China National
 22 Tobacco Corporation, the government tobacco

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1 Claimant stated, any other NPM treated more or
 2 less favorably? Oh, no. To the best of my
 3 knowledge, I think the answer is no.
 4 However it became crystal clear during
 5 the course of legal argument at this hearing,
 6 Claimants do not want to be treated the same as
 7 all other NPMs. Instead, they want special
 8 treatment that has not been extended to any other
 9 tobacco manufacturer, much less any other NPM.
 15:08:30 10 Claimants argue the best treatment
 11 here, we think, would be the opportunity to join
 12 the MSA with grandfathering.
 13 As Mr. Hering noted on day two of
 14 this hearing, and if I understand the opening from
 15 the Claimants in this case yesterday, they're also
 16 asking -- or really asking for a different deal.
 17 They would like a grandfather essentially as an
 18 NPM. They don't wish to become or really become a
 19 participating manufacturer and make payments for
 15:08:55 20 all the cigarettes on they pay FET, Federal Excise
 21 Tax, because as I explained yesterday, that is the
 22 basis for your payments under the MSA, the FET,

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1 monopoly, and obtained a default judgment. We
 2 sued Taiwan Tobacco, also a government-owned
 3 tobacco manufacturer and reached a settlement that
 4 was entered by the court as a judgment.
 5 We sued and obtained a default judgment
 6 against Patriot Tobacco, a Texas manufacturer, and
 7 we sued and settled claims against de Sol, a
 8 Florida manufacturer.
 9 Mr. Thompson noted during testimony
 15:07:32 10 that the New Mexico Attorney General's office
 11 enforces against both foreign and domestic NPMs.
 12 As such, all NPMs, whether domestic or foreign
 13 nationals, are treated equally under the Allocable
 14 Share Amendments to the Escrow Statutes. They are
 15 subject to the same escrow deposit requirements
 16 and they are subject to the same enforcement
 17 measures should they fail to comply with that
 18 statute, regardless of whether they are domestic
 19 or foreign nationals.
 15:07:57 20 Claimants have conceded these points
 21 when asked by the Tribunal is there any other NPM
 22 that is treated more or less favorably than you,

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1 not the SET. What they wish to do is remain NPM
 2 and to argue that they allocable share release is
 3 akin to the grandfathered share. That is, they
 4 don't want to make payments; they don't want to
 5 submit to the public health provisions of the MSA;
 6 and yet, they want to be able to get a release of
 7 nearly all of their escrow under the allocable
 8 share provision.
 9 As Mr. DeLange, who has overseen and
 15:09:30 10 participated in the MSA application stated, other
 11 NPMs that have signed on to the MSA have not
 12 received a grandfather share nor would they have
 13 been able to request one.
 14 After even a cursory review of
 15 Claimants' Article 1102 claim, it becomes clear
 16 that as Professor Goldberg stated in her first
 17 expert report, the gravamen of Claimants'
 18 complaint is that Grand River has been treated
 19 exactly the same as other NPMs. Having failed to
 15:10:00 20 meet this third less favorable treatment element,
 21 Claimants Article 1102 claim should be dismissed.
 22 With regard to the most favored nation

1 treatment under Article 1103, I would again like
 2 to provide the text of NAFTA Article 1103,
 3 Paragraphs 1 and 2, for your review.
 4 Claimants have failed to meet any of
 5 the three required elements for an Article 1103
 6 most favored nation treatment claim. As with an
 7 Article 1102 national treatment claim -- for an
 8 Article 1103 claim, Claimants bear the burden of
 9 establishing three elements: Being accorded
 15:10:41 10 treatment with respect to an investor or its
 11 investment in the United States, identifying a
 12 comparator that is in like circumstances and
 13 demonstrating that the treatment accorded to the
 14 investor or the investment was less favorable than
 15 that accorded to the comparator in like
 16 circumstances. The only major analytical
 17 difference between Articles 1102 and 1103 is that,
 18 for the like circumstances elements, the
 19 comparator must be a foreign rather than a
 15:11:10 20 domestic, or as phrased here, "In like
 21 circumstances to investors under Article 1103.1 or
 22 investments of investors under Article 1103.2 of

1 grandfathered SPMS, nor could they, as they
 2 weren't in the market at the time the incentive to
 3 join the MSA was offered; Moreover, Grand River is
 4 in most like circumstances with other NPMs.
 5 And Claimants have not identified a
 6 foreign-owned NPM or a domestic NPM for that
 7 matter that receives more favorable treatment by
 8 virtue of its nationality. In light of this,
 9 Claimants' Article 1103 claim, like their 1102
 15:12:37 10 claim, should be dismissed.
 11 I will be happy to address any
 12 questions.
 13 ARBITRATOR CROOK: Let me ask a
 14 question for the sake of argument.
 15 Let's suppose that the Tribunal were to
 16 decide that you've got it wrong and that the
 17 correct comparator is not other NPMs but that
 18 they're right and it is exempt SPMS. Is it your
 19 position that we should then do the kind of
 15:13:11 20 analysis that Pope & Talbot called for, and, if
 21 so, how would that analysis run?
 22 MS. CATE: If you were to determine

1 another party or of a nonparty."
 2 The relevant example here is that
 3 Canadian investors or their investment must be
 4 compared to investors or their investments from
 5 other countries, such as Mexico, Korea, Armenia,
 6 Indonesia, Spain and The United Arab Emirates that
 7 are in like circumstances.
 8 Here, again, the burden of proving all
 9 three elements of Article 1103 rests with
 15:11:39 10 Claimants, and the failure to establish even one
 11 of these elements results in the failure to
 12 establish the most favored nation treatment claim.
 13 For the reasons already mentioned, the
 14 relation to Article 1102 and laid out in our
 15 submissions, Claimants have failed to meet any of
 16 these requisite elements. The Allocable Share
 17 Amendments to the Escrow Statutes have not
 18 accorded Grand River treatment with respect to any
 19 investment in the United States. Claimants have
 15:12:06 20 made no attempt to show how Grand River is in like
 21 circumstances with their proffered comparators,
 22 participating manufacturers, especially

1 that Grand River is in like circumstance with
 2 exempt SPMS, then you would be able to do the
 3 added analysis; however, we maintain again that
 4 they are not. They're in the most like
 5 circumstances with other NPMs.
 6 ARBITRATOR CROOK: I understand, but at
 7 that point if we were to agree with them and not
 8 with you, is the Pope & Talbot analysis the
 9 analysis that should be run or is there something
 15:13:56 10 else, the reasonable nexus to a rational goal or
 11 whatever it is --
 12 MS. CATE: As I mentioned earlier on in
 13 my presentation, that could come into your
 14 analysis, yes.
 15 MR. FELDMAN: Mr. Crook, I would add
 16 that the Pope & Talbot analysis -- it's when
 17 you're making the decision on like circumstances.
 18 So, if the Tribunal were already to
 19 have decided, okay, we have found our comparator,
 15:14:19 20 the next step then is to look at the third element
 21 which Ms. Cate addressed, treatment -- more
 22 favorable treatment on account of nationality, and

1 that analysis has nothing to do with reasonable
 2 nexus, rational basis.
 3 Thank you.
 4 ARBITRATOR ANAYA: Okay. So, at some
 5 point, assuming the scenario co-arbitrator laid
 6 out we would get into this reasonable basis or
 7 rational nexus or reasonable rational basis nexus
 8 analysis; right?
 9 MR. FELDMAN: Under Pope & Talbot, that
 15:14:59 10 analysis applies. If you're looking to the
 11 challenge measure and deciding, are entities
 12 subject to the challenge measure -- are they in
 13 like circumstances with entities that are not
 14 subject to the challenge measure? That's when
 15 that analysis applies.
 16 ARBITRATOR ANAYA: Yes, I understand.
 17 My point is, whenever it applies, how
 18 does that analysis go? What do you have to say
 19 about that?
 15:15:21 20 MR. FELDMAN: The analysis is, is there
 21 a rational policy reason not based on nationality?
 22 ARBITRATOR ANAYA: Yes.

1 Daniel Morris, will be giving presentation with
 2 regard to the rational policy issues, and that
 3 will probably resolve any of your questions.
 4 MR. FELDMAN: Professor Anaya, at this
 5 time I would just underscore, in terms of the
 6 evidence of the record, we have testimony, we have
 7 expert testimony, we have fact testimony. On the
 8 face of the statutes themselves, the statements of
 9 the purpose of the statutes, if you look at all of
 15:16:50 10 the evidence in the record, everything makes clear
 11 that these amendments arose from an unforeseen
 12 circumstance that needed correction.
 13 ARBITRATOR ANAYA: What do we make of
 14 these documents we were shown today, these
 15 e-mails, this exchange of e-mails where you see
 16 this, these private or quasi private discussions
 17 going on? What do we make in light of that --
 18 MR. FELDMAN: Mr. Morris will
 19 addressing this in detail, but I point emphasize
 15:17:16 20 at this time that the legislative process for
 21 these measures was completely open, completely
 22 regular, and what the Claimants have been trying

1 MR. FELDMAN: So, in this case, is
 2 there a rational public health reason for the
 3 distinction that's being drawn by the challenged
 4 measure; that would be the analysis.
 5 ARBITRATOR ANAYA: I understand. What
 6 is your argument?
 7 MR. FELDMAN: Oh, we've laid out -- I
 8 mean, it begins with the MSA --
 9 ARBITRATOR ANAYA: Okay. So, but we
 15:15:48 10 have a counter argument.
 11 MR. FELDMAN: Right.
 12 ARBITRATOR ANAYA: I'm trying to join
 13 on this point -- your argument, we know what it
 14 is, health reasons, okay. But they have a counter
 15 argument that that's a ruse or that's not really
 16 right in light of these other factors to point us
 17 to what they characterize as arbitrariness and so
 18 forth.
 19 So, how can you guide us in that
 15:16:14 20 confrontation of different perspectives on this
 21 question of rational basis and so forth?
 22 MS. CATE: I think our colleague,

1 to argue -- they've been trying to conflate
 2 meetings that occur with parties to a private
 3 agreement -- trying to conflate that with a
 4 completely open legislative process in which NPMs,
 5 through CITMA, actively participated, actively
 6 opposed these measures, made their arguments --
 7 and in fact, as we heard from Mr. Hering last
 8 week, in the State of Missouri -- ultimately
 9 prevailed in their arguments. Missouri does not
 15:17:49 10 have an Allocable Share Amendment. You had NPMs
 11 participating, lobbying part of this open process,
 12 and these are points that Mr. Morris will address
 13 in detail, but for now I can at least fore shadow
 14 there's a real divide between meetings that go on
 15 between parties to an agreement and the
 16 legislative process which was completely open to
 17 all parties and in which NPMs were well
 18 represented.
 19 PRESIDENT NARIMAN: But if don't mind,
 15:18:17 20 from what we have seen from the documents that
 21 were shown to us, and no doubt, someone from your
 22 side will deal with it, it does give the

1 appearance that NPMs who objected to the
2 legislation, et cetera, did so, I mean, against
3 closed doors.

4 In our confabulations where, with the
5 NPMs and exempt SPMs and not with the NPMs at all
6 -- so, that's their challenge. How does one meet
7 it? This is a problem that --

8 MR. FELDMAN: Yes. Thank you,
9 Mr. President.

15:19:00 10 As a Tribunal you need to look at the
11 legislative process. Was there any --

12 PRESIDENT NARIMAN: It is a legislative
13 process unlike a legislative process in public law
14 is normally the process by which the government
15 introduces the bill, the bill is then passed, et
16 cetera, but here it was a collective effort.
17 Bills were vetted by outside agencies who don't
18 normally get into the legislative process. So,
19 when you say legislative process, it was a
15:19:29 20 peculiar legislative process so far as these
21 amendments were concerned. It is not the normal
22 legislation. This is what I'm worried about.

1 represented NPMs, made the arguments in opposition
2 to this legislation.

3 Michael Hering testified that, over and
4 over again, he would go to state legislature
5 testifying in support of these bills and he was
6 opposed by CITMA representing NPMs. NPMs had
7 their voice in this process, and so we cannot
8 conflate discussions taking place between members
9 to an agreement over how a bill that they want to
10 propose -- what language should be contained in
11 that bill -- for purposes of the Tribunal's
12 analysis, the important part is, once the bill
13 gets to the floor, how is the debate carried on
14 the floor? Are the stake holders -- do they have
15 a voice? And in this case, the stakeholders,
16 without exception, had a voice, including NPMs,
17 through CITMA.

18 PRESIDENT NARIMAN: That doesn't
19 prevent us, if at all, from determining whether or
15:21:21 20 not either it was fair and equitable or whether
21 there was discrimination or not. That doesn't
22 prevent the Tribunal in a NAFTA matter -- doesn't

1 MR. FELDMAN: Mr. President, we submit
2 there was nothing peculiar about this legislative
3 process whatsoever. You had bills produced in the
4 normal course; you had debate on the bills in the
5 normal course; you had CITMA representing multiple
6 NPMs.

7 PRESIDENT NARIMAN: No, no. There were
8 confabulations in between as to what that bill
9 should contain. Now, that is a matter of public
15:19:57 10 interest with the government or the state must
11 decide, not deciding in consultation with vested
12 interests.

13 MR. FELDMAN: Mr. President, these are
14 -- this happens before bills are introduced in the
15 legislature.

16 The important point for analyzing, has
17 anything irregular happened is, when a bill is
18 introduced, do all stake holders have a voice.
19 Are all stakeholders able to participate in that
15:20:23 20 process? And here, absolutely, without exception,
21 in the state legislature when you have bills being
22 discussed, all stakeholders were presented. CITMA

1 prevent. Yes.

2 MR. FELDMAN: Mr. President, there was
3 lot of discussion about clandestine activities
4 here, and our point is, for the role that NPMs had
5 in the democratic process, there was nothing
6 clandestine here. It was an absolutely open
7 procedures; NPMs participated in the procedure;
8 the legislative process went about in a completely
9 normal fashion; and so, we would submit that it is
15:21:56 10 important not to conflate discussions between
11 members of a private agreement and an open
12 Democratic process which we had here.

13 MR. KOVAR: Mr. President, if I could
14 just add one point, which is to recall that what
15 you have here is a somewhat unique situation,
16 because the MSA was entered into between nearly 50
17 states and these tobacco companies and then
18 additional tobacco companies joined it.

19 So, before an important amendment is
15:22:29 20 made to that, the parties to that agreement have
21 the right and the ability to discuss it. And
22 we've seen the Claimants pick and choose from tens

1 of thousands of pages of documents that they've
2 gotten in a variety of Affora(ph) and highlighted
3 a few lines and made it look like it was a grand
4 conspiracy, but in each case, as Mr. Feldman has
5 explained -- once a model Allocable Share
6 Amendment was prepared, that had to then pass each
7 individual state legislature where they had the
8 normal open legislative processes in order to do
9 that, just like any other bill. And in fact at
10 15:23:21 least in one state Missouri, the amendment failed,
11 it wasn't passed. So, that's the way the
12 legislation has been done.

13 The unique thing about the MSA is that
14 it's not Federal legislation it's done at that
15 more fragmented state level.

16 Thank you.

17 PRESIDENT NARIMAN: Okay. Please.

18 MR. KOVAR: If we're done with 1102,
19 1103, then I would ask that you invite Ms. Cate to
10 15:23:53 move onto expropriation, 1110.

21 Thank you.

22 MS. CATE: Mr. President, Members of

1 expectation of exemption from state regulation of
2 their on-Reservation activities must be premised
3 on the assumption that Grand River operates
4 on-Reservation and within Indian Country in the
5 United States and that Native Wholesale Supplies'
6 importation, possession, transportation, and sales
7 activities occur exclusively on-Reservation and
8 within Indian Country in the United States.

9 ARBITRATOR ANAYA: Why is that the
10 15:25:38 case? Why must it be premised on the assumption
11 that Grand River operates on-Reservation? I mean,
12 why can't we just look at the sale of the
13 cigarettes, where it took place?

14 MS. CATE: It's my understanding that
15 the Federal Indian law is based on two particular
16 analyses, and if I may just continue, I think I'll
17 address your question in due course.

18 ARBITRATOR ANAYA: Okay.

19 MS. CATE: During this merits hearing
10 15:26:12 Claimants have misstated the Respondent's position
21 with respect to on-Reservation expectations as
22 they have applied to Article 1110, and I hope I

1 the Tribunal, I will now address Claimants'
2 alleged on-Reservation expectations, which, as we
3 have repeatedly and consistently noted, should
4 only be evaluated in the context of Claimants'
5 Article 1110 claim.

6 Claimants' assertion is that "Claimants
7 held, and were fully entitled to hold, the
8 expectation that on-reserve sales would never be
9 disturbed by state regulation of the kinds at
10 15:24:35 issue in this case."

11 ARBITRATOR CROOK: Ms. Cate, sorry,
12 excuse me. So, I take it that your position is
13 that frustration of reasonable expectations is not
14 an element of the customary standard for purposes
15 of 1105.

16 MS. CATE: That is correct.

17 ARBITRATOR CROOK: Will somebody be
18 explaining that to us in due course?

19 MS. CATE: Yes, Mrs. Thornton.

10 15:25:11 ARBITRATOR CROOK: Thank you.

21 PRESIDENT NARIMAN: Yes, please.

22 MS. CATE: Claimants' alleged

1 will be able to clarify these matters for the
2 Tribunal.

3 On day one of this hearing, you heard
4 they, the United States, say that Claimants' sales
5 which take place on tribal land or reservation,
6 Indian land in the United States, really aren't
7 on-Reservation because they are sold to
8 non-reservation members who come there. That is
9 not the case.

10 15:26:43 Our position, which is based on the law
11 and the facts is as follows: Under Federal Indian
12 law Grand River and its shareholders, Kenneth Hill
13 and Jerry Montour, are, for purposes of U.S.
14 Federal Indian law, non-Indians law operating
15 outside Indian Country; therefore, they are indeed
16 subject to state regulation if they engage in
17 activities that are regulated by such state
18 regulation. Grand River and its shareholders are
19 subject to the state Escrow Statutes whether in
10 15:27:12 their original or amended forms, because the
21 Escrow Statutes regulate all non participating
22 tobacco manufacturers, NPMs, who manufacture

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1 cigarettes anywhere, and who intend that those
 2 cigarettes be sold in the United States. Grand
 3 River and its shareholder manufacture Seneca
 4 cigarettes in Canada and intend that Seneca
 5 cigarettes are sold in the United States.
 6 Arthur Montour and his solely owned
 7 company, Native Wholesale Supply --
 8 ARBITRATOR ANAYA: I think I'm confused
 9 on this, if you can help me.
 15:27:48 10 Isn't it the case, though, that for
 11 on-Reservation sales the states themselves, at
 12 least some of them, aren't taxing those sales and
 13 hence aren't counting them as units sold and hence
 14 aren't applying the Escrow Statutes?
 15 MS. CATE: That's true. The state
 16 excise taxes vary, as do applications within the
 17 states.
 18 ARBITRATOR ANAYA: So, I don't get this
 19 analysis then.
 15:28:11 20 If we're talking about a scenario where
 21 there's a non-application of the Escrow Statutes,
 22 but the states themselves say it's the sales

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1 applying the Escrow Statutes for cigarettes sold
 2 on-Reservation.
 3 MS. CATE: Oklahoma is an example.
 4 ARBITRATOR ANAYA: They are?
 5 MS. CATE: Yes, that's my
 6 understanding.
 7 MR. VIOLI: We don't know. We have
 8 asked for -- it is not in the record, that I know
 9 of. That's an issue. We don't know.
 15:29:31 10 MR. FELDMAN: We heard testimony this
 11 week from, I believe, Mr. Hering, on the Oklahoma
 12 --
 13 MR. VIOLI: He said he believes: No
 14 record, no document.
 15 MR. KOVAR: You'll have a chance to
 16 close, Mr. Violi. If the question is where in the
 17 record is it.
 18 MR. LUDDY: He just asked where it was
 19 in the record.
 15:29:49 20 MR. KOVAR: If you're asking where in
 21 the record it is, we will point it out. We said
 22 it was Mr. Hering.

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1 on-Reservation. There's a non-application of the
 2 Escrow Statutes. So, then why are we arguing
 3 whether or not they're subject to Escrow Statutes
 4 under Federal Indian law?
 5 MS. CATE: With regard to the
 6 complementary legislation, that is definitely an
 7 issue which I'm about to address.
 8 ARBITRATOR ANAYA: No, I understand
 9 that and I'll ask you about that, too, but I'm
 15:28:39 10 asking about the Escrow Statutes. How are they
 11 applying? You're arguing against the application
 12 of the Escrow Statutes -- no, sorry. You're
 13 arguing that the Escrow Statutes should be applied
 14 to Grand River because -- under Federal Indian --
 15 MS. CATE: I'm arguing with regard to
 16 the legitimate expectations as an investor in the
 17 United States. They should have expected, based
 18 on an analysis of federal Indian law, which they
 19 should have done state by state --
 15:29:04 20 ARBITRATOR ANAYA: How about -- base
 21 that analysis on what the states are doing. Do
 22 you have any examples of where the states are

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1 MR. FELDMAN: Professor Anaya, I will
 2 just make a general point and Ms. Cate will
 3 address in more detail, Professor Goldberg's
 4 analysis focused on --
 5 ARBITRATOR ANAYA: I understand --
 6 look, I understand Professor Goldberg's analysis.
 7 I've read it, I don't want to waste our time here
 8 going through it. I mean, if you want to repeat
 9 it, fine, you can, but that's not what I'm asking
 15:30:19 10 about. I'm asking about the application or not of
 11 the Escrow Statutes. It seems what we've heard,
 12 and I'm trying to get to clarify it, that the
 13 states are not applying Escrow Statutes for
 14 on-Reservation sales. And if that's the case, I
 15 don't even know why we're getting into Professor
 16 Goldberg's analysis. I understand fully what it
 17 is, but that also is a question of mine. That
 18 framework for an output doesn't seem to apply if
 19 we're talking about on-Reservation sales where, in
 15:30:42 20 fact, the states aren't applying the Escrow
 21 Statutes. So, it seems like a critical factor is
 22 whether or not the states are applying the Escrow

1819

1 Statutes. The ones I heard here, the Attorney
2 General's deputies that I heard here seems to say
3 they weren't.
4 MS. CATE: I would add that, as an
5 added point of analysis, that once the cigarettes
6 are sold to non-Indians whether on-Reservation or
7 off, then it is actually --
8 ARBITRATOR ANAYA: They're subject to
9 state taxation. That's why I was asking these
10 deputy AGs whether or not they were in fact taxing
11 and subjecting it to the Escrow Statutes, and from
12 what I understood, each one said no.
13 PRESIDENT NARIMAN: No. For some
14 reason.
15 ARBITRATOR ANAYA: So why are we
16 talking about the application in the Escrow
17 Statutes when they're not being applied?
18 MS. CATE: Because there are some
19 states in which it is applied, that the --
15:31:42 20 ARBITRATOR ANAYA: There are?
21 MS. CATE: There are.
22 ARBITRATOR ANAYA: Okay. All right.

1821

1 the Creek Application actually mentions an
2 amendment to the legislation to do --
3 (Discussion off microphone.)
4 MR. WEILER: Their amended law does
5 purport to apply to apply Escrow Statutes
6 on-reserve, and that's why they're challenging it,
7 just to help you.
8 PRESIDENT NARIMAN: That's held to be
9 the challenge --
10 MR. WEILER: The Creek challenge.
11 MR. VIOLI: That's the complementary
12 legislation.
13 (Discussion off microphone.)
14 PRESIDENT NARIMAN: No one has given us
15 a complete picture of everything, that's the
16 problem.
17 SPEAKER: Professor Anaya --
18 PRESIDENT NARIMAN: Some on-Reservation
19 -- you say some states do it, some states don't do
15:33:18 20 it. On what principle do they do it, then?
21 If they do include on-Reservation
22 sales, then on what principle, on some federal

1820

1 On-Reservation sales. That's what --
2 MS. CATE: That's my understanding.
3 ARBITRATOR ANAYA: I understand how
4 they're applied for off-Reservation sales.
5 MS. CATE: Right.
6 ARBITRATOR ANAYA: That has happened,
7 yes, but I'm interested to know if, in fact, they
8 are being applied by states for on-Reservation
9 sales.
10 15:32:03 MS. CATE: Right, I understand. And
11 it's my understanding that they are in some
12 states. Some states they are not, and that's kind
13 of -- it varies based on the state you're looking
14 at, and you've seen that to be the case.
15 ARBITRATOR ANAYA: Is that in the
16 record?
17 MS. CATE: Yes. That's my
18 understanding is that we have pointed to states
19 that do apply state excise tax and obviously
15:32:23 20 you've seen in the course of this hearing those
21 that do not.
22 MR. KOVAR: If I could help my friend,

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1 principle, state principle? What principle?
2 MR. KOVAR: President Nariman and
3 Professor Anaya, one of the points of Ms. Cate's
4 presentation will be to establish that Federal
5 Indian law will give the states a certain amount
6 of discretion on this point, and that the
7 Claimants should have known that when they were
8 getting into the market of on-reserve cigarettes.
9 So, there is a little bit of disparity
10 15:33:56 among the states on how they do this, and I think
11 Ms. Cate found the point in Mr. Hering's
12 transcript where he talked about Oklahoma and I
13 think the Creek documents may show the same thing.
14 That will be our point. The issue here
15 is the expectations, what expectations the
16 Claimants could have had going into the on-reserve
17 market, and the expectation should have been that
18 you have to hire an attorney and find out exactly
19 how the state in that case applies the excise tax,
15:34:33 20 and then how it applies the escrow in order for
21 them to make rational business decisions about
22 what will be their escrow costs, deposit costs, in

1823

1 any particular state market, rather than to think
2 there's some blanket approach to the application
3 of the escrow laws in each state.

4 PRESIDENT NARIMAN: Where do you get
5 this that it's discretionary with the states?
6 Which laws says this discretion?

7 MR. KOVAR: That's what we will be
8 explaining in this presentation.

9 PRESIDENT NARIMAN: No, I'm saying --
15:35:03 10 correct, you will explain, but I'm saying, which
11 law says it will be at the discretion of the
12 states whether to enforce the Escrow Statutes
13 against Indian reservations or companies which
14 operate from Indian reservations or not?

15 MR. KOVAR: I can be corrected by
16 Ms. Cate but the point is that the Claimants have
17 said that Indian law, Federal Indian law of the
18 Constitution and treaties prevents the states from
19 doing it and that the states can only do it --
15:35:34 20 they all have to act the same; they cannot apply
21 the escrow laws to on-reserve sales. What
22 Ms. Cate is going to explain to you is that that's

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1 I mean, would it then be a valid
2 expectation to a state to -- that a state that
3 doesn't charge or apply its Escrow Statutes for
4 on-Reservation sales continue not to apply those?
5 That's what I'm trying to figure out. That's why
6 it's critical for me to understand the extent to
7 which -- or important for me to understand the
8 extent to which the states are in fact are, in
9 exercise or otherwise that their discretion
10 applies to the Escrow Statutes.

11 MR. KOVAR: Let me respond directly to
12 your question then I'll turn it back over to my
13 colleagues. We have to recall that of course it's
14 the Claimants that have the burden to make their
15 case. So, if they feel that, in 46 states, they
16 would have expectations that are different from
17 state to state, then they have to establish that
18 and I don't think they have. They don't have that
19 kind of evidence on the record.

15:37:20 20 ARBITRATOR CROOK: Just a very brief
21 question.
22 The Chairman asked a question what law

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1 not the case, that under Federal Indian law the
2 states do have discretion in dealing with the
3 escrow obligations of Grand River which is not an
4 American company, so they're not an Indian for
5 purposes of American law; they're First nations
6 and indigenous people in Canada, but for purposes
7 of U.S. Federal Indian law they don't qualify as
8 an Indian. And therefore, when you go to the
9 analysis, which Ms. Cate will go to in some detail
15:36:17 10 about whether the states have some discretion on
11 how they regulate the activities on-Reservation,
12 you will see they do have discretion for that
13 reason, that Grand River is not an Indian in the
14 United States.

15 ARBITRATOR ANAYA: Just to clarify my
16 inquiry, though, and I'm not necessarily disputing
17 the point you just made.

18 Say we agree that the states have
19 discretion, what I'm concerned about is whether or
15:36:45 20 not they do -- what they're in fact they're doing
21 and to the extent to which what they're in fact
22 doing creates expectations.

1826

1 do we look to. I take it that we're really
2 dealing with interpretation of case law here
3 rather than federal statute; is that correct?
4 We're basically -- we're parsing the cases.

5 MS. CATE: That's correct.

6 Returning to the slide. Arthur Montour
7 and his wholly-owned company, Native Wholesale
8 Supply, while considered Indian under Federal
9 Indian law, are conducting regulated activities
15:38:19 10 partially off-Reservation and outside Indian
11 Country, thus NWS is also subject to state
12 regulation, specifically NWS is subject to the
13 standalone complementary legislation which
14 regulates any and all persons or entities engaging
15 negotiate a number of activities related to
16 tobacco products, including the importation,
17 possession, transportation, and sale of tobacco
18 products that are not listed on a state's
19 directory of compliant manufacturers and friends.

15:38:49 20 What we have discussed in our briefs
21 and I will again discuss today, the large volume
22 of Seneca cigarettes that are sold, imported, and

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1 distributed by Claimants in the United States and
 2 the fact that these cigarettes are sold to
 3 non-Indians both on and off-Reservation, a point
 4 which Claimants have conceded, we believe the
 5 foregoing two points are sufficient to prove that
 6 Claimants will not have held expectation that they
 7 would not be subject to state regulation. This
 8 latter point regarding sales to non-Indians only
 9 bolsters the first two point. Claimants, Grand
 15:39:24 10 River and NWS, were and were aware and are fully
 11 aware that Seneca cigarettes were and are being
 12 sold both on- and off-Reservation to non-Indians.
 13 As such, the states have yet another alternative
 14 argument for imposing state regulations on
 15 Claimants, whether on- or off-Reservation.
 16 Claimants tobacco-related activities can lead to
 17 significant adverse health effects on non-Indian
 18 consumers of Seneca cigarettes in the states
 19 prompting a valid state interest that may be
 15:39:54 20 consider sufficient to allow for state regulation
 21 even on-Reservation.
 22 However, the Tribunal need not reach

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1 originally designated as confidential; however,
 2 Claimants and the United States have agreed to
 3 amend that designation so that the document is
 4 public. Professor Goldberg's rebuttal report was
 5 designated public from the onset. As such, I will
 6 again by referring to Professor Goldberg's expert
 7 report.
 8 Professor Goldberg explains in her
 9 Expert Report how Federal Indian law governs the
 15:41:30 10 ability of U.S. states to regulate Indian
 11 activity. She stated, "Whether Federal Indian law
 12 a laws states to regulate and enforce the legal
 13 requirements depends in the first instance on the
 14 location of the activities targeted for
 15 regulation."
 16 Professor Goldberg added that a second
 17 consideration central to any analysis of state
 18 jurisdiction under Federal Indian law is whether
 19 the targets of state regulation are Indian or
 15:41:55 20 non-Indian. Thus, there are two central elements
 21 to consider when analyzing state jurisdiction to
 22 regulate Indian activities under U.S. Federal

1828

1 this highly fact-specific analysis to determine
 2 that Claimants have no legitimate expectation of
 3 freedom from state regulation. In fact, in the
 4 course of this presentation, I will demonstrate
 5 under the standards of Federal Indian law and the
 6 facts of this case, Claimants who are importing,
 7 possessing, transporting, and not only intending
 8 to go sell but actually selling Seneca cigarettes
 9 in the highly regulated U.S. market should have
 15:40:27 10 fully expected their activities to be subject to
 11 state regulation.
 12 I will first discuss the relevant term
 13 and principles that apply under Federal Indian law
 14 as set out by Professor Goldberg, an eminent
 15 expert on Federal Indian law.
 16 And second, I will apply Federal Indian
 17 law to the facts of this case. Once I have
 18 completed this presentation, you will see that
 19 Claimants could not have reasonably held the
 15:40:55 20 expectations they argue.
 21 Just a quick note before I again.
 22 Professor's Goldberg's first Expert Report was

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1 Indian law.
 2 The first element is the location of
 3 the activities targeted for state regulation,
 4 which may be within Indian Country, outside Indian
 5 Country, or partially within and partially outside
 6 Indian Country.
 7 The second element is Indian status as
 8 that term is defined under Federal Indian law,
 9 under which an individual is considered either
 15:42:28 10 Indian or non-Indian.
 11 In her expert report Professor Goldberg
 12 set out the Federal Indian law definitions for the
 13 terms "Indian Country" and "Indian." First, with
 14 respect to the term "Indian country," Professor
 15 Goldberg identified 18 USC Section 1151 as
 16 providing the applicable definition for purposes
 17 of state jurisdiction. That statute defines
 18 Indian Country as all lands within the limits of
 19 any Indian reservation under the jurisdiction of
 15:43:02 20 the United States.
 21 Concerning Section 1151, Professor
 22 Goldberg stated, according to that provision,

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1 reservations must be under the jurisdiction of the
 2 United States Government in order to qualify as
 3 Indian country and benefit from the special
 4 jurisdictional rules applicable to such territory
 5 under Federal Indian law. As to the second term,
 6 "Indian," Professor Goldberg stated that, to fall
 7 within the definition of Indian under Federal
 8 Indian law, the individual must not only have
 9 indigenous ancestry but must also belong to a
 10 group or entity that enjoys a
 11 government-to-government relationship with United
 12 States. Professor Goldberg further noted, Federal
 13 recognition is a formal political act that
 14 establishes government-to-government relationship
 15 between United States and a recognized tribe.
 16 Pursuant to Federal law, the United
 17 States Department of Interior publishes updated
 18 list of federally recognized tribes; however, only
 19 tribes wholly based in the United States are on
 15:43:37 20 the list of federally recognized tribes. Thus, as
 21 Professor Goldberg stated, only groups within the
 22 territorial boundaries of the United States and

1833

1 wholly outside Indian Country is subject to state
 2 jurisdiction.
 3 Professor Goldberg also explains that,
 4 when Indian activities occur partially within and
 5 partially outside Indian Country, Federal Indian
 6 law allows the activity to be treated
 7 off-Reservation or outside Indian Country for
 8 purposes of state regulatory power. For
 9 circumstances where non-Indians are conducting
 10 activities within Indian country the authority of
 11 states to regulate is determined on a case-by-case
 12 basis by a balancing test that weighs Federal,
 13 tribal, and state interest.
 14 As Professor Goldberg noted in her
 15 expert report, as to non-Indians the Supreme
 16 Court's jurisprudence allows some state authority
 17 even within Indian Country, and where non-Indians
 18 conduct activities outside Indian Country, Federal
 19 Indian law imposes no constraints on the state
 15:45:45 20 power to regulate. Thus states have full
 21 jurisdiction is regulate in this category.
 22 As I noted at the outside of this

1832

1 thus subject to congress's authority may enjoy
 2 this government- to-government relationship with
 3 the United States and only individuals belonging
 4 to such groups may count as Indians for purposes
 5 of Federal Indian law.
 6 In addition, a non-member Indian
 7 on-Reservation has also been considered by several
 8 courts in the United States to be a non-Indian
 9 under Federal Indian law.
 10 The diagram you see before you on the
 11 screen will be used to illustrate the legal terms
 12 and principles of Federal Indian law as explained
 13 by Professor Goldberg.
 14 Under Federal Indian law, if an
 15 indigenous person or entity falls under the
 16 definition of Indian and is conducting activities
 17 solely within Indian Country, there is no state
 18 jurisdiction to regulate those activities absent
 19 federal statutory authorization. However, as
 15:44:40 20 Professor Goldberg explains, absent express
 21 Federal law to the contrary, an Indian conducting
 22 regulated activities off-Reservation and therefore

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1 presentation, Claimants' alleged expectation of
 2 exemption from state regulation of their
 3 on-Reservation activities are premised on the
 4 assumption that Grand River operates
 5 on-Reservation and within Indian Country in the
 6 United States and that Native Wholesale Supply's
 7 importation, possession, transportation, and sales
 8 activities occur exclusively on-Reservation and
 9 within Indian Country, but none of that is true.
 10 ARBITRATOR ANAYA: I don't understand
 11 that to be their argument. I don't understand
 12 that to be the premise that they're putting
 13 forward.
 14 Why can't the premise be that what's
 15 being regulated is the sale of cigarette and the
 16 sales occurring on-Reservation? Isn't that really
 17 what they're argument is, since the premise would
 18 be we're on-Reservation, you were in your quadrant
 19 -- the northwest quadrant there, because it's
 15:46:51 20 on-Reservation and the sales are by Indians?
 21 MS. CATE: Grand River is not --
 22 ARBITRATOR ANAYA: No, I understand

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1 that, but it seems like we're mixing -- and I'm
2 trying to understand this. We're talking about
3 on-Reservation sales.
4 MS. CATE: Mm-hmm.
5 ARBITRATOR ANAYA: And the state is
6 trying to regulate on-Reservation sales, right?
7 MS. CATE: The tax authorities of each
8 state are the ones that are -- the ones that apply
9 the state excise taxes. And as we noted, that
10 15:48:00 varies from state to state. You have to do an
11 analysis based on each state to understand that
12 clearly.
13 PRESIDENT NARIMAN: But if you take the
14 five states that they're operating, that seems to
15 be the case. They have deliberately restricted
16 their activities, according to you, in the five
17 states.
18 MS. CATE: But my understanding is
19 that, with regard to those five states, those are
10 15:48:22 off-Reservation activities.
21 PRESIDENT NARIMAN: I beg your pardon?
22 MS. CATE: With regard to those five

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1 River -- forget Grand River.
2 MS. CATE: Can I review the record and
3 come back to you.
4 PRESIDENT NARIMAN: That's what I'm
5 saying, because subject of these --
6 MS. CATE: I understand your question,
7 now.
8 PRESIDENT NARIMAN: Concentrate on
9 these 5 states, instead of all the 48 -- some
10 15:49:23 whether some do it, some don't do it, they are not
11 operating within the 48 states; they're operating
12 within the 5 states.
13 MS. CATE: I understand the question
14 and I will get back to you if that's all right.
15 PRESIDENT NARIMAN: Yes, that's all
16 right.
17 MR. KOVAR: Excuse me. May I just make
18 two points.
19 One, in response to the Resident's
10 15:49:39 question, Claimants on-Reservation sales are
21 throughout the United States. I think you heard
22 from Arthur Montour that he travels to every state

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1 states --
2 PRESIDENT NARIMAN: No, I was just
3 wondering -- my question is not that. My question
4 is that, in those five states are those states
5 enforcing the Escrow Statutes against -- in
6 respect of on-Reservation sales, those five states
7 alone? We are not concerned with 46 or 48 states.
8 MS. CATE: My understanding is that, in
9 those five states Grand River is selling
10 15:48:53 off-Reservation.
11 PRESIDENT NARIMAN: That's not the
12 question, please.
13 MS. CATE: Okay.
14 PRESIDENT NARIMAN: They may be
15 selling, and therefore they are liable to state
16 regulation, I agree. You are right.
17 MS. CATE: Yes.
18 PRESIDENT NARIMAN: I am asking a
19 different question.
10 15:48:58 In those states in which they operate,
21 are on-Reservation sales, as a matter of practice,
22 treated as subject to Escrow Statutes? Not Grand

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1 in the country to promote his brand,
2 on-Reservation. So, I think it would be
3 artificial to only look at five states.
4 PRESIDENT NARIMAN: My question is on
5 expectations as you mentioned. Therefore, in
6 these five states where they have concentrated all
7 their sales in order to get as much as they can
8 from the -- and respect of which -- by reason of
9 which the amendments were passed and so on --
10 15:50:11 we've gone over all that. In those five states,
11 what is the practice? Five states, not other
12 states.
13 MR. KOVAR: We may not have evidence on
14 the record for each of those states, but we'll do
15 the best we can based on your --
16 PRESIDENT NARIMAN: Therefore you
17 cannot refute whether they have or not had
18 legitimate expectation that they said they had we
19 don't know them. We are in a state of flux.
10 15:50:35 MR. KOVAR: That's why we've been
21 trying to distinguish trying to distinguish
22 between their on-Reservation and their

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1 off-Reservation expectations. And now, we're
 2 speaking about their on-Reservation expectations.
 3 Mr. Feldman will later address their
 4 off-Reservation expectations.
 5 But if I could, I wanted to come back
 6 to one of Professor Anaya's question, which had to
 7 do with, what is the measure here. Claimants
 8 would like us to think that the only thing that's
 9 being regulated is the point where national --
 15:51:03 10 where Native Wholesale Direct sells to a Native
 11 wholesaler in the state, that it's that point;
 12 that's the only thing. It's purely
 13 on-Reservation, they're both Indians. But the
 14 realities is, is the transaction spreads across a
 15 much broader part of the country and involves more
 16 pieces which is what takes it out of the
 17 on-Reservation rubric, and I think Ms. Cate
 18 mentioned that the application of the state excise
 19 tax -- I think it's the same thing. I think we've
 15:51:38 20 heard the states actually take different
 21 approaches as to at what point of sale they would
 22 assess the state excise tax. So, in some cases,

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1 identify: What is the particular regulatory
 2 activity that the state is purporting to reach
 3 here?
 4 Now, it would be difficult to argue
 5 that it's the manufacturer by Grand River and
 6 Canada, because there would be other
 7 jurisdictional impediments. So, what is the
 8 particular regulatory activity it's trying to
 9 reach? And that's within the framework of the
 15:53:21 10 analysis, I think it is necessary for us to
 11 understand because you're trying to draw very
 12 bright lines on-Reservation, off-Reservation,
 13 Indian, non-Indian, and these kinds of things.
 14 And so, I think it's important to understand what
 15 is the particular regulatory activity that we're
 16 talking about here.
 17 MR. KOVAR: And you can jump in if I
 18 don't get it exactly right, but just to try to
 19 respond directly to your question, the challenged
 15:53:47 20 measures here are the Escrow Statutes, the
 21 Allocable Share Amendments, and the complimentary
 22 legislation. So, we tried to focus, because this

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1 they actually would assess it at the wholesale
 2 level. At other states, they may assess it at the
 3 point of sale, at retail. So, they do have
 4 different approaches. And I think if anything.
 5 It demonstrates how. Given these transactions are
 6 so broad scale and involve movement of a huge
 7 amount of goods over good deal of territory. Both
 8 on and off-Reservation, that it would be
 9 artificial only to focus on whatever point of sale
 15:52:22 10 is most advantageous to Native Wholesale Direct.
 11 ARBITRATOR ANAYA: But the case is --
 12 and when we're talking federal Indian law, we're
 13 really talking about cases by the Supreme Court
 14 interpreting principles that are, at bottom,
 15 amorphous to begin with. I mean, there's no --
 16 anyway, I don't want to -- the Federal Indian law
 17 thing is basically case, law, right? So, there's
 18 no magical law we find written down and some
 19 professor is able to magically identify. But the
 15:52:50 20 cases are very specific about the particular
 21 regulatory activity.
 22 And so, that's what I'm trying to

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1 is a NAFTA Chapter 11 case, on the matters
 2 challenged in the arbitration.
 3 So, when we look at the Allocable Share
 4 Amendment, we're looking at how they apply the
 5 Escrow Statute. The Escrow Statutes apply to the
 6 manufacturer. So, the fact that Grand River is
 7 not an Indian under American law --
 8 ARBITRATOR ANAYA: It seems like
 9 there's a little of apples and oranges here. Your
 15:54:23 10 using the cases that have to do with state
 11 jurisdiction, regulatory jurisdiction, and most of
 12 these cases are really taxation occasions which is
 13 somewhat, arguably, more circumscribed in terms of
 14 their applicability outside that context.
 15 So, you're using these cases, albeit as
 16 interpreted by an expert. Clearly, there's no
 17 question about that -- Professor Goldberg -- but
 18 at bottom, what she's doing and what you're not
 19 doing is using the using these cases that are
 15:54:57 20 really about regulatory activity, very specific
 21 regulatory activity. And now, we're applying them
 22 in a context of sort of an arrangement to sort of

1 reach out to manufacturers outside the country to
 2 influence them in their sales that ultimately end
 3 up in the states.
 4 MR. KOVAR: Professor Anaya, I think
 5 you're asking exactly the right question, because
 6 these laws have been applied on their face to the
 7 manufacturer. That's the way they apply to all
 8 manufacturers, whether they're domestic or
 9 foreign. And we've seen they've applied them
 15:55:29 10 Chinese and Taiwanese and so on and so forth, as
 11 well as domestic.
 12 Grand River is a foreign manufacturer,
 13 they're applied to them. How are they tested in
 14 court, which I think is part of your question,
 15 well, you have to bring an enforcement action.
 16 And as we've seen, and the Claimants, of course,
 17 make a big deal out of the fact that the states
 18 are having difficulty enforcing their statutes
 19 against this foreign manufacturer.
 15:55:55 20 Well, if I might -- I might point out
 21 that it's particularly ironic that the Claimants
 22 are here under the NAFTA claiming they have an

1 ARBITRATOR ANAYA: Right. Thank you
 2 for that. Thank you for that, because the way
 3 it's been presented is like, yes, it's clear. You
 4 just import these -- there's this Federal Indian
 5 law thing that's out there, you grab, and then it
 6 is imported into this context, but I understand
 7 your point.
 8 MR. KOVAR: I think in this case the
 9 ambiguity cuts against the Claimants' argument,
 15:57:30 10 that they're expectation was clear that there
 11 never could be regulation, never apply to them,
 12 and that's what we're trying to rebut, because
 13 that's the case they have to make.
 14 Thank you.
 15 MS. CATE: In fact, I believe earlier
 16 today the Claimants actually stated -- if you'll
 17 just hold on a moment and I'll find it.
 18 PRESIDENT NARIMAN: Can we take the
 19 break now or later?
 15:58:00 20 MS. CATE: That's fine I wanted to
 21 finish the point.
 22 PRESIDENT NARIMAN: If you are

1 investment in the United States. Grand River is
 2 claiming, we have an investment in the United
 3 States; we are present in the United States. But
 4 in California they're saying, hey, we're not here.
 5 We're in Canada. We have no idea where our
 6 cigarettes are going. They can't have it both
 7 ways.
 8 So, we're trying to take the case as
 9 they presented it and we're trying to look at the
 15:56:30 10 challenged measures as they apply and as the
 11 states applied them and we're trying to look at
 12 Federal Indian law to analyze their expectations.
 13 As you know, the cases they have
 14 -pointed out are on appeal; they're trial level
 15 cases, and maybe they'll eventually go all the way
 16 up to the -- and be decided under the due process
 17 clause of the Constitution in Federal Court, but
 18 at this point they're simply trial cases.
 19 But here, the case under NAFTA, under
 15:57:02 20 Article 1110, is about expectations. So, that's
 21 the way we're trying to analyze the case there are
 22 no clear answers, but in this case --

1 finishing, then we can take ten minutes.
 2 MS. CATE: I still have quite a bit
 3 left to go.
 4 PRESIDENT NARIMAN: I beg your pardon?
 5 MS. CATE: I still have quite a bit
 6 left to go in my presentation.
 7 PRESIDENT NARIMAN: So, should we take
 8 the break now?
 9 MS. CATE: Sure.
 15:58:21 10 PRESIDENT NARIMAN: 4:15.
 11 (Whereupon, at 4:00 p.m., the hearing
 12 was adjourned until 4:15 p.m., the same day.)
 13 PRESIDENT NARIMAN: Okay? Are you
 14 ready? Thank you.
 15 MS. CATE: Before the break, I just
 16 wanted to sort of point to something that the
 17 Claimants had made earlier today which is that
 18 there were uncertainties in 2001 as to the laws
 19 and if indeed there were uncertainties in 2001, it
 20 sort of begs the question as to how GRE could have
 21 legitimate expectations would be exempt from state
 22 regulation.

1 With that, I would continue, along in the
2 presentation I've prepared.

3 Having provided an outline of the legal
4 terms and principles under Federal Indian law, I
5 will turn to the facts as they relate to each set
6 of Claimants. First I will discuss the relevant
7 facts related to Grand River and its shareholders
8 J. Montour and Kenneth Hill; and second, I will
9 turn to the facts related to Arthur Montour and
10 his solely owned company Native Wholesale Supply.

11 First with respect to Grand River and its
12 shareholders, Claimants do not dispute that Grand
13 River manufacturers Seneca cigarettes only in
14 Canada with the intent to sell them in the United
15 States. The U.S. Second Circuit Court of Appeals
16 and Grand River Enterprises Six Nations Limited
17 versus Prior found as follows: Grand River itself
18 operates only on land that is outside the United
19 States. Thus the activities of Grand River and
20 Canada are off-Reservation activities.

21 Grand River's activities and Canada are
22 therefore outside Indian Country, as that term is

1 their contents.

2 With respect to Grand River and its
3 shareholders, Jerry Montour and Kenneth Hill, the
4 following facts which are not contested by
5 Claimants have a bearing -- a direct bearing on
6 whether those Claimants qualify as Indians under
7 Federal Indian law. Professor Goldberg notes:
8 For purposes of determining whether these
9 Claimants are Indian or non-Indian under Federal
10 Indian law, it is worth restating that Claimants'
11 Grand River is a corporation incorporated in
12 Canada. Claimant Jerry Montour is a member of the
13 community on the Wahta Mohawk Reservation, an
14 indigenous First Nation in Canada. And Claimant
15 Kenneth Hill is a member of the Six Nations of the
16 Grand River First Nation, also an indigenous First
17 Nation in Canada. Thus, as noted by Professor
18 Goldberg, Jerry Montour and Kenneth Hill are
19 indigenous people from Canada.

20 They are not members of Indian tribes that are
21 federally recognized by the United States nor is
22 the company itself, Grand River, incorporated

1 defined under U.S. Federal Indian law. As
2 Claimants themselves note in their Memorial, Jerry
3 Montour and Kenneth Hill are the controlling
4 shareholders of Claimant Grand River Enterprises
5 Six Nations Limited, Grand River, a Corporation
6 established under the laws of Canada, and Grand
7 River's manufacturing plant is located in
8 Ohsweken, Ontario.

9 Additional factual evidence that Grand
10 River Seneca Cigarettes are manufactured and sold
11 in Canada and therefore outside Indian Country in
12 the United States can be found in the confidential
13 first Witness Statement of Jerry Montour at
14 Paragraph 13. And in the confident first Witness
15 Statement of Arthur Montour at Paragraph 4.

16 The facts that Grand River's activities
17 do not occur within Indian Country is further
18 bolstered by Seneca Nation President Barry E.
19 Schneider, Senior, who stated Seneca cigarettes
20 are manufactured in Ontario, not on our
21 territories.
22 The nation is in no way responsible for them or

1 under the law of a federally recognized tribe;
2 rather, it is incorporated in Canada.

3 Professor Goldberg further noted that for
4 purposes of Federal Indian law, a member of a
5 First Nation of Canada--in fact any member of any
6 indigenous group located outside the United
7 States--is considered a non-Indian. In light of
8 the facts outlined in her report, Professor
9 Goldberg concluded that Grand River and its
10 shareholders Jerry Montour and Kenneth Hill are
11 non-Indians under Federal Indian law, making them
12 far more vulnerable to state regulatory authority
13 regardless of whether their activities are within
14 or outside Indian country. As stated by Professor
15 Goldberg, as a non-Indian NPM with no operations
16 in Indian country, only an express Federal
17 exemption can protect Grand River from the
18 application of the state escrow law requirements
19 under those circumstances. The same rule applies
20 to Grand River shareholders Jerry Montour and
21 Kenneth Hill who likewise do not qualify as
22 Indians under U.S. Federal Indian law and have no

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1 operations within Indian Country. Grand River and
 2 its shareholders would have this Tribunal believe
 3 they belong in the category now shown here on the
 4 screen. However, under Federal Indian law, Grand
 5 River and its shareholders Jerry Montour and
 6 Kenneth Hill cannot have had any reasonable
 7 expectation of being exempt from the challenge
 8 measures in this case. Grand River and its
 9 shareholders fall squarely within the state
 10 jurisdiction because under the facts and Federal
 11 Indian law, they are deemed non-Indians and they
 12 conduct their tobacco manufacturing activities
 13 outside Indian Country.
 14 During the course of this hearing,
 15 Claimants have argued that because state excise
 16 taxes are not applicable to their on-Reservation
 17 sales, Grand River is not subject to the state
 18 Escrow Statutes; however, that is incorrect. The
 19 Escrow Statutes apply to any tobacco manufacturer
 20 anywhere that intends for its cigarettes to be
 21 sold in the United States. Grand River meets the
 22 intent requirement of the Escrow Statute. The

1853

1 the Escrow Statutes, the states vary on whether or
 2 not the state taxing authority imposes a sales
 3 excise tax on cigarettes sold on-Reservation. And
 4 in addition in a number of states there are
 5 compacts with the tribes that would allow for
 6 state excise taxes to be imposed and therefore
 7 units sold to be --
 8 ARBITRATOR ANAYA: Is that the case
 9 always, where there's a compact, it's a unit sold
 10 and hence subject to escrow?
 11 MS. CATE: I believe it depends on the
 12 compact, but there are some states which have
 13 Reservations and they have compacts with those
 14 tribes, and the agreement is the state excise
 15 taxes is to be imposed on sales on-Reservation.
 16 The tribes themselves gets a portion of that state
 17 excise tax, but it is a unit sold for purposes of
 18 the Escrow Statutes.
 19 ARBITRATOR ANAYA: In each of those
 20 states you're talking about?
 21 MS. CATE: I'm sorry?
 22 ARBITRATOR ANAYA: In each of those

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1 parties are in agreement on this point. Grand
 2 River intends for its cigarettes to be sold in the
 3 United States.
 4 The issue then becomes one of how the
 5 statute is executed in each state which can and
 6 does vary to some degree. The calculation of the
 7 escrow deposits under the Escrow Statutes is
 8 determined by the number of cigarettes sold by
 9 which state excise tax has been collected, also
 10 known as units sold under the Escrow Statutes.
 11 Sales of cigarettes which are not subject to state
 12 excise tax do not give rise to escrow deposit
 13 obligations. Seneca cigarettes are sold both
 14 off-Reservation and on-Reservation in the United
 15 States. With respect to off-Reservation sales
 16 which my colleague Mr. Feldman will address, all
 17 Seneca cigarettes give rise to state excise taxes
 18 which in turn are considered units sold for
 19 purposes of the state Escrow Statutes, which in
 20 turn requires that the tobacco manufacturer makes
 21 a corresponding escrow deposit. As to
 22 on-Reservation cigarette sales, for purposes of

1854

1 states you're talking about? Because Mr. Violi,
 2 as I understood it, said that even where there's a
 3 compact or in some cases where there's a compact,
 4 that's not a unit sold for the purposes of escrow,
 5 the Escrow Statutes--
 6 MS. CATE: I believe it varies with
 7 states, again, that there is a--it depends on the
 8 compact, it depends on the state. But the whole
 9 point here is that there is a possibility in some
 10 states that the state excise taxes would be
 11 imposed to on-Reservation sales and therefore they
 12 should have had a legitimate expectation --
 13 ARBITRATOR ANAYA: And do you have --
 14 is there in the record which states those are?
 15 PRESIDENT NARIMAN: Yes, that's right?
 16 Which states?
 17 ARBITRATOR ANAYA: And we've heard --
 18 we have evidence of states where that's not the
 19 case.
 20 PRESIDENT NARIMAN: Yes.
 21 ARBITRATOR ANAYA: But, and we have one
 22 state Oklahoma in the record --

1 MS. CATE: I would again impose the
2 burden on the Claimants to provide that
3 information.
4 ARBITRATOR ANAYA: It's in your
5 argument, though. You're making the argument.
6 PRESIDENT NARIMAN: Forget the burden,
7 then.
8 ARBITRATOR ANAYA: You're making the
9 argument. You're sitting here making an argument.
10 PRESIDENT NARIMAN: Answer if you can.
11 If you can't, somebody else will answer. It's not
12 a question of burden.
13 MS. CATE: To the -- we will review --
14 ARBITRATOR ANAYA: And you're making
15 the assertion there are such states, and I'm just
16 asking you which states, and then you're saying,
17 you know, they have to tell us.
18 MS. CATE: I will review the record to
19 clarify which states. I understand.
20 You have heard testimony from three state
21 representatives from the National Association of
22 Attorneys General as well as the office of the

1 testimony heard here is that some states such as
2 Oklahoma view on-Reservation sales as incurring
3 state excise taxes; that is in units sold from
4 whence escrow deposits arise. As Professor
5 Goldberg has made clear, given that Grand River
6 and its shareholders are not Indians under Federal
7 Indian law, located outside Indian Country, they
8 have no legitimate expectation of freedom from
9 state regulation, whether for sales made
10 off-Reservation or on-Reservation in the United
11 States.
12 Professor Goldberg stated that if
13 Claimants Grand River, Jerry Montour and Kenneth
14 Hill are deemed not Indians for purposes of
15 Federal Indian law, state jurisdiction to regulate
16 sales of Grand River manufactured Seneca
17 cigarettes in the United States can be supported
18 regardless of whether those activities are within
19 or outside Indian Country.
20 With respect to Arthur Montour, Claimants
21 allege that his solely owned company Native
22 Wholesale Supply makes on-reserve sales on a

1 Attorneys General in California, in Mexico and
2 Idaho that confirm this point: The states vary in
3 their approach to the application of sales excise
4 taxes on-Reservation. Michael Hering of the
5 National Association of Attorneys General also
6 confirmed this point. For instance, in
7 Tobaccoville, I believe all of them Grand River
8 manufactured cigarettes are sold in the way that
9 state excise taxes are due because they are sold
10 off-Reservation in South Carolina and other
11 states. They pay SET. In the case of Native
12 Wholesale Supply, some of those sales are taxable
13 and some are not. Some of the on-Reservation
14 sales are clearly not taxable. However, some of
15 the sales made by the cigarettes brought in by
16 Native Wholesale ultimately are sold in a way that
17 they could be taxable. And again the specifics of
18 that we will try to flesh out for you upon further
19 review of the record.
20 These are the known facts with respect to
21 Grand River and the operation of the state's
22 Escrow Statutes. What became clear from the

1 nation-to-nation basis. The facts however
2 demonstrate otherwise. With regard to Indian
3 versus non-Indian status under Federal Indian law,
4 Arthur Montour in his second Witness Statement
5 stated that while he was born on the Mohawk Nation
6 Kahnawake Territory near Montreal Canada, he is a
7 member of the Seneca Nation due to his maternal
8 lineage. As a member of the Seneca Nation of
9 Indians, Arthur Montour is member of a Federally
10 recognized tribe in the United States and is
11 therefore an Indian under Federal Indian law. For
12 purposes of this analysis, we will assume that
13 both Arthur Montour and his solely owned company
14 Native Wholesale Supply are Indian under Federal
15 Indian law.
16 The central focus of the factual analysis
17 here is on the location of the activities to be
18 regulated. More specifically, the central issue
19 is whether Arthur Montour's and Native Wholesale
20 Supply's activities occur within or outside Indian
21 Country. As the facts show, Arthur Montour and
22 Native Wholesale Supply's importation, possession,

1 transport and sales of Seneca cigarettes occur
2 partially off-Reservation and outside Indian
3 Country. In fact, many of these activities occur
4 within and in transit to from the various states
5 surrounding the foreign trade zones or FTZs
6 located in New York and Las Vegas, Nevada. Arthur
7 Montour confirmed that he uses foreign trade zones
8 in his confidential Witness Statement at Paragraph
9 18. That's his first Witness Statement. These
10 FTZs are not on-Reservation and therefore are not
11 Indian Country.

12 To arrive in these foreign trade zones,
13 the Grand River manufactured Seneca cigarettes
14 imported by Arthur Montour and Native Wholesale
15 Supply must traverse areas of the United States
16 that are off-Reservation and outside Indian
17 Country. In fact, as this map shows, Grand River
18 manufactured Seneca cigarettes are transported by
19 ground transportation a distance of over 3500
20 miles or 5,632 kilometers across lands located
21 outside Indian Country from Grand River's location
22 in Ohsweken, Ontario, to arrive at the foreign

1 transported across the highways and there is U.S.
2 Supreme Court authority for the states to seize
3 contraband cigarettes when they're on the state's
4 highways that is off-Reservation.

5 Native Wholesale Supply is listed on the
6 shipping documents as the entity responsible for
7 importing, possessing, transporting and selling
8 Grand River Seneca cigarettes out of the Las Vegas
9 FTZ and into the various surrounding states,
10 including California, Idaho and New Mexico.
11 Examples of such shipping documents are attached
12 to Dennis Eckhart's declaration at Exhibit A.

13 During his testimony Mr. Eckhart noted
14 that he deposed the operator of Las Vegas FTZ and
15 she explained the four following documents to him.
16 This is the U.S. Department of Homeland Security,
17 Bureau of Customs and Border Protection entry form
18 that provides evidence of importation of 205 cases
19 of cigarettes. As you can see, Native Wholesale
20 Supply is listed as both the importer of record
21 and the ultimate consignee. And as certified here
22 by the customs broker Jean Mack, the cigarettes

1 trade zone in Las Vegas, Nevada.

2 From the foreign trade zone, the Seneca
3 cigarettes are then transported hundreds of
4 additional miles off-Reservation before reaching
5 the respective destination on-Reservation in
6 locations such as Idaho and California. For
7 example the Seneca cigarettes that are transported
8 from the FTZ in Las Vegas to Warpath Inc., located
9 on the Coeur d'Alene Reservation in Plummer,
10 Idaho, traverse yet another 1,178 miles or 1,896
11 kilometers off-Reservation and therefore outside
12 Indian Country. And Seneca cigarettes shipped by
13 NWS from the FTZ in Las Vegas to the Big Sandy
14 Rancheria in Auberry, California, are transported
15 another 425 miles or 694 kilometers
16 off-Reservation and outside Indian Country.

17 As Mr. Eckhart noted in testimony, the
18 statute, the complementary legislation or
19 directory statute as I prefer to call it, does
20 prohibit the transportation of cigarettes that are
21 not listed on the directory and so there is an
22 issue that -- because those cigarettes are being

1 were released to Native Wholesale Supply in the
2 Las Vegas, Nevada FTZ. This document shows that
3 Native Wholesale Supply both imported and
4 possessed cigarettes in the Las Vegas Foreign
5 Trade Zone, which is outside Indian Country.

6 The second document is a Nevada FTZ No.
7 89 warehouse withdrawal. It provides evidence of
8 the different types of cigarettes contained in the
9 205 cases of cigarettes imported by Native
10 Wholesale Supply which included 20 cases of Opal
11 30s, 20 cases of Seneca 120s, and 165 cases of
12 Seneca 60s. This document shows that all of the
13 cigarettes in the two 205 cases imported by Native
14 Wholesale Supply are Grand River manufactured
15 cigarettes.

16 This third document is the invoice bill
17 of lading that provides evidence that Native
18 Wholesale Supply is the seller and Big Sandy
19 Rancheria is the purchaser. This shows that
20 Native Wholesale Supply not only imported and
21 possessed 205 cases of Grand River manufactured
22 cigarettes in the Las Vegas FTZ but then sold

1 those 205 cases to a buyer located in California.
 2 And finally this fourth document is the
 3 bill of lading that provides evidence of shipping.
 4 As shown here, Conway Freight is the common
 5 carrier. The entity responsible for paying for
 6 the transportation of the cigarettes is Native
 7 Wholesale Supply. The consignee to whom the
 8 cigarettes are to be shipped is Big Sandy
 9 Rancheria in California.
 10 This shows that Native Whole Supply is responsible
 11 for paying for the transportation of the 205 cases
 12 of Grand River manufactured cigarettes to Big
 13 Sandy Rancheria in Auberry, California.
 14 In addition, Mr. Eckhart noted during his
 15 testimony that the operator of the FTZ testified
 16 at her deposition that she had never had--she
 17 never had contact whatsoever with Big Sandy
 18 Rancheria, that all of the instructions came from
 19 NWS as to where, how many cigarettes were shipped
 20 out, what brands, what quantities, what freight
 21 company was to be used and where they were to be
 22 sent; that all that information came from NWS,

1 legislation. However, all three gentlemen from
 2 the state Attorneys General offices of California,
 3 New Mexico and Idaho make clear that the
 4 complementary legislation is a stand-alone
 5 provision that serves as an important public
 6 purpose--that serves an important purpose of
 7 tracking cigarettes so that the state authorities
 8 know which cigarettes are being sold and where.
 9 The complementary legislation also ensures the
 10 state authorities know where the cigarettes have
 11 undergone the certification process by the state,
 12 all of which is done in the interest of public
 13 health.
 14 Mr. Eckhart from California stated
 15 because the directory statute or the complementary
 16 legislation as you called it stands on its own, it
 17 doesn't require--in my view, it doesn't require
 18 that it only be enforced if it complements the
 19 Escrow Statutes enforcement. It is a stand-alone
 20 provision of law. Mr. Thompson of New Mexico
 21 stated: The directory statute has an element to
 22 it that goes beyond that -- because it's again

1 that none of it came from Big Sandy Rancheria.
 2 Mr. DeLange mentioned similar evidentiary
 3 documents during his testimony, all of which
 4 pointed to NWS as the entity responsible for
 5 importing, possessing, transporting and shipping
 6 Seneca cigarettes into Idaho. These four
 7 documents along with the testimony of Mr. Eckhart
 8 and Mr. DeLange demonstrate that Native Wholesale
 9 Supply, Arthur Montour's solely owned company, was
 10 responsible for importing, possessing,
 11 transporting and selling Seneca cigarettes
 12 off-Reservation and therefore outside Indian
 13 Country.
 14 While state escrow statutes apply to
 15 tobacco manufacturers such as Grand River and not
 16 to an importer and distributor of cigarettes such
 17 as NWS, NWS is subject to the state's
 18 complementary legislation. Claimants would have
 19 the Tribunal believe that the complementary
 20 legislation is integrally linked to the Escrow
 21 Statutes, and without a violation of the Escrow
 22 Statutes, one cannot violate the complementary

1 it's also -- it's a health-related document not
 2 for purposes of escrow but also for purposes when
 3 there's a stamp on it and it's a distributor to
 4 this license. We know where this product is
 5 going. So, if it shows up somewhere, we know
 6 where it's been, where it's going, and we know if
 7 that product, you know, when it goes through its
 8 certification, that it's met all the requirements
 9 of certification.
 10 Mr. DeLange of Idaho stated the court,
 11 the Supreme Court of Idaho in Idaho v. Maybee,
 12 January 15, 2009, stated -- said they're separate
 13 laws. And the Court expressly said, look, we
 14 understand the concept of units sold that applies
 15 to the Escrow Statutes, but the Complimentary Act
 16 applies to cigarettes. So when we're talking
 17 complementary act, don't sell a noncompliant
 18 cigarette, so they rejected that argument that
 19 complementary is only meant to apply to units
 20 sold.
 21 The complementary legislation, here
 22 Idaho's act is representative prohibits any and

1 all individuals from engaging in certain
2 cigarette-related activities. Specifically, the
3 complementary legislation prohibits affixing a
4 stamp; selling, offering or possessing for sale;
5 acquiring, holding, owning, possessing,
6 transporting, importing or causing to be imported
7 cigarettes that are not on a state's directory of
8 compliant manufacturers and brands and that the
9 person knows or should know are intended for
10 distribution or sale in the state.

11 As the foregoing documents from the
12 California FTZ and Mr. Eckhart's testimony
13 demonstrate, much of Native Wholesale Supply's
14 importation, possession and transportation of
15 Seneca cigarettes occur outside Indian Country.
16 The complementary legislation is therefore
17 regulating activities that occur partly or
18 partially outside Indian Country--in other words,
19 off-Reservation activity.

20 As previously noted, when the Indian
21 activities occur partially within and partially
22 outside Indian Country, Federal Indian law allows

1 are subject to state jurisdiction and are treated
2 as outside Indian Country.

3 Professor Goldberg concluded under
4 general principals of Federal Indian law, Arthur
5 Montour, Jr, is subject to the state Complimentary
6 Acts for those off-Reservation activities in any
7 case where his Seneca brand of cigarettes is not
8 included on the applicable state directory of
9 complaint manufacturers and brands. Thus, as soon
10 as Grand River manufactured Seneca cigarettes are
11 imported, possessed, transported or sold
12 off-Reservation and therefore outside Indian
13 Country, Arthur Montour and NWS are subject to
14 state jurisdiction absent express Federal law to
15 the contrary, and here there is no Federal to the
16 contrary. Thus, Arthur Montour and NWS must
17 comply with the state's complementary legislation.

18 I've noted at the outside of this
19 presentation we do not believe we need to go any
20 further to demonstrate the fact that Claimants had
21 no legitimate expectations that they're alleged
22 on-Reservation activities would be completely

1 that activities be treated as off-Reservation for
2 purposes of state regulatory power. With respect
3 to the activities of Arthur Montour and NWS,
4 Professor Goldberg observes that if any non-Indian
5 portions of the state must be traversed to reach
6 an Indian Country retailer, such activity and the
7 application of state law to that activity would be
8 considered off-Reservation for purposes of Federal
9 Indian law, even if some other component of an
10 importer or distributor's activities occurred
11 within Indian Country.

12 Professor Goldberg also noted
13 furthermore, because the act of importing those
14 cigarettes first occurs as soon as a cigarette
15 enter the regulating state and before the
16 cigarettes have reached a reservation, that
17 activity is likewise taking place outside Indian
18 Country. Professor Goldberg noted that as an
19 Indian engaging in regulated activities, partially
20 within and partially outside Indian Country, the
21 Seneca cigarette sales and distribution activities
22 of Arthur Montour and his wholly owned company NWS

1 exempt from state regulations since much of the
2 regulated activities actually occurs
3 off-Reservation.

4 However, we believe it is important to note that
5 the states have another legal basis under U.S.
6 Federal Indian law for imposing state regulation
7 even directly on-Reservation and inside Indian
8 Country.

9 Claimants have conceded the fact that
10 Seneca cigarettes, quote, they are indeed sold
11 off-Reservation to non-Indians and they may be
12 sold on-Reservation to non-Indians as well. Mr.
13 Eckhart stated in his declaration that virtually
14 all of NWS's shipments from the Las Vegas FTZ into
15 California ultimately were resold to non-members
16 of the governing tribe, resulting in substantial
17 off-Reservation effects.

18 The sheer volume of Grand River
19 cigarettes being imported by NWS only confirms
20 that the great bulk of their so-called
21 on-Reservation market in fact exists
22 off-Reservation, outside Indian Country and with

1 non-Indians. In 2007 NWS distributed --
 2 ARBITRATOR ANAYA: The evidence of that
 3 again is -- what's the evidence of that?
 4 MS. CATE: I am about to tell you.
 5 ARBITRATOR ANAYA: Okay.
 6 MS. CATE: In 2000 --
 7 ARBITRATOR ANAYA: You're going to tell
 8 us what the evidence is about on-Reservation.
 9 That's what you're going to say now.
 10 MS. CATE: Yes.
 11 In 2007, NWS distributed 74 million Grand
 12 River manufactured cigarettes on the Big Sandy
 13 Rancheria Reservation in California, which has a
 14 population of approximately 84 people. Thus, each
 15 and every resident on the Reservation would have
 16 had to have purchased 116 packs of Grand River
 17 manufactured cigarettes on a daily basis. And
 18 these are the sales number for 2007 which are low
 19 in comparison to NWS's sales to California
 20 distributors in 2008.
 21 With regard to the substantial
 22 off-Reservation effects, Mr. Eckhart stated in his

1 MR. VIOLI: Oh, you can't see it on
 2 here, sir.
 3 MS. CATE: Oh, sorry. It says Navigant
 4 Expert Report, Paragraph 73.
 5 MR. VIOLI: Okay, thanks.
 6 MS. CATE: Sure.
 7 MR. VIOLI: The printout you gave us is
 8 --
 9 MS. CATE: Out. Got it.
 10 PRESIDENT NARIMAN: What's all this on?
 11 What's all this leading to according to you? I
 12 mean what's the submission? According to you,
 13 this proves that the Claimants are wrong in
 14 respect of what matter?
 15 MS. CATE: Legitimate expectations.
 16 PRESIDENT NARIMAN: Again --
 17 MS. CATE: They had no legitimate
 18 expectations under Article 1110 that they would
 19 not be regulated by the states.
 20 PRESIDENT NARIMAN: I see. Thanks.
 21 MS. CATE: Sure.
 22 Mr. Eckhart added those on-Reservation

1 testimony, the cigarettes that are not on our
 2 directory, which means that non-Indians are
 3 smoking those cigarettes and developing whatever
 4 tobacco-related diseases they might develop over
 5 the course of time, these cigarettes are also not
 6 certified as fire safe in the State of California,
 7 and that has off-Reservation effects to the extent
 8 that cigarettes are going off the Reservation or
 9 have a propensity to start a fire.
 10 MR. VIOLI: Can I just ask a question?
 11 Where is this in the record, this chart with the
 12 little person and the 116 packs per day?
 13 MS. CATE: The information is
 14 extrapolated based on information that's in the
 15 record.
 16 MR. VIOLI: Okay. Any particular cite?
 17 MS. CATE: It's in our pleadings.
 18 MR. FELDMAN: That's in our preliminary
 19 statement of our Counter Memorial, those numbers.
 20 MS. CATE: It's also -- if you look at
 21 the bottom right corner, all of our slides have
 22 the source.

1 businesses are open to the general public and are
 2 advertising on the Internet at cheaper prices such
 3 that they attract customers from off-Reservation.
 4 Customers come onto the Reservation, buy
 5 cigarettes that are untaxed. In order to show
 6 Claimants' confidential business information, I
 7 would like ask that all non participants to the
 8 proceedings leave the room, although I don't think
 9 there are anywhere.
 10 PRESIDENT NARIMAN: They're all asleep.
 11 MS. CATE: Okay. Just trying to
 12 protect the --
 13 (End of open session. Confidential
 14 business information redacted.)
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2 CONFIDENTIAL SESSION
3 MS. CATE: As shown in this chart --
4 (Discussion off microphone.)
5 MS. CATE: Just the chart is.
6 (Discussion off microphone.)
7 PRESIDENT NARIMAN: Carry on.
8 MS. CATE: It's one minute.
9 Apologies for the interruption.
10 As shown in this chart, NWS's sales
11 increased 81 percent in 2008 in California alone.
12 This is a major increase that is likely to have
13 significant --
14 PRESIDENT NARIMAN: Whose chart is
15 this?
16 MS. CATE: If you see down at the
17 bottom right, on the screen at least, it says
18 Rebuttal Report of Wayne R. Wilson, Jr. At 20,
19 March 3, 200.
20 PRESIDENT NARIMAN: Their witness.
21 MS. CATE: Yes. And then why is this
22 confidential? It's marked confidential. Yes,

1
2 OPEN SESSION
3 MS. CATE: When one looks at
4 on-Reservation sales in general, cigarette sales
5 on-Reservation in New York further confirm that
6 much of Claimant's so-called "on-Reservation
7 market" actually exist off-Reservation.
8 In 2007, over 6 billion cigarettes were
9 sold on Indian lands in New York including Seneca
10 cigarettes with 20 sticks per pack, that's 300
11 million packs but fewer than 20,000 Indians live
12 on those lands. Thus, each resident of the
13 Reservation would have had to have purchased
14 15,000 packs during 2007 or 41 packs of cigarettes
15 per person per day.
16 PRESIDENT NARIMAN: So your point is
17 that this was all off-Reservation sales -- --
18 MS. CATE: Yes.
19 PRESIDENT NARIMAN: And this
20 on-Reservation is just a cloud that they have
21 raised which doesn't apply to the facts of the
22 case.

1 they have marked it as confidential.
2 (Discussion off microphone.)
3 MS. CATE: This is a major increase
4 that is likely to have significant off-Reservation
5 effects in California.
6 And with that we can ask the gentleman to
7 return. This is the only confidential slide that
8 would be shown.
9 (End of confidential session.)
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1 MS. CATE: That is correct.
2 PRESIDENT NARIMAN: That's your point.
3 MS. CATE: Yes. The off-Reservation
4 sales also under Federal Indian law give rise to
5 state jurisdiction in the sense that they're
6 off-Reservation effects occurring to non-Indians
7 in the state.
8 ARBITRATOR ANAYA: That's your
9 argument, right? There is no statute that says
10 that, right?
11 MS. CATE: No. It's the Federal Indian
12 law.
13 ARBITRATOR ANAYA: As interpreted by?
14 MS. CATE: Professor Goldberg.
15 ARBITRATOR ANAYA: We're talking here
16 about on-Reservation sales to non-Indians.
17 MS. CATE: Right.
18 ARBITRATOR ANAYA: We're inferring that
19 that means (off microphone) -- oh, I'm sorry.
20 We're talking about on-Reservation sales
21 to non-Indians, so non-Indians coming on the
22 reservation --

1 MS. CATE: Yes.
 2 ARBITRATOR ANAYA: And you're inferring
 3 that by the data --
 4 MS. CATE: Right.
 5 ARBITRATOR ANAYA: -- that you're
 6 presenting. Okay. Now -- and your point is that
 7 on-Reservation sales of cigarettes to non-Indians
 8 are subject to state regulation, right?
 9 MS. CATE: Yes.
 10 ARBITRATOR ANAYA: Okay, and that's
 11 based --
 12 MS. CATE: Because under a balancing
 13 test that obviously a court would have to apply --
 14 ARBITRATOR ANAYA: But is there any
 15 specific authority for that? I mean, I don't see
 16 Professor Goldberg. She's pointing to a bunch of
 17 cases having to do with taxation, but is there any
 18 authority beyond that? These on-Reservation sales
 19 are subject to regulation beyond taxation?
 20 MS. CATE: I believe -- let me just --
 21 ARBITRATOR ANAYA: I know the balancing
 22 test but that's a balancing test and I guess

1 Goldberg has cited to Wagnon v. Prairie Band
 2 Potawatomi Nation, and Oklahoma Tax Commission
 3 versus Chickasaw Nation.
 4 ARBITRATOR ANAYA: Which I think are
 5 tax cases. I mean it's a fair -- I'm not. It's a
 6 fair argument. I'm not questioning that. I just
 7 want to -- I'm trying to see what we have there.
 8 MS. CATE: I believe with regard to
 9 Federal Indian law, and please correct me if I'm
 10 wrong, the large majority of the cases either deal
 11 with gaming or taxation, and from that one
 12 extrapolates to what degree other civil state
 13 regulations comply.
 14 ARBITRATOR ANAYA: But the gaming cases
 15 say that, you know, there's limited regulation of
 16 gaming, Indian gaming on-Reservation even
 17 involving non-Indians so...
 18 MS. MONTOUR: Is my friend suggesting
 19 that the Gaming (off microphone) suggest that the
 20 non-Indian even though the detriment is
 21 off-Reservation, that the state has a right to tax
 22 them?

1 someone's got to do that.
 2 MS. CATE: Right. It would be -- a
 3 court perhaps would be the one that would be doing
 4 the balancing test.
 5 ARBITRATOR ANAYA: But I just want to
 6 see -- and I honestly don't know if there's any
 7 specific authority for regulation of sales of
 8 cigarettes or any other goods --
 9 MS. CATE: Okay.
 10 ARBITRATOR ANAYA: -- on-Reservation
 11 other than the taxation cases that Professor
 12 Goldberg relies on.
 13 MS. CATE: And those are the ones that
 14 I would have cited to you just now.
 15 ARBITRATOR ANAYA: Because I think it's
 16 a bit of an overstatement to say Federal Indian
 17 law says this when really there are cases that say
 18 this in the context of taxation of cigarettes but
 19 we don't have anything -- I don't know what else
 20 we have. That's why I'm asking for the authority.
 21 MS. CATE: Well, I can only tell you
 22 that with regard to this proposition, Professor

1 ARBITRATOR ANAYA: That -- I don't
 2 know. I would just caution going there because
 3 that's heavily regulated by statute, by Federal
 4 statute, the area of gaming. So we're getting
 5 into a whole other area, that I wouldn't want to
 6 be responsible for driving us down. I just want
 7 to show that -- the complexity of that cuts
 8 different ways.
 9 MS. CATE: Yes. And we definitely
 10 recognize that this is a very complex issue.
 11 MR. KOVAR: But again it's important to
 12 point out that it's a question about expectations
 13 so that if it's unclear --
 14 ARBITRATOR ANAYA: That I understand.
 15 I'm just reacting to these categorical statements
 16 of what Federal Indian law says.
 17 PRESIDENT NARIMAN: But let's say that
 18 you cannot regulate, say, even except for
 19 taxation.
 20 Then the expectation part becomes an inference,
 21 doesn't it?
 22 MS. CATE: Can you repeat the question,

1 I'm sorry?

2 PRESIDENT NARIMAN: If the Federal
3 Indian law says that you cannot regulate, states
4 cannot regulate except for taxation, then any
5 measure that is not a taxing measure would fall
6 foul of Federal Indian law.

7 MS. CATE: I believe there are cases --

8 PRESIDENT NARIMAN: And that's the case
9 which they make, namely that this is not taxing.
10 This is you're applying some statute or the other
11 to these sales which is not permitted. Let's --
12 I'm a little confused.

13 MR. FELDMAN: Mr. President, I would
14 just note that unlike a tax, an NPM such as Grand
15 River retains ownership over its escrow deposits.

16 PRESIDENT NARIMAN: That's a point.
17 You're right. That is the point. That's what
18 they're saying; it is not a tax.

19 MR. FELDMAN: Right, but in terms --

20 PRESIDENT NARIMAN: Let the state have
21 the power to regulate. That's the question.

22 MR. FELDMAN: Right. My only point is

1 and, with our expert Professor Goldberg from the
2 University of UCLA, indicated that the facts of
3 this case fall within an area under Federal Indian
4 law as you would extrapolate it from the cases, a
5 variety of the cases even if most of them are in
6 the taxation area, that would indicate that the
7 states potentially do have the right to regulate.
8 It's not necessarily crystal clear but they
9 certainly -- they do. And what -- we're now in
10 the subsidiary argument. The first argument we
11 made was based on where exactly Native Wholesale
12 Supply was operating, much of which was
13 off-Reservation. What we're now looking at is a
14 subsidiary argument which is not only that, but
15 you can also look to see who their real customers
16 are. And from these numbers, you can see that
17 it's absolutely physically impossible for Indians
18 to have actually smoked all these cigarettes. So
19 it has to be non-Indians and so what our point is
20 is that our expert in her analysis of the case,
21 and we're relying on her expertise, has said that
22 the states -- that the Claimants had no legitimate

1 that in terms of the extent of the state's
2 regulatory interference, we would submit that an
3 escrow deposit is less of a regulatory burden
4 because the manufacturer retains ownership over
5 the deposit unlike a tax which -- in which case
6 the property is taken from the manufacturer.

7 PRESIDENT NARIMAN: The point is not
8 that. The point is that they say that the state's
9 power ends at taxing. They cannot regulate beyond
10 that with regard to this on-Reservation, but
11 that's the contention. You may say that this is
12 hardly a regulation. I mean, they still have the
13 money and so on, but that doesn't answer the
14 point. That's the problem. You see, are you
15 accepting the position that the state's power of
16 regulation is limited to taxation and not beyond,
17 and if you are not, then please tell us why?

18 MR. KOVAR: Mr. President, it's the
19 Claimants that have come here to say that the law
20 says categorically that they cannot be subject to
21 regulation and they have not cited authority for
22 that proposition. What we have done is come in

1 expectation that the states wouldn't also
2 potentially have the right to regulate on this
3 basis, that the real customers are non-Indian
4 customers. The over -- and not just a few but the
5 overwhelming number of customers are non-Indians,
6 so that if you get to the balancing test area
7 under Federal Indian law principles, the balance
8 is almost certainly going to swing in favor of
9 state regulation. That's Professor Goldberg's
10 expert argument. And we have to rely on that.
11 Thank you.

12 ARBITRATOR ANAYA: And your point is
13 that you don't have to necessarily win on that
14 argument. You just have to be able to make a
15 strong case so that the other side couldn't rely
16 reasonably on the opposite.

17 MR. KOVAR: Yes. Yes, Professor Anaya.
18 They have to show that they had legitimate
19 expectations, that they would be completely free
20 of regulation which is what they have claimed.

21 ARBITRATOR ANAYA: So do you have to
22 win on this argument that you're laying out here

1 of Federal Indian law?
 2 MR. KOVAR: We think that the Claimants
 3 have to prove that they had --
 4 ARBITRATOR ANAYA: No, I'm not -- if
 5 you have to convince us. I mean, you're here
 6 arguing to us.
 7 MR. KOVAR: Yes.
 8 ARBITRATOR ANAYA: But this -- and it's
 9 presented like it's black and white. Like, I mean
 10 we have, you know, we have experts on the other
 11 side that have been presented to us --
 12 MR. KOVAR: Well --
 13 ARBITRATOR ANAYA: And I can't ignore
 14 my own read of these cases as someone who lost one
 15 of these cases before the U.S. Supreme Court.
 16 MR. KOVAR: Right.
 17 ARBITRATOR ANAYA: So it's a --
 18 MR. KOVAR: I guess the bottom line,
 19 Professor Anaya, is that, well, we're relying on
 20 our expert that Federal Indian law would permit
 21 the states to regulate in these areas based on the
 22 facts of this case as they've been presented that

1 impact alone, finding that there is no sufficient
 2 showing of economic impact and never need to reach
 3 the issue of expectations. So, in terms of the
 4 larger picture, that is the landscape.
 5 PRESIDENT NARIMAN: Okay. What next?
 6 MS. CATE: Just trying to figure out
 7 where I left off.
 8 Such a large quantity of cigarettes must
 9 be serving a market an off-Reservation market
 10 outside Indian Country. Through the scores of Web
 11 sites that sell Seneca cigarettes to the public, a
 12 sampling of which are shown here, it is clear that
 13 the cigarettes are indeed serving a largely
 14 off-Reservation non-Indian market that is located
 15 outside Indian Country and often accessed via the
 16 internet. This has been further confirmed by Mr.
 17 DeLange's testimony and a recent Idaho Supreme
 18 Court decision Idaho v. Scott Maybee.
 19 As noted by Mr. DeLange in testimony,
 20 Internet sales is a tremendous problem. Internet
 21 cigarette sales' growth has been exponential and
 22 there are some real problems. States have done a

1 ultimately if it remains ambiguous and that one
 2 can hypothesize that the Supreme Court could go
 3 either way, that reasonable people could differ,
 4 that the Claimants lose because they have to show
 5 that they had legitimate expectations and that
 6 those expectations were clear and solid.
 7 Otherwise, they couldn't build their whole
 8 business model on something that they might not
 9 get. So that's our position.
 10 MR. FELDMAN: Professor Anaya, I would
 11 just like to make one broader point about
 12 expectations. We're addressing expectations as
 13 one among three elements under the expropriation
 14 obligation. We do not feel that it is appropriate
 15 to analyze it under the 1105 obligation. One of
 16 the other three expropriation obligations is
 17 economic impact, and Ms. Morris will be discussing
 18 the economic impact element. Mr. Sharp will be
 19 discussing the damages element. Certainly this
 20 Tribunal, as the Glamis Tribunal recently did in
 21 their analysis of the expropriation allegation,
 22 certainly this Tribunal could analyze economic

1 number of things over the years. In some of the
 2 studies, half the Internet sites don't do age
 3 verification. Now maybe it's getting better; some
 4 sites are fine, but there's a youth access
 5 problem. Some of them are misrepresenting.
 6 They're telling consumers buy with us and don't
 7 worry about taxes, and then consumers get a tax
 8 bill or a penalty bill. So it's a concern to our
 9 state and our state passed a law actually in 2003
 10 as well that said we want Internet sellers to obey
 11 the same tobacco sales laws that wholesale
 12 distributors and others have to obey in terms of
 13 the Complimentary Act.
 14 For example, with regard to the Supreme
 15 Court of Idaho's recent decision in Idaho v.
 16 Maybee, Mr. DeLange noted the following facts.
 17 Mr. Maybee is a member of the Seneca Nation. He's
 18 located on the Seneca Reservation. I don't
 19 believe that's the correct title but it's that
 20 reservation that I think NWS actually is located
 21 at. He sells his cigarettes via the Internet and
 22 he sold millions to Idaho.

1 Turns out quite a few of those cigarettes are
2 Seneca. They're Grand River cigarettes. They're
3 not the only ones. He sells lots of different
4 cigarettes. In fact, some of them are compliant.
5 28 percent of his cigarette sales are of compliant
6 brands, but 72 percent are noncompliant. The
7 largest share was Seneca cigarettes. We wrote, so
8 we, you know, wrote Mr. Maybee like we wrote NWS
9 and advised him of the law and asked for his
10 compliance. He refused. So we filed a lawsuit.
11 Then we litigated and we sued him under the
12 Complimentary Act, just like we sued NWS under the
13 Complimentary Act.

14 PRESIDENT NARIMAN: What happened to
15 that?

16 MS. CATE: I'm about to tell you.
17 The Idaho v Maybee decision held the
18 following: The complimentary Act regulates
19 cigarettes not merely units sold. The
20 Complimentary Act applies to interstate delivery
21 sellers as well as intrastate sellers. The Idaho
22 Uniform Commercial Code is not determinative of

1 one, that Grand River manufacture cigarettes
2 on-Reservation in the United States within Indian
3 Country; that Grand River and its shareholders
4 qualify as Indian under Federal Indian law; and
5 that the cigarette-related activities of Arthur
6 Montour's company Native Wholesale Supply, namely
7 importation, possession, transportation and sales
8 activities occur exclusively on-Reservation and
9 serve exclusively an Indian population residing
10 within Indian Country. As explained, none of
11 those assumptions is correct. Grand River's
12 manufacturing operations occur only on land that
13 is outside the United States. Such
14 off-Reservation operations are considered
15 activities outside Indian Country under Federal
16 Indian law. Simply put, Grand River's
17 manufacturing operations occur outside Indian
18 Country.

19 In addition, the two Grand River
20 shareholders who are Claimants in this case, Jerry
21 Montour and Kenneth Hill, have failed to
22 demonstrate any membership in a federally

1 the site of sales for purposes of the application
2 of the Complimentary Act. Maybee sold
3 noncompliant cigarettes in Idaho. The Interstate
4 Commerce clause of the U.S. Constitution does not
5 preempt the Complimentary Act as it applies to
6 Maybee. The Indian Commerce clause of the U.S.
7 Constitution does not preempt the Complimentary
8 Act in the MAA as they apply to Maybee.

9 In addition, Professor Goldberg noted
10 that if cigarettes sold to on-Reservation
11 retailers are later possessed, transported and
12 sold off-Reservation by the on-Reservation
13 purchasers, then the state regulations will be
14 analyzed as burdens on off-Reservation activities
15 and as such, state jurisdiction to regulate will
16 be upheld.

17 As you can seem from the diagram on the
18 screen, Claimants would have this Tribunal believe
19 that they belong in a Federal Indian law category
20 shown here, namely Indian within Indian Country.
21 However, they're entire theory would have to be
22 based on the following false assumptions, namely,

1 recognized -- Indian Tribe in the United States
2 and thus failed to qualify as Indians as that term
3 is defined under Federal Indian law.

4 With respect to Arthur Montour and his
5 solely owned company Native Wholesale Supply, the
6 company's importation, possession, transportation
7 and sale activities related to Seneca cigarettes
8 occurs partially on and partially off-Reservation
9 and targets markets outside Indian Country.

10 In fact, much of the so-called
11 on-Reservation market for Seneca cigarettes exists
12 off-Reservation on the Internet through scores of
13 Web sites that sell Seneca cigarettes to the
14 general public.

15 As the actual facts of this case and the
16 standards of Federal law demonstrate, Claimants
17 could not have held any reasonable expectations
18 that their so-call "on-Reservation operations"
19 could be exempt from state regulation.

20 In short, while Claimants argue that they
21 should be exempt from state jurisdiction and state
22 regulation because they are allegedly Indians

1 operating within Indian Country, in fact Grand
2 River and its shareholders Jerry Montour and
3 Kenneth Hill do not qualify as Indians under
4 Federal Indian law and do not operate within
5 Indian Country. And with respect to Claimant
6 Arthur Montour, much of the importation,
7 possession, transportation and sales of Seneca
8 cigarettes by NWS in the United States occur
9 partially within and partially outside Indian
10 Country, which means Arthur Montour's activities
11 are treated as outside Indian Country for purposes
12 of state regulatory power.

13 For all the foregoing reasons, Claimants
14 cannot have had any reasonable expectation under
15 Federal Indian law that their so-called
16 "on-Reservation activities" would be entirely
17 exempt from state regulation. Their activities
18 fall squarely within states' jurisdiction to
19 regulate.

20 Thank you very much.

21 PRESIDENT NARIMAN: Thank you. I
22 wanted to ask you one thing. You supplied us with

1 397803(b)(2)(b) of the Act to obtain an early
2 release of the great majority of their escrow
3 deposit. This frustrates the purposes for which
4 the Act was passed as stated in the Idaho Code
5 39-7801. Can we have a copy of this for -- the
6 purposes, end of quote.

7 MR. FELDMAN: Mr. President, I believe
8 that that is in the record. I can get the tab
9 number for you.

10 PRESIDENT NARIMAN: Oh, yeah, just give
11 me the tab number if you don't mind.

12 MR. FELDMAN: Okay.

13 PRESIDENT NARIMAN: Thank you so much.
14 Because I want to know what, whether,
15 where are the purposes of this Act stated in the
16 Idaho court.

17 MR. FELDMAN: Okay. Thank you.

18 PRESIDENT NARIMAN: Right. Now what
19 else?

20 MS. CATE: Mr. Chairman, if I may just
21 try to sort of clarify again with respect to the
22 five states that you mentioned. Those are states

1 the statement of purpose this morning.

2 MR. FELDMAN: Yes.

3 PRESIDENT NARIMAN: (Off microphone)
4 There are two numbers. Will you just have a look?
5 Mr. DeLange forwarded it to you and you handed it
6 to me.

7 MR. FELDMAN: Yes.

8 PRESIDENT NARIMAN: Have a look at the
9 statement of purpose. RS-13109. This is with
10 regard to the Allocable Share Amendment?

11 MR. FELDMAN: Yes.

12 PRESIDENT NARIMAN: Am I right?

13 MR. FELDMAN: Yes.

14 (Discussion off microphone.)

15 PRESIDENT NARIMAN: What year?

16 MR. FELDMAN: We're checking. I

17 believe it's 2004 but we need to check.

18 PRESIDENT NARIMAN: Yeah, and secondly,
19 the third sentence said -- let me read the second
20 sentence: Some tobacco product manufacturers, not
21 parties to the Master Settlement Agreement, have
22 begun utilizing present language in Idaho Court

1 that Claimants are selling via Tobaccoville
2 off-Reservation. There are no on-Reservation
3 sales.

4 PRESIDENT NARIMAN: Right.

5 MS. CATE: Okay.

6 MR. FELDMAN: Mr. President, we just
7 confirmed that the two statements of purpose that
8 we've distributed, those are from 2003.

9 PRESIDENT NARIMAN: 2003. Both of
10 them?

11 MR. FELDMAN: Yes.

12 PRESIDENT NARIMAN: And I would like to
13 have that Idaho Code. Which year 39701 -- 7801.

14 MR. FELDMAN: Yes, we will provide
15 that.

16 (Discussion off microphone.)

17 MR. FELDMAN: Yes.

18 MR. VIOLI: Just to note for the
19 record, of the five original states, there was
20 sales on-Reservation in Oklahoma. It's not just
21 an off-Reservation state. Oklahoma, there was
22 on-Res -- in fact, that's what the Muskogee Creek

1 litigation that was recently filed about two --
 2 there continued to be on-Reservation sales.
 3 MR. KOVAR: Mr. Violi, I don't think
 4 that's one of the states that the president asked
 5 about. I think he asked about the five
 6 off-Reservation states.
 7 MR. VIOLI: Yeah. Oklahoma is one of
 8 the five off-Reservation states, too. That's the
 9 only state where there's -- that's the only state
 10 where there's both on and off-Reservation sales.
 11 MS. CATE: And Oklahoma, as I stated,
 12 is the state that -- with regard to state excise
 13 taxes they are units sold is our understanding.
 14 PRESIDENT NARIMAN: They are what?
 15 MS. CATE: Units sold.
 16 PRESIDENT NARIMAN: Yes. Okay, yes,
 17 Mr. Kovar.
 18 MR. KOVAR: Mr. President, Members of
 19 the Tribunal, I would like to now explain why the
 20 Claimants could not have had -- we're going to
 21 come back to expectations under 1110 -- how they
 22 could not have had an expectation that their

1 territories and countries of the two parties on
 2 the continent of America, and to navigate all the
 3 lakes, rivers and waters thereof and freely to
 4 carry on trade and commerce with each other.
 5 This provision, which is known as the
 6 Free Passage Provision, originally entitled all
 7 U.S. citizens and all British subjects as well as
 8 North American Indians, called Indians at both
 9 sides of the border at that time, to cross the
 10 border in either direction without hindrance. As
 11 a practical matter, the free passage right for
 12 non-Indians has been in force for decades, if not
 13 longer. I'm sorry. As a practical matter, the
 14 free passage right for non-Indians has not been in
 15 force for many decades, if not longer.
 16 By contrast for Indians, the free passage
 17 right is still in force and Indians today travel
 18 freely back and forth across the border between
 19 the United States and Canada. However -- and this
 20 is the important point -- contrary to Professor
 21 Clinton's opinion, the free passage provision of
 22 Article 3 is not the relevant one in this case.

1 tobacco sales either on-Reservation or
 2 off-Reservation would be free from regulation
 3 based on Article 3 of the Jay Treaty, 1794 Jay
 4 Treaty.
 5 MS. CATE: Can we turn the mike up?
 6 MR. KOVAR: It's not high enough.
 7 The Jay Treaty was concluded to resolve
 8 numerous trade and boundary disputes that had
 9 arisen in the years following the American War of
 10 Independence. It never, even at its inception,
 11 gave North American Natives a right to transport
 12 commercial goods on a large scale across the
 13 border without regulation by the British and later
 14 the Canadian or the U.S. Governments.
 15 Article 3 of the Jay Treaty contains two
 16 essential provisions. It provides first -- and
 17 I'll read from it: It is agreed that it shall at
 18 all times be free to his Majesty's subjects and to
 19 the citizens of the United States and also to the
 20 Indians dwelling on either side of the said
 21 boundary line freely to pass and re-pass by land
 22 or inland navigation into the respective

1 Article 3 also specifically addresses the issue of
 2 duties, and it is that provision which is relevant
 3 to Claimants' import-export business.
 4 Thus -- and let's continue with Article
 5 3 -- it provides, second -- and I'll continue to
 6 read -- no duty of entry shall ever be levied by
 7 either party on peltries -- that is animal skin
 8 pelt -- animal skins, beaver pelts basically.
 9 No duty of entry shall ever be levied by
 10 either party on peltries brought by land or inland
 11 navigation into the said territories respectively
 12 nor shall the Indians passing or repassing with
 13 their own proper goods and effects of whatever
 14 nature pay for the same any impost or duty
 15 whatsoever. But goods and bales or other large
 16 packages unusual among Indians shall not be
 17 considered as goods belonging bona fide to
 18 Indians. This provision, known as the duty
 19 exemption provision of Article 3, exempted
 20 everyone, Indian or non-Indian, from paying duties
 21 when bringing pelts across the border. Obviously,
 22 that was a very important thing at the time, but

1903

1 it also entitled Indians specifically to bring,
2 quote, their own proper goods and effects unquote,
3 across the border without paying taxes -- which
4 was called imposts there -- taxes or duties.
5 Regardless of what is meant by the limitation on
6 the duty exemption to an Indian's proper goods and
7 effects, the Treaty drafters further limited the
8 duty exemption by explicitly providing that,
9 quote, goods and bales or other large packages
10 unusual among Indians shall not be considered as
11 goods belonging bona fide to Indians. Thus, the
12 Treaty drafters clearly provided that large
13 quantities of goods would not be entitled to the
14 duty exemption under the Treaty.

15 Yes?

16 ARBITRATOR ANAYA: What if they had a
17 lot of pelts?

18 MR. KOVAR: Pelts were completely
19 exempted for all non-Indian or Indian --

20 ARBITRATOR ANAYA: So even if they were
21 in large quantities and baled up if that's what it
22 means?

1905

1 large packages" so that it's other large packages
2 which are unusual among Indians. So, if there are
3 large packages are usual among Indians --

4 MR. KOVAR: Well the --

5 ARBITRATOR ANAYA: -- that are
6 permitted.

7 MR. KOVAR: The provision talks about
8 goods, so goods and bales or other large package
9 unusual among Indians shall not be considered as
10 goods belonging bona fide to Indians. So I think
11 the point is it's not the good or the type of
12 good, whether it's a traditional good or some
13 other good, if it's in a large package or a bale
14 -- the package baling has to be unusual among
15 Indians.

16 ARBITRATOR ANAYA: Right.

17 MR. KOVAR: That right.

18 ARBITRATOR ANAYA: So, if it is usual
19 among Indians, then it's not subject to --

20 MR. KOVAR: Well, if it's a bale it's
21 not, I think, under that provision. If it's in a
22 bale that's unusual.

1904

1 MR. KOVAR: Yes. It did not matter
2 what those goods were apart from peltries which
3 had a special provision. But as far as all other
4 goods carried by Indians, because Indians had a
5 special exemption for their own personal goods and
6 effects, but you have to go beyond that to look at
7 the next provision on large packages. Whatever
8 they were carrying in large packages or bales, it
9 didn't matter what the goods were apart from
10 peltries, only that they will were in bales or
11 other large packages unusual among Indians.

12 ARBITRATOR ANAYA: But isn't the other
13 large packages qualified by the phrase "unusual
14 among Indians"? So if it were usual among
15 Indians, it could be in a large package.

16 MR. KOVAR: If it was in a large
17 package, the Treaty specifically provides that it
18 would not qualify as a -- well it says, Professor
19 Anaya, that --

20 ARBITRATOR ANAYA: I can read it but my
21 question is as matter of construction, doesn't
22 "unusual among Indians" qualify the words "other

1906

1 PRESIDENT NARIMAN: What's a bale?

2 MR. KOVAR: A bale would probably be a
3 big wicker basket.

4 ARBITRATOR ANAYA: What if it's in a
5 truck?

6 MR. KOVAR: Well, they didn't have
7 trucks then. But if they did have trucks --

8 ARBITRATOR ANAYA: Does this just apply
9 to them? I mean, it still applies, doesn't it,
10 Article 3? Are you saying Article 3 is
11 fabricated?

12 MR. KOVAR: This particular provision
13 is no longer in force, yes, and I'm going to get
14 to that.

15 ARBITRATOR ANAYA: Okay. But let's say
16 it were because I mean, then I don't understand --

17 MR. KOVAR: If it were, what we have
18 here is a situation where they're manufacturing
19 millions of cigarettes in a modern plant.

20 ARBITRATOR ANAYA: Well, why isn't that
21 usual among Indians?

22 MR. KOVAR: Well, in 1794 --

1 ARBITRATOR ANAYA: No. Today. If this
2 were in force today. You can't apply treaties
3 like -- you're not going to find NAFTA 50 years by
4 virtue of simply the technology available today I
5 hope. I mean, you know, there are going to be all
6 kinds of new questions.

7 MR. KOVAR: Well, I think if one were
8 to take that interpretation, you could almost say
9 anything would be usual because an Indian can be
10 in charge of any business. They can manufacture
11 anything. That would be -- why wouldn't they.
12 That would be usual.

13 ARBITRATOR ANAYA: What's wrong with
14 that?

15 MR. KOVAR: Because it's inconsistent
16 with the Treaty. Because the Treaty clearly --
17 the --

18 ARBITRATOR ANAYA: Usual among Indians.

19 MR. KOVAR: But the Treaty was trying
20 to get at the point that Indians didn't bring
21 commercial quantities of goods across the border.
22 And I think that as we --

1 hasn't been in force for some time. And so again,
2 even if one were to say that that was arguable,
3 even though we well present why we think it's not
4 arguable, it still comes down to a question of
5 expectations, and Professor Clinton would provide
6 that anybody reading the Jay Treaty would know
7 that it's clear that they could bring as many
8 cigarettes as they want across the border, and our
9 point is that anyone doing due diligence would
10 actually reach most likely the opposite
11 conclusion, that in fact it's never been
12 interpreted that way and it's not in force.

13 ARBITRATOR ANAYA: Just to the previous
14 point you made, you said that Article 3 applies
15 and not the free passage provision.

16 MR. KOVAR: Yes. The free passage
17 provision does still -- is still in force under
18 the Treaty but not the duty exemption.

19 ARBITRATOR ANAYA: Okay. I'm sorry, I
20 misspoke a little bit. I understood you to say
21 that the relevant provision here is --

22 MR. KOVAR: The duty exemption, yes.

1 ARBITRATOR ANAYA: Was it?

2 MR. KOVAR: Yes. And I think as we --

3 ARBITRATOR ANAYA: -- Professor Clinton
4 -- I mean, I'm not saying I agree or we should
5 agree but I -- there seems to be a different view
6 of that and if you're going to assert that, then
7 we need to have something more than just a -- you
8 know, a general assertion.

9 MR. KOVAR: Well, in our view this
10 language is clear. Professor Clinton draws on
11 other sources to say that it's not, but in our
12 view it's clear.

13 But even if it isn't, all of the case law since
14 has clearly stated that you look at how big the
15 package is, and I'll go through some of that, and
16 has said furthermore that if it's commercial
17 quantities, it's not covered by the duty
18 exemption. But even so, and we'll go through all
19 of that and we'll look at cases on the Canadian
20 side, we'll look at cases on the U.S. side, even
21 when you go -- if you get beyond that, you'll that
22 see this provision is no longer in force. It

1 ARBITRATOR ANAYA: -- which is no
2 longer in force but that the free passage
3 provision isn't relevant here --

4 MR. KOVAR: Yes.

5 ARBITRATOR ANAYA: -- wouldn't (ph)
6 provide the kind of protection that the Claimant
7 is seeking.

8 MR. KOVAR: What the free passage
9 provision provides is free passage and in fact
10 Indians today on both sides of the border still
11 enjoy the benefits of that.

12 ARBITRATOR ANAYA: Why couldn't that be
13 understood to include free passage for trade where
14 this one speaks specifically to duty?

15 MR. KOVAR: Well, it was never
16 interpreted as a free trade provision. It was
17 interpreted as a free passage provision and in
18 fact --

19 ARBITRATOR ANAYA: Professor Clinton
20 doesn't interpret it that way.

21 MR. KOVAR: Well, Professor Clinton
22 takes a different view and we think that's

1 incorrect.

2 PRESIDENT NARIMAN: (Off microphone) --

3 Relying on the last part: Freely to carry on

4 trade and commerce.

5 MR. KOVAR: Yes. It does not say carry

6 on free trade. It says freely to carry on trade,

7 and it's never been interpreted as a free trade

8 provision.

9 ARBITRATOR ANAYA: But when you say

10 it's never been interpreted, I guess you mean by a

11 court.

12 MR. KOVAR: That's right. It's not

13 been interpreted by the laws of Canada and the

14 United States or by the courts of Canada and the

15 United States. I can't say that there aren't

16 people out there who may have interpreted it that

17 way.

18 ARBITRATOR ANAYA: But, I mean, but

19 you're being very dismissive of Professor Clinton

20 when just now we heard a whole in a half hour just

21 solely based on an expert, and so we can't just

22 get, you know, try to some of the underlying

1 interpreted by the courts and by the legislatures

2 and by the State Department is different, and in

3 fact that it's no long -- this particular

4 provision, the duty exemption, is no longer in

5 force.

6 PRESIDENT NARIMAN: Was the Jay Treaty

7 in any way part of the motivation for NAFTA?

8 MR. KOVAR: No.

9 PRESIDENT NARIMAN: Not at all.

10 MR. KOVAR: No.

11 PRESIDENT NARIMAN: I know, but was it

12 part of the historical in background in which

13 NAFTA was concluded?

14 MR. KOVAR: No. I don't think so.

15 PRESIDENT NARIMAN: I just wondered.

16 Thank you.

17 MR. KOVAR: So, as I said, and this is

18 our position, we believe on its face that Article

19 3 doesn't provide a reasonable basis to support an

20 expectation that a modern cigarette manufacturer

21 located on Canadian's First Nations land could

22 transport truly billions of cigarettes worth

1 arguments here --

2 MR. KOVAR: And on this point we

3 disagree with Professor Clinton.

4 ARBITRATOR ANAYA: I know. I

5 understand that but we'll present it with -- our

6 expert, you know, is right and their expert is

7 wrong when I --

8 MR. KOVAR: Right.

9 ARBITRATOR ANAYA: We're not given more

10 than that, and I'm trying to get why is he wrong,

11 why is your person right, you know, well, we don't

12 have to talk about that anymore but --

13 MR. KOVAR: Well, where we're starting

14 is with the text of the Treaty.

15 ARBITRATOR ANAYA: Okay.

16 MR. KOVAR: And we think a fair reading

17 of the actual language of the Treaty would lead

18 you to the understanding that the duty exemption

19 is what applies here and that anything being

20 brought in large packages on a commercial quantity

21 is not covered by the duty exemption, and then we

22 will get to the point that how this has been

1 millions of dollars, packaged in modern boxes,

2 carried on pallets when in fact we saw pictures of

3 those in the video of Mr. Montour's company

4 brought in motorized trucks without any

5 regulation. Because remember the Claimants are

6 saying this provision says you can't regulate us.

7 We're saying it just on its face it doesn't say

8 that and it's never been interpreted that way by

9 the legal authorities in both countries.

10 Article 3 expressly applies only to

11 personal goods and not to goods in commercial

12 quantities and packages. And indeed all courts

13 that have considered the scope of the duty

14 exemption have interpreted the restrictive clause

15 in this manner.

16 Let me give you an example of the case

17 law.

18 PRESIDENT NARIMAN: (Off microphone.)

19 MR. KOVAR: You didn't get it.

20 Let me start with the case law if I may,

21 and since Claimants come from Canada, we'll start

22 with the case law in Canada. In 1993, the Ontario

1915

1 Court of Appeal in a case called Regina v. Vincent
 2 rejected an assertion from Ms. Vincent, who is a
 3 Canadian Huron First Nation member, that she had
 4 -- and this is what the Court said that she
 5 alleged -- that she had a historic right which
 6 allowed her to import into Canada from the United
 7 States any commercial merchandise free of duty and
 8 of any other form of taxation to sell such
 9 merchandise in Canada. That was her allegation.
 10 The Court held squarely that under Article 3 of
 11 the Jay Treaty, the words from the Treaty that we
 12 saw "their own proper goods and effects of
 13 whatever nature" refer to personal goods which
 14 belong to what they in the case called
 15 "aboriginals" for their use or consumption but
 16 does not include commercial goods which are
 17 subject to duty. The Court in this case, Ontario
 18 Court of Appeal, was clear that Article 3 of the
 19 Jay Treaty did not permit Ms. Vincent, who is an
 20 Indian member of the Treaty clearly, to import
 21 seven large cardboard boxes of manufactured
 22 tobacco products from the United States into

1917

1 was trying to bring in. And in examining Article
 2 3 duty exemption, the trial division opined that
 3 the exemption, quote, permitted Indians to cross
 4 the border without paying duty on their personal
 5 possessions but commercial goods are goods in
 6 quantity for resale -- and then they quote the
 7 Treaty again -- goods and bales or other large
 8 package unusual among Indians did not qualify as
 9 their personal possessions and were therefore not
 10 exempt from duty.

11 On appeal, the Ottawa Federal Court of
 12 Appeal agreed with the trial division noting that
 13 the restrictive clause in Article 3, and I quote
 14 from the Court of Appeals decision, indicates that
 15 goods transported in large quantities or
 16 quantities larger than what usually corresponds to
 17 personal and community belongings and effects
 18 cannot be reasonably considered as, quote, only
 19 proper goods and effects unquote, exempt from
 20 taxation. They are considered goods for trade and
 21 therefore subject to customs duties.

22 That's in two cases rendered just a few

1916

1 Canada without paying a duty. So it's a much
 2 smaller amount than what we have here but similar
 3 nature of good. The Court found, and I quote
 4 again from the Court, the opinion, quote, In this
 5 case, the tobacco imported by the Appellant in
 6 seven large cardboard boxes could not be
 7 considered exempt from duty because the tobacco
 8 was, quote, goods and bales or other large
 9 packages unusual among Indians, unquote.
 10 Similarly, and this will be my second
 11 case from the Canadian courts, the trial division
 12 of the Federal Court of Canada in Ottawa in
 13 Mitchell v. Ministry of National Revenue
 14 considered testimony from various historians
 15 regarding the meaning of Article 3's restrictive
 16 clause and concluded that commercial goods are
 17 goods in quantity for resale were excluded from
 18 the duty exemption by its terms. In that case,
 19 Mr. Mitchell, who is a Canadian Mohawk First
 20 Nation member, claimed to be exempt from paying
 21 duty on various goods for personal, communal and
 22 commercial use. He had a variety of goods that he

1918

1 short years before Claimant began selling
 2 cigarettes in the United States. Canadian courts
 3 clearly stated that the duty exemption for
 4 Canadian First Nations members' goods in Article 3
 5 of the Jay Treaty never conferred upon those North
 6 American Indians the right to import commercial
 7 good across the border without payment of duty or
 8 tax.

9 PRESIDENT NARIMAN: There are no
 10 17:20:47 10 contrary cases.

11 MR. KOVAR: Not that I'm aware.
 12 Furthermore, contrary to the interpretation
 13 offered by Claimants' expert Professor Clinton the
 14 Ontario Court of Appeals found specifically that
 15 the duty exemption does not apply to any products
 16 imported by Indians in bulk or on a commercial
 17 scale, even products like tobacco, which have long
 18 been carried by Indians in quantities for personal
 19 and communal use.

20 17:21:12 20 Just as Canadian courts have recognized
 21 this limitation on the Article 3 duty exemption,
 22 I'll now turn to some U.S. cases.

1919

1 In 1977, the U.S. Court of Customs and
 2 Patent Appeals in the case of Adkins V United
 3 States, also plainly recognized that, and I quote
 4 again from the case opinion, "Large packages or
 5 bales of goods were not excluded from the duty
 6 under Article 3.
 7 We've seen then the Article 3 duty
 8 exemption has a clear exemption for goods and
 9 bales and other large packages. We've also seen
 10 17:21:49 that modern courts of appeal in both Canada and
 11 the United States have clearly held that Article 3
 12 does not exempt commercial products transported in
 13 large quantities or quantities larger than what
 14 usually corresponds to personal and community
 15 belongings and effects.
 16 In our view, it's inconceivable based
 17 on the language of the treaty and the existence of
 18 this case law that Claimants could have had any
 19 reasonable expectation that their importation and
 17:22:16 20 distribution of billions of cigarettes in the
 21 United States would be free of any tax, duty or
 22 other state regulation.

1921

1 MR. KOVAR: Yes.
 2 ARBITRATOR ANAYA: Are they paying
 3 duties?
 4 MR. KOVAR: They're paying federal
 5 excise tax. I don't know if they're paying duties
 6 actually.
 7 ARBITRATOR ANAYA: Okay. Well, that
 8 would fairly fall within the construction of this
 9 provision you're fancying, right?
 10 17:23:35 MR. KOVAR: Yes. But remember the
 11 Claimants are claiming that they're free of all
 12 state regulation, and they're saying that the
 13 treaty then gives them that freedom from state
 14 regulation, and the only provision they can point
 15 to is the duty exemption.
 16 ARBITRATOR ANAYA: That's my question,
 17 is that the only provision? What about the
 18 provision on free passage?
 19 MR. KOVAR: Well, in our view and we
 17:23:54 20 looked at it earlier, that's a provision about
 21 passage, it's a not provision about -- it's not a
 22 free trade provision. It's about freely carrying

1920

1 ARBITRATOR ANAYA: All these cases have
 2 to do with payment of duties or taxes that you're
 3 citing?
 4 MR. KOVAR: Yes. And they involved
 5 individuals bringing across goods. So they're not
 6 even large commercial entities, they're just
 7 individuals bringing across --
 8 ARBITRATOR ANAYA: And you're saying we
 9 can extrapolate from that a more general
 10 17:22:44 proposition, there's no exemption for any
 11 regulation by the states?
 12 MR. KOVAR: What we want to illustrate
 13 from this is that when the courts have looked at
 14 this case, modern courts, so if the Claimants had
 15 been doing research prior to entering the U.S.
 16 market and wondering, well, what does the Jay
 17 Treaty hold, what does that mean in terms of our
 18 ability to sell without regulation in the United
 19 States, we think they would have found that the
 17:23:12 20 Jay Treaty probably is not something to rely on.
 21 ARBITRATOR ANAYA: Well, they would
 22 have relied they have to pay duties.

1922

1 on the activities, not carrying on free trade.
 2 That's our position. And again, when you look at
 3 the cases, the cases don't analyze this question
 4 under the free passage provision.
 5 ARBITRATOR ANAYA: But you can conclude
 6 that the cases then say they have to pay duties,
 7 okay, fine, what about original things being
 8 subjected to state regulation?
 9 MR. KOVAR: Well, the cases --
 10 17:24:26 ARBITRATOR ANAYA: Yeah, I mean,
 11 Article 3 talks about the ability to freely carry
 12 on trade and commerce with each other.
 13 MR. KOVAR: Well, we don't have a case,
 14 the facts of this case where you have a
 15 manufacturer shipping large quantities of goods in
 16 and claiming a duty exemption, I grant you that we
 17 don't have that case. All we can do is
 18 extrapolate from the cases that we do have.
 19 ARBITRATOR ANAYA: That's right. What
 17:24:48 20 we're doing here, we're extrapolating, I take it.
 21 MR. KOVAR: That's right.
 22 ARBITRATOR ANAYA: You know how the

1923

1 courts do, they read into treaties and
 2 constitutional provisions prior principles that
 3 are embraced, like our Supreme Court has done with
 4 11th Amendment, prior principle of state
 5 sovereignty.
 6 I mean, is there prior principle
 7 embodied in the Jay Treaty of free trade and this
 8 Article 3 then only speaks to duties. So the
 9 construction would be that, you know, this is sort
 17:25:16 10 of along the lines of what Professor Clinton is
 11 advancing, that Article 3 speaks to duties,
 12 they're paying duties but as to other aspects of
 13 free trade that's protected, that's part of the
 14 inherent or prior rights that were accepted by the
 15 United States and implicit in Canada and implicit
 16 -- or Great Britain, and implicit in the Jay
 17 Treaty.
 18 MR. KOVAR: Well, Professor Anaya, I
 19 guess my response to Professor Clinton would be
 17:25:44 20 that while he makes an argument based on
 21 historical factors, and such things, he doesn't
 22 actually make an argument based on modern case law

1925

1 ARBITRATOR ANAYA: Where does that come
 2 from, which part of the Jay Treaty?
 3 MR. KOVAR: From Article 3. So, in
 4 other words --
 5 ARBITRATOR ANAYA: Free passage for
 6 native Americans?
 7 MR. KOVAR: Free passage for Indians --
 8 ARBITRATOR ANAYA: Comes from?
 9 MR. KOVAR: Is in Article 3, it's part
 17:26:58 10 of the free passage provision. If we go back --
 11 ARBITRATOR ANAYA: Wait, wait, I'm a
 12 little confused. Sorry, this is important.
 13 MR. KOVAR: Yes, it is.
 14 ARBITRATOR ANAYA: Today there is a
 15 practice of allowing free passage by Indians based
 16 on the Jay Treaty.
 17 MR. KOVAR: Well, we'll get to that.
 18 ARBITRATOR ANAYA: Why can't you get to
 19 it now?
 17:27:19 20 MR. KOVAR: Hopefully, I can explain it
 21 to you.
 22 In Canada, this provision is, as I

1924

1 or facts. And --
 2 ARBITRATOR ANAYA: The only case law
 3 that I understand you're presenting has to do with
 4 the duty provision.
 5 MR. KOVAR: That's right.
 6 ARBITRATOR ANAYA: Can you point to any
 7 case on negating such a prior principle that's
 8 implicit within the Jay Treaty?
 9 MR. KOVAR: We've never been able to
 17:26:09 10 find any -- I'm not aware of any case law that
 11 would have interpreted the free passage provision.
 12 Remember, the free passage provision was not
 13 limited to Indians, it applied to everybody.
 14 So under the construction that is being
 15 advanced, then it would have been a free trade
 16 provision for everybody, Indian and non Indian.
 17 It was not limited to Indians.
 18 But what we will get to and point out
 19 is that what's left of that provision of this
 17:26:34 20 entire article, in fact, is only the free passage
 21 back and forth across the border for Indians, that
 22 the rest of the--

1926

1 understand it, applied as a matter of indigenous
 2 rights. It's not, the Jay Treaty does not apply
 3 directly in Canada, there's no implementing
 4 legislation for the Jay Treaty. In fact, the
 5 courts have found other bases for the free passage
 6 right for Indians.
 7 In the United States, our immigration
 8 law incorporates a free passage provision for
 9 Indians and it has since 1928. It's been
 17:28:00 10 codified.
 11 ARBITRATOR ANAYA: It's not Jay Treaty
 12 based, you're saying, either for Canada or the
 13 United States, is that what you're saying?
 14 MR. KOVAR: What we will get to is the
 15 United States view is that the U.S. Department of
 16 State's view and we've published this in treaties
 17 in force since the 1970s, is that the free passage
 18 right in Article 3, but nothing else in Article 3,
 19 remains in force. Just the free passage right.
 17:28:25 20 But our courts have actually held, have
 21 gone beyond that and have said it's not in force
 22 at all. Article 3 is not in force. The Akin's

1927

1 case I just cited from the Court of Customs and
2 Pattern Appeal, they found that Article 3 is no
3 longer in force at all.
4 ARBITRATOR ANAYA: At all?
5 MR. KOVAR: Right. So they go even
6 further than the State Department does.
7 Our view under international law is
8 that most of the Jay Treaty is no longer in force,
9 but the -- just the free passage provision for
10 17:29:00 Indians remains in force between the United States
11 and Canada and also Articles 9 and 10 which are
12 not relevant.
13 ARBITRATOR ANAYA: That's the position
14 of the State Department, as a matter of right
15 arising from the Jay Treaty?
16 MR. KOVAR: Our view is that between
17 the United States and Canada, that is a treaty
18 obligation.
19 ARBITRATOR ANAYA: Okay. That's the --
10 17:29:24 MR. KOVAR: Article 3.
21 ARBITRATOR ANAYA: Free passage
22 provision?

1929

1 ARBITRATOR ANAYA: I understand that.
2 The view of the U.S. would be that only free
3 passage for the person and whatever personal
4 effects protected by the Jay Treaty and not to
5 carry on, free to carry on trade and commerce as
6 stated --
7 MR. KOVAR: I don't know that I would
8 say personal effects, then you would have a
9 question of what your normal, how many bottles of
10 17:30:31 wine you're allowed to cross the border with and
11 so on, how many dollars and instruments of
12 whatever, but the normal immigration laws. But
13 for purposes of immigration under -- since 1928
14 the immigration law has been clear that Indians
15 have the right to pass and repass the border.
16 And when we get to it, we'll see the
17 Supreme Court actually in 1929 held that non
18 Indians don't have that right. The U.S. Supreme
19 Court held that in 1929 because the immigration
10 17:31:04 laws didn't provide that for non Indians.
21 ARBITRATOR CROOK: Couple questions.
22 Adkins versus United States, is this the thing

1928

1 MR. KOVAR: Yes.
2 ARBITRATOR ANAYA: Even though it seems
3 to apply to everybody, Indians and non Indians.
4 MR. KOVAR: Right. Our view is that
5 only the non passage right for Indians remains in
6 force.
7 ARBITRATOR ANAYA: Even though it says
8 it applies to everybody, the U.S. position is that
9 free passage still applies but only as to Indians;
10 17:29:47 is that right?
11 MR. KOVAR: Correct.
12 ARBITRATOR ANAYA: So we can still see
13 a free passage provision applying specifically to
14 Indians in Article 3?
15 MR. KOVAR: Yes, freedom to pass and
16 repass by land or inland navigation.
17 ARBITRATOR ANAYA: And carry on free
18 trade and commerce.
19 MR. KOVAR: I don't know if the free
10 17:30:04 trade and commerce is in force. It's only free
21 passage and we've implemented it in the
22 immigration laws.

1930

1 that ruled that the tariff act of 1899 terminated
2 the free passage of goods provision?
3 MR. KOVAR: It noted that, yes.
4 ARBITRATOR CROOK: Okay.
5 MR. KOVAR: 1897, I believe.
6 ARBITRATOR CROOK: 1897. Okay. But
7 they held that this venerable statute had
8 repealed, at least as a matter of U.S. law, the
9 free passage of goods provision.
10 17:31:37 MR. KOVAR: Yes.
11 ARBITRATOR CROOK: Okay. This gets us
12 to the next question that gets us into the
13 incredible morass of self execution of treaties
14 both as a matter of Canadian and U.S. law.
15 I take it from what you're saying that
16 the United States does not regard the Jay Treaty
17 as self-executing, that it has domestic legal
18 effect only to the extent Congress enacts
19 implementing legislation?
10 17:32:03 MR. KOVAR: I don't know that we opined
21 on that issue. I don't think it's relevant
22 because the State Department has stated clearly

1931

1 that we believe the free passage provision is in
2 effect and the immigration law incorporates that
3 provision. So whether it's self executed or not,
4 Indians coming into the United States including
5 the Claimants are allowed to pass freely.
6 ARBITRATOR CROOK: Do you happen know
7 as a matter of Canadian law the Jay Treaty has
8 domestic legal effect or does it have effect to
9 the extent it's implemented by act of parliament?
17:32:35 10 MR. KOVAR: My understanding and I may
11 not have the date right, but since 1825 there's
12 been no implementing legislation in Canada for the
13 Jay Treaty, that's a long time, 1825.
14 And then in the 1950s in a case called
15 Francis, the Canadian Supreme Court noted that
16 fact and said that the Jay Treaty wasn't
17 implemented domestically in Canada.
18 ARBITRATOR ANAYA: Just so I'm clear,
19 as a matter of international law, apart from the
17:33:07 20 self execution question, but as a matter of
21 international law, the free passage provision for
22 Indians is still in effect, that's the position of

1933

1 ability to work without, you know, going through
2 the normal --
3 MR. KOVAR: In our view, that's all it
4 includes today and that's all that's implemented
5 in our law.
6 ARBITRATOR ANAYA: There must be some
7 reasoning for that because it doesn't say to pass
8 and then go work within the U.S. jurisdiction
9 extraordinarily.
17:34:35 10 MR. KOVAR: Well, it may not be the Jay
11 Treaty that would give you the right to work in
12 the United States.
13 ARBITRATOR ANAYA: I understood you to
14 say that.
15 MR. KOVAR: I don't know if it's the
16 Jay Treaty that gives you that right. I think
17 it's Canadian Indians may have that right. I
18 could be mistaken on that point, but the Jay
19 Treaty itself doesn't provide that right, it just
17:34:57 20 said pass and repass.
21 ARBITRATOR ANAYA: Now you're saying it
22 doesn't give you the right, the right to work?

1932

1 the United States?
2 MR. KOVAR: Yes, it is and we publish
3 that every year officially since the 1970s.
4 ARBITRATOR ANAYA: That was my
5 understanding.
6 So the question then becomes what is
7 the scope of the free passage right protected
8 under the treaty still?
9 MR. KOVAR: Yes.
17:33:37 10 ARBITRATOR ANAYA: Now, am I correct it
11 includes the ability of Canadian Indian people to
12 work in the United States?
13 MR. KOVAR: I don't know the answer to
14 that. I think it does. Yeah.
15 ARBITRATOR ANAYA: So it's not just the
16 ability to cross?
17 MR. KOVAR: That's my understanding.
18 If I'm wrong, we can correct the record tomorrow
19 but I believe that's right.
17:34:04 20 ARBITRATOR ANAYA: So the question is
21 what else does it include, comes to my mind. If
22 it's not just crossing the border and includes the

1934

1 MR. KOVAR: I'm not aware that it does.
2 ARBITRATOR ANAYA: My understanding
3 that was based on the Jay Treaty.
4 MR. KOVAR: I don't know the answer to
5 that. I don't know that it's relevant to the
6 case.
7 ARBITRATOR ANAYA: Let me tell you why
8 I think it's relevant. It is beyond just passage
9 and includes work, it seems like there would be
17:35:18 10 some implication to carry on trade, as well.
11 MR. KOVAR: We're talking about an
12 import/export business that's worth millions and
13 millions of dollars.
14 ARBITRATOR ANAYA: Then, again, it's a
15 matter of scope.
16 MR. KOVAR: If Arthur Montour was
17 saying he was unable to live on the Seneca nation
18 as a Canadian Indian and work, that would be a
19 different case, but that's not the case we have.
17:35:48 20 So where I was in talking about this is
21 I had pointed out modern Courts of Appeal in
22 Canada and the U.S. held, we believe, clearly that

1935

1 Article 3 does not exempt commercial products
2 transported in large quantities larger than what
3 usually corresponds to personal community
4 belongings and effects under the duty exemption.
5 And so we think it's inconceivable that
6 billions of cigarettes in the modern manufacturing
7 facility and a large import/export business would
8 be, would have been exempted under the Jay Treaty,
9 even as it was originally written, even if it was
10 all in force.
11 Nevertheless, for the sake of argument,
12 if there was a plausible basis for asserting that
13 the treaty language supports the interpretation
14 the Claimants propose, we believe that Claimant
15 should have shown that the duty exemption is not
16 in force.
17 In fact, United States has maintained
18 for decades that the only aspect of Article 3 that
19 remains in force is the free passage right for
20 Indians and that the duty exemption along with
21 most of the rest of the treaty is no longer in
22 force. Every year since 1973 -- did you want to

17:36:26

17:36:49

1937

1 note, which we'll go to the next slide and this is
2 what we said starting in 1973 as to what is in
3 force. Only Article 3, so far as it relates to
4 the right of Indians to pass across the border,
5 that's what we say, and Articles 9 and 10 appear
6 to remain in force.
7 PRESIDENT NARIMAN: What does the
8 meaning of appear to remaining in force means?
9 MR. KOVAR: That's what we said, that
10 it appears to remain in force.
11 PRESIDENT NARIMAN: What does that
12 mean? Is it in force or not in force according to
13 the United States?
14 MR. KOVAR: Mr. Chairman, we don't have
15 a -- we never entered into a formal agreement with
16 Canada terminating the treaty. In fact, in our
17 view, most of the treaty has terminated by tacit
18 agreement, unspoken agreement by the actions of
19 both states.
20 PRESIDENT NARIMAN: This is the view of
21 Canada, as well?
22 MR. KOVAR: Well, we don't have Canada

17:38:27

17:38:51

1936

1 ask something?
2 ARBITRATOR CROOK: I'm just wondering,
3 what relevance in the sense this is all terribly
4 abstract because this is NAFTA and, of course,
5 these goods move free of duty anyway.
6 MR. KOVAR: That's right. If the free
7 passage provision were a free trade agreement,
8 then that might have had an impact on whether we
9 would have ever had NAFTA. I mean, that's kind of
10 a rhetorical point.
11 PRESIDENT NARIMAN: That is why I ask
12 you whether there was motivation in NAFTA,
13 drafting NAFTA that there was some historical
14 background of the Jay Treaty?
15 MR. KOVAR: And the answer was no. So
16 every year since 1973, so soon we'll have another
17 treaty in force and it will be 37 years, the U.S.
18 Department of State has formally published our
19 position of treatise in force to the official list
20 of treaties in force.
21 PRESIDENT NARIMAN: This is in force.
22 MR. KOVAR: I will give the explanatory

17:37:24

17:37:57

1938

1 here to ask.
2 PRESIDENT NARIMAN: I'm just asking
3 you.
4 MR. KOVAR: They didn't give their
5 opinion on this issue in their 1128, which they
6 put in on some other legal issues, but their
7 courts have been very clear and that's one of the
8 reasons we wanted to give you their court's
9 opinions.
10 ARBITRATOR CROOK: Has Canada ever
11 protested this note?
12 MR. KOVAR: Not that I'm aware of. In
13 1977 and then in 1977 the note was slightly
14 modified to include reference to the decision of
15 the U.S. Court of Customs and Patent appeals in
16 Adkins that we talked about.
17 Adkins went further than the State
18 Department as we discussed and found that the
19 entirety of Article 3, including the free passage
20 right of Indians, is no longer in force. But
21 either way, for 37 years the U.S. has publicly
22 maintained that the duty exemption itself is no

17:39:13

17:39:41

1939

1 longer in force.
 2 So in conclusion, given the clear terms
 3 of the restrictive clause in Article 3, in our
 4 views, the interpretation of the clause by courts
 5 on both sides of the border and the explanatory
 6 note of the Jay Treaty in force, Claimants
 7 couldn't have had a reasonable or legitimate
 8 expectation that they could manufacture and export
 9 large quantities of Seneca brand cigarettes into
 17:40:17 10 the U.S. without interference by the U.S. federal
 11 or state governments.
 12 At the time that Grand River made its
 13 alleged investment in this case. Furthermore, at
 14 the time Grand River entered into its
 15 manufacturing and licensing agreement with native
 16 tobacco direct in 199, Claimants could certainly
 17 not have had, as Professor Clinton maintains, any
 18 reasonable expectation that they're on-Reservation
 19 and off-Reservation sales would be, quote,
 17:40:41 20 completely free of interference, taxation or
 21 regulation by the states of the United States
 22 based on the same provision of Article 3.

1941

1 MS. CATE: Yes. Thank you.
 2 PRESIDENT NARIMAN: Yes.
 3 MR. FELDMAN: Thank you.
 4 Mr. President, Members of the Tribunal.
 5 I will now address Claimants' alleged expectation
 6 with respect to their off-Reservation claim.
 7 Claimants assert that, quote, NPMs have
 8 regional brands because they have generally never
 9 possessed the substantial resources required to
 17:42:57 10 market and distribute their brands off-reserve
 11 nationally. And that, quote, the MSA and escrow
 12 statutes both recognized this phenomenon and
 13 reenforced it with the allocable share release
 14 mechanism.
 15 Claimants further assert the allocable
 16 share release mechanism constituted in effect,
 17 quote, a promise of annual releases of escrow
 18 payments for companies that restricted their
 19 ambition of maintaining a regional brand.
 17:43:30 20 Based on those assertions, Claimants
 21 allege under the original escrow statutes, they
 22 held expectations of large escrow deposit in

1940

1 I'm happy to answer some additional
 2 questions. Do you have any other?
 3 PRESIDENT NARIMAN: No.
 4 MR. KOVAR: Thank you very much.
 5 PRESIDENT NARIMAN: What's next?
 6 MS. CATE: Mr. Chairman, and Members of
 7 the Tribunal, I believe before there were
 8 questions about the Indian commerce clause. And I
 9 just wanted to point the Tribunal to the Grand
 17:41:18 10 River Enterprises Six Nations versus prior
 11 decision, which was issued by the Second Circuit
 12 in 2005.
 13 And it, basically, said with respect to
 14 Grand River, the imposition of an escrow
 15 requirement for cigarette manufacturing in Canada
 16 does not run afoul of the Indian commerce clause,
 17 and the District Court correctly dismissed this
 18 cause of action. Grand River Enterprises Six
 19 Nations versus Prior, 425 F Third.
 17:41:56 20 PRESIDENT NARIMAN: That's her case?
 21 MS. CATE: F Third and 158, 2005.
 22 PRESIDENT NARIMAN: Second Circuit.

1942

1 perpetuity, as long as they maintained so-called
 2 regional brand.
 3 The assertions you see on the screen
 4 are without foundation. Not only do Claimants
 5 make no attempt to support those assertions, they
 6 also make no attempt to reconcile those assertions
 7 with the core goals of the escrow statutes.
 8 First, by releasing millions of dollars in
 9 deposited funds to so-called regional NPMs,
 17:44:08 10 settling states no longer had adequate funds to
 11 satisfy potential future tobacco-related judgments
 12 against those NPMs.
 13 Indeed, the allocable share loophole
 14 was particularly counter productive in this
 15 respect, given that a greater increase in NPMs
 16 concentration of sales of harmful cigarettes in a
 17 particular state, only led to a greater decrease
 18 in the state's ability to access escrowed funds,
 19 it would be sufficient to satisfy any potential
 17:44:33 20 future tobacco related judgments against the NPM.
 21 Second, the so-called regional NPMs
 22 that obtained large releases from settling states

1 enjoyed large marginal cost advantage over
 2 particular manufacturers, thereby undermining the
 3 goal of the escrow statutes to promote
 4 manufacturers, quote, who determined not to enter
 5 into, unquote, the MSA from using their, quote,
 6 resulting cost advantage to derive large short
 7 term profits in the years before liabilities may
 8 arise.

9 Third, the large releases obtained by
 10 so-called regional NPMs enabled those NPMs to
 11 maintain relatively lower prices for their
 12 cigarettes thereby increasing demand among price
 13 sensitive consumers, including smokers under age
 14 18, to the detriment of public health.

15 Simply put, Claimants allege promise of
 16 large releases to so-called regional NPMs could
 17 not be reconciled with the fundamental goals of
 18 the escrow statutes.

19 In reality, the NPMs that were able to
 20 obtain large releases under the allocable share
 21 mechanism were not acting pursuant to any promise
 22 from the MSA states, but were rather were simply

17:45:13

17:45:39

1 But Claimants, of course, did have a
 2 complaint with the original escrow statutes to the
 3 tune of \$340 million. Because that claim is time
 4 barred, however, Claimants have been forced to
 5 overhaul their claim in an attempt to salvage the
 6 claim under Chapter 11 and the key component of
 7 that overhaul is Claimants' new theory that the
 8 original escrow statutes included a promise of
 9 large releases in perpetuity to so-called regional
 10 NPMs.

11 Claimants' position with respect to the
 12 original escrow statutes have shifted 180 degrees
 13 in this arbitration. And they recognized just how
 14 awkward that reversal is. As Claimants state at
 15 page 502 of the transcript, quote, a time bar
 16 prevents a complaint to be registered that as of
 17 2001 when confronted with these measures, when
 18 driven to make the choice to go into this regional
 19 strategy because of the time bar we could not
 20 complain. And it turns out it's a good thing we
 21 could not complain because it turns out that
 22 things were better than we thought they were.

17:47:28

17:48:02

1 exploiting an unanticipated loophole in that
 2 mechanism.

3 Those NPMs concentrated their sales in
 4 certain states not because they were maintaining a
 5 regional brand, but rather to exploit the loophole
 6 and thereby obtain largest release possible.

7 I would like to say a few more words
 8 about Claimants' assertion that that original
 9 escrow statutes included a promise of annual
 10 releases with regional NPMs. Claimants did not
 11 allege such a promise when they submitted their
 12 claim to arbitration in 2004. To the contrary,
 13 Claimants allege that the original escrow
 14 statutes, that is, the statutes containing the
 15 allocable share release provision had caused them
 16 not less than \$340 million in damages.

17 But today, Claimants assert that it
 18 wasn't until the allocable share release mechanism
 19 was removed from the escrow statutes, quote, that
 20 they had a problem, that they had a complaint.
 21 You will find that representation at page 100 of
 22 the transcript.

17:46:09

17:46:42

1 That actually they were able to compete quite well
 2 with that allocable share. Admittedly, the
 3 Claimants when they first launched this case, were
 4 not very sure of that, unquote.

5 Thus, in 2004 because Claimants, quote,
 6 were not very sure how they would fare under the
 7 original escrow statutes, they launched a \$340
 8 million claim against the United States.

9 Because that claim was found to be time
 10 barred, however, Claimants now represent to the
 11 Tribunal that those very measures, rather than
 12 destroying their investment in the United States,
 13 in fact, contained an unmistakable promise of
 14 large releases to regional NPMs in perpetuity and,
 15 indeed, the promise was so clear that the MSA
 16 states should have been estopped from amending the
 17 terms of the release.

18 Under Claimants original version of the
 19 facts as of 2004 the original escrow statutes
 20 appeared to be destroying their investment but
 21 somehow today with nearly ten years of hindsight
 22 an alleged promise of large releases in perpetuity

17:48:41

17:49:18

1947

1 under those measures suddenly has become obvious
 2 and unmistakable.
 3 These are the contortions Claimants
 4 must go through to avoid the time bar restrictions
 5 in this case. And so to address Mr. Crook's
 6 question from last week concerning the effect of
 7 the Tribunal's ruling on time bar, in paragraph
 8 103 of its decision on jurisdiction, the Claimants
 9 amended claim is not time barred. But to avoid
 17:49:58 10 the Tribunal's time bar ruling, the Claimants have
 11 been forced to radically overhaul their entire
 12 theory of the case, which simply undermines the
 13 credibility that the original escrow statutes
 14 contained a clear promise of large releases in
 15 perpetuity for regional NPMs.
 16 Mr. Crook asked last week whether there
 17 was any contemporaneous evidence supporting our
 18 position that the large releases obtained by
 19 certain NPMs under the original escrow statutes
 17:50:29 20 were, in fact, the result of an unforeseen
 21 loophole. There is substantial evidence
 22 contemporaneous at least with the Allocable Share

1949

1 addressing among other measures the proposed
 2 allocable share amendment for Nevada. Those
 3 amendments include amendments by Michael Hering
 4 for NAAG in support of the bill who observed the
 5 amendment, quote, is meant to deal with a loophole
 6 in the statute as it was drafted. And the problem
 7 with the existing release is it was, quote, not
 8 artfully drafted.
 9 We also heard in witness testimony last
 17:52:02 10 week from Brett DeLange that large releases of
 11 escrow deposits under the original Idaho escrow
 12 statute was, quote, not what we imagined and,
 13 quite frankly, as much as anyone, I'm the one who
 14 took the blame, I'm the one who didn't realize the
 15 effects when I was advising my Attorney General of
 16 the original legislation, that that's what would
 17 happen.
 18 It also must be remembered that this
 19 Tribunal in paragraph 16 of its decision on
 17:52:29 20 jurisdiction expressly found that the original
 21 escrow statutes contained what the states viewed
 22 as a loophole that required correction through

1948

1 Amendments in the legislative history of those
 2 measures.
 3 For example, at a public hearing of
 4 Nebraska's proposed Allocable Share Amendment, a
 5 representative from the Nebraska Attorney
 6 General's office, Lynn Fritz, stated that, quote,
 7 an unintended consequence or loophole in the way
 8 the allocable share provision is written is that
 9 if a non participating manufacturer sells in a few
 17:51:03 10 states that has small allocable shares, like
 11 Nebraska, then it gets a large part of its escrow
 12 deposit back, it gets the release from escrow.
 13 This was an unintended consequence of the way the
 14 escrow statute was written.
 15 The current language of the release
 16 provision creates this loophole that some NPMs are
 17 using to get almost all of their escrow back just
 18 immediately after they deposit it. Excerpts from
 19 that hearing at found at Exhibit 25 to Claimants'
 17:51:30 20 reply brief.
 21 In addition, Exhibit 181 to our counter
 22 memorial includes minutes from a public hearing

1950

1 adoption of the Allocable Share Amendments.
 2 Indeed, as stated in the American Law
 3 Report on the MSA in its related measures, the
 4 original escrow statutes were adopted on the
 5 understanding that tobacco manufacturers operated
 6 on a national basis. Calculations, quote,
 7 calculations under the original escrow statutes
 8 were based on an assumption that a non
 9 participating manufacturer sold cigarettes
 17:53:05 10 nationally. When this was the case the statute
 11 functioned as intended, but when tobacco
 12 manufacturers restricted their sales to a limited
 13 number of states, quote, the original escrow
 14 statutes allowed the NPM to obtain a refund that
 15 was much larger than intended.
 16 Thus, the promise alleged by Claimant
 17 is, in fact, an oversight. The state legislatures
 18 that adopted the original escrow statutes didn't
 19 anticipate that some tobacco manufacturers like
 17:53:33 20 Grand River would exploit the allocable share
 21 provision by concentrating their sales in one or
 22 only a few of the MSA states.

1951

1 As I discuss in our overview of the MSA
 2 regime such exploitation resulted in the release
 3 of escrow deposits back to NPMs on a large scale.
 4 As stated in the declaration of Michael Hering,
 5 quote, approximately 137 million of these deposits
 6 or 58 percent of the original amount deposited was
 7 released back to NPMs through operation of the
 8 allocable share release mechanism. No promise of
 9 multimillion dollar releases in perpetuity was
 10 ever made to so-called regional NPMs.
 11 To the contrary, the large releases
 12 obtained by NPMs exploiting the allocable share
 13 release provision forced MSA states to act through
 14 adoption of the Allocable Share Amendments to
 15 ensure that the fundamental goals of the escrow
 16 statutes would continue to be met.
 17 As stated by Professor Gruber in his
 18 expert rebuttal report, quote, with the allocable
 19 share loophole in place NPMs were able to keep
 20 prices low and, therefore, induce more smoking
 21 undercutting the health goals of the MSA.
 22 The Allocable Share Amendments were

1953

1 quote, significant enough for public health
 2 purposes.
 3 Thus as a result of NPM exploitation of
 4 the allocable share loophole, a significant share
 5 of cigarettes were no longer priced at a level
 6 that reflected their social cost and were
 7 manufactured by companies operating outside of the
 8 extensive marketing and lobbying restrictions of
 9 the MSA.
 10 As I discussed in our overview of the
 11 MSA regime, the Allocable Share Amendments
 12 corrected the loophole in the allocable share
 13 mechanism. Under the amended release provision,
 14 an NPM can no longer obtain large releases by
 15 concentrating their sales in only a few states and
 16 thus the core goals of the Escrow Statutes have
 17 been restored.
 18 By contrast, Claimants' allegations of
 19 a promise of large releases in perpetuity by
 20 so-called regional NPMs cannot be core goals of
 21 the escrow statutes. First, large releases of
 22 escrow deposits to NPMs deprived settling states

1952

1 critical measures to protect the public health by
 2 ensuring that all cigarettes were at a higher
 3 level that reflect their social cost. By
 4 exploiting the allocable share loophole, NPMs were
 5 able to keep prices low and experience dramatic
 6 increase in NPM market share in the United States
 7 which rose from .4 percent in 1997 to 8.1 percent
 8 in 2003.
 9 Last week Claimants went to
 10 considerable effort attempting to establish that
 11 such gains in market share were entirely
 12 attributable to, in their words, quote, the
 13 decision by the OPMS to inflate per pack profit
 14 margins at the cost of losing market share. But
 15 as Professor Gruber testified last week the
 16 marginal cost advantage enjoyed by NPMs under the
 17 allocable share provision was a key factor in the
 18 market share gains of the NPMs.
 19 Even if only some of the gains in the
 20 NPMs market share was attributable to the MSA such
 21 gains would still mean, in the words of Professor
 22 Gruber, a lot more smoking, and thus would be,

1954

1 of adequate funds to satisfy potential future
 2 tobacco related judgments against those NPMs.
 3 Second, NPMs that obtain large releases from
 4 settling states enjoy a large marginal cost
 5 advantage over participating manufacturers which
 6 could then be used by such NPMs to derive large
 7 short term profits in the years before liability
 8 may arise.
 9 Third, NPMs obtaining large releases
 10 were able to maintain relatively lower prices for
 11 their cigarettes, thereby increasing demand among
 12 price sensitive consumers, including smokers under
 13 the age of eighteen, to the detriment of public
 14 health. Given the large releases obtained by NPMs
 15 were undermining the core policy goals of the
 16 escrow statutes, the correction of that loophole
 17 by MSA states through adoption of the Allocable
 18 Share Amendments plainly was foreseeable.
 19 Claimants simply could not have had any reasonable
 20 expectation that large releases of Grand River's
 21 escrow payments would remain available in
 22 perpetuity. Claimants allege off-Reservation

1955

1 expectations, therefore, are meritless.
 2 I would be happy to take any questions
 3 from the Tribunal.
 4 PRESIDENT NARIMAN: Nothing. Anything
 5 else? Who's next?
 6 MR. KOVAR: Next, Mr. President, if we
 7 could invite you to invite Ms. Morris to address
 8 the economic impact part of the expropriation
 9 analysis.
 10 17:58:20 PRESIDENT NARIMAN: I wanted to ask you
 11 one thing. The USA filed a federal suit in New
 12 York.
 13 MR. FELDMAN: Yes.
 14 PRESIDENT NARIMAN: You are aware of
 15 it. Is there a judgment in that suit?
 16 MR. FELDMAN: This is the RICO action?
 17 PRESIDENT NARIMAN: Yes.
 18 MR. FELDMAN: Ms. Morris will address
 19 the RICO action.
 20 17:58:48 PRESIDENT NARIMAN: Where all the
 21 states are impleaded and tobacco companies are
 22 impleaded. I'm talking of New York.

1957

1 There's a lengthy brief from the United States on
 2 the record.
 3 PRESIDENT NARIMAN: I want that brief.
 4 MR. FELDMAN: There may be additional
 5 briefs, as well.
 6 PRESIDENT NARIMAN: I don't know what
 7 you call a brief. We call it a complaint that is
 8 you go to court with a suit and the complaint.
 9 MR. FELDMAN: There's the initial
 10 17:59:53 complaint.
 11 PRESIDENT NARIMAN: Initial complaint,
 12 yes. Okay.
 13 MR. WEILER: Earlier when you said New
 14 York, you said with the states and the companies.
 15 PRESIDENT NARIMAN: Companies, sorry.
 16 MR. WEILER: If you're talking about
 17 that, that would be the significant factor
 18 arbitration.
 19 PRESIDENT NARIMAN: No, no, no. The
 20 18:00:09 litigation, I'm talking of the court case, the
 21 litigation. Is there a litigation? Is there a
 22 case filed by the United States Government?

1956

1 MR. FELDMAN: Oh, the New York
 2 litigation.
 3 PRESIDENT NARIMAN: New York
 4 litigation.
 5 MR. FELDMAN: There are two. There's
 6 the Grand River action in New York.
 7 PRESIDENT NARIMAN: I'm not talking of
 8 Grand River. I'm talking of the United States,
 9 federal government's action, your action.
 10 17:59:09 MR. FELDMAN: The RICO action.
 11 PRESIDENT NARIMAN: I don't know about
 12 RICO, your action. It has come on record from
 13 time to time. I want the pleadings in that. I
 14 want your complaint, you call it a --
 15 MR. FELDMAN: Briefs in the case.
 16 PRESIDENT NARIMAN: That's a statement
 17 of the case. Have you got that?
 18 MR. FELDMAN: Some of them are in the
 19 record.
 20 17:59:32 PRESIDENT NARIMAN: Not some. There is
 21 only one suit that you filed.
 22 MR. FELDMAN: From that case, yes.

1958

1 MR. FELDMAN: Against certain tobacco
 2 companies, yes.
 3 PRESIDENT NARIMAN: Are there some
 4 other parties against whom no relief was claimed
 5 we're told.
 6 MR. FELDMAN: Ms. Morris, can address
 7 the case.
 8 MS. MORRIS: My understanding is that
 9 all of the parties, all of the defendants are
 10 18:00:39 still involved but that the request for monetary
 11 damages has been rejected by the court and now
 12 it's going on for injunctive relief against all of
 13 the defendants.
 14 PRESIDENT NARIMAN: I want to see the
 15 case of the United States Government in that suit.
 16 MS. MORRIS: We're happy to give you
 17 the complaint.
 18 PRESIDENT NARIMAN: Complaint, yes.
 19 MS. MORRIS: Just so that you know, the
 20 18:01:01 Claimants have put the United States post trial
 21 brief into their exhibit, so you already have that
 22 and we're happy to give you the complaint

1959

1 tomorrow.

2 PRESIDENT NARIMAN: I want the

3 complaint with the briefs and the parties.

4 MS. MORRIS: That should be in the

5 caption in the complaint which we'll have for you

6 tomorrow.

7 PRESIDENT NARIMAN: Yes, I want that.

8 Good. Okay.

9 MS. MORRIS: Mr. President, Members of

18:01:45 10 the Tribunal, I will now address the economic

11 impact of the challenged measure on Claimants

12 Grand River, Jerry Montour and Kenneth Hill's

13 investment and change measure afterwards.

14 As an initial matter, the fact that the

15 word expropriation was rarely used by Claimants in

16 their presentation in chief is striking. They

17 maintained that they preserved all of the claims

18 that they raised in their Memorial but have

19 presented no detailed argument on Article 1110

18:02:17 20 whatsoever.

21 Indeed, Mr. Weiler contends that the

22 distinction between Article 1110 and Article 1105

1961

1 impact is fundamental --

2 (Pause in the Proceedings.)

3 PRESIDENT NARIMAN: Sorry.

4 MS. MORRIS: Excuse me.

5 PRESIDENT NARIMAN: Yes, please, sorry.

6 MS. MORRIS: Economic impact of the

7 challenged measure on an investor's investment is,

8 therefore, the central factor in the analysis

9 under Article 1110. Yet, Claimants have failed to

18:03:55 10 prove any significant economic impact of the

11 challenged measures on an investment they have

12 made in the United States. In fact, Claimants'

13 tobacco sales are higher than ever. On this basis

14 alone, their Article 1110 claim should be

15 rejected.

16 PRESIDENT NARIMAN: Do you have

17 detailed slides?

18 MS. MORRIS: I have many detailed

19 slides, I would be delighted to show you.

18:04:20 20 PRESIDENT NARIMAN: It's in the record?

21 MS. MORRIS: I have many detailed slide

22 slides to show you which we'll get to in just a

1960

1 in this case is, quote, largely evaporated.

2 Claimants have focused overwhelmingly on the

3 discriminatory nature of the MSA regime and the

4 frustration of their asserted investment backed

5 expectations. Although these are certainly

6 factors for the Tribunal to consider in its

7 analysis, there's no getting around the fact that

8 a claim of regulatory or indirect expropriation is

9 nevertheless a claim of expropriation.

18:02:51 10 As such, the Cinnequanone(ph) is

11 whether plaintiffs established an economic impact

12 sufficiently severe to constitute a taking or its

13 equivalent. The economic impact of the challenged

14 measure on an investor's investment is, therefore,

15 the central factor in the analysis under Article

16 1110. Yet Claimants have failed to prove any

17 significant economic impact of the challenged

18 measures on an investment they have made in the

19 United States.

18:03:17 20 In fact, Claimants' tobacco sales are

21 higher than ever. On this basis alone, their

22 Article 1110 claim should be rejected. Economic

1962

1 minute. Economic impact is fundamental to a

2 finding of expropriation but Claimants have been

3 unable to clearly defined the alleged impact on

4 their investment in this occasion.

5 Although they have substantially

6 altered their position over the course of these

7 proceedings with respect to both the investment at

8 issue and the economic impact on that investment,

9 their efforts have only underlined their failure

18:04:46 10 to carry their burden of proof in this litigation.

11 Perhaps the only respect in which Claimants have

12 been consistent is in their failure to provide a

13 specific date of expropriation.

14 In their particularized statement of

15 claim, Claimants identified their investment as

16 the market share for their cigarettes in the

17 United States, and asserted that the effective

18 compliance with these MSA implementation measures

19 is the complete destruction of the investor's

20 business in their investments.

18:05:15 21 In they're Memorial, however, Claimants

22 identified their investment as good will that

1963

1 these investors developed in their brands over the
 2 years, as well as the intellectual property rights
 3 that underlie them. With respect to the economic
 4 impact on that investment, Claimant stated, as
 5 amended the escrow statutes effectively destroyed
 6 the value and, indeed, the very utility of the
 7 Seneca brand as a basis for marketing tobacco
 8 products in Georgia, North Carolina, South
 9 Carolina, Oklahoma and Arkansas.

18:05:52 10 As such, each amended Escrow Statute
 11 results in an indirect, uncompensated
 12 expropriation of Claimants' investment in the
 13 territory of each relevant state.

14 Finally, in their reply Claimants
 15 identify their claim as one for substantial
 16 interference that certain amended escrow statutes
 17 have imposed upon Claimants' brands. The Seneca
 18 and Opal brands are Claimants' investment for the
 19 purposes of Article 1110. The United States would
 18:06:22 20 note, however, that Claimants made no mention of
 21 the Opal brand in their notice of intent, notice
 22 of arbitration, particularized statement of claim

1965

1 Tennessee, North Carolina and South Carolina. In
 2 this proceeding Claimants now allege that their
 3 investments in Arkansas, Oklahoma and Georgia have
 4 been expropriated, yet Mr. Wilson, Claimants'
 5 damages expert, continue to calculate alleged
 6 damages in the, quote, five original states for
 7 which Claimants initially requested
 8 off-Reservation damages. Arkansas, Georgia, North
 9 Carolina, South Carolina and Oklahoma.

18:08:09 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]

18 Claimants have at no point even
 19 acknowledged, much less explained these
 18:08:39 20 discrepancies. Furthermore, despite the shifting
 21 contours of Claimants' purported investment in the
 22 ever shrinking claimed impact of the challenged

1964

1 or allocable share claim.

2 In light of that fact discussed in more
 3 detail in footnote 245 of the counter memorial,
 4 the United States submits that this claim is not
 5 properly before the Tribunal in this proceeding.

6 Claimants have failed to provide
 7 sufficient notice of this aspect of their claims
 8 and had no right simply to add new claims. The
 9 United States, therefore, requests that the
 18:06:53 10 Tribunal disregard any allegations regarding the
 11 Opal brand. Returning to Claimants' reply, in
 12 that filing Claimants restrict the alleged
 13 economic impact to the three states where
 14 Claimants have been substantially deprived of the
 15 use and/or benefits of the Seneca and Opal brands
 16 by the relevant amended Escrow Statute.

17 Until this hearing, however, Claimants
 18 failed to identify the three states to which they
 19 referred. They alleged in their reply that their
 18:07:25 20 brands have been driven out of the market in both
 21 Arkansas and Oklahoma in 2005, and asserted that
 22 they only retain a brand presence in Georgia,

1966

1 measures, Claimants fail to demonstrate their
 2 investment has suffered any diminution in value
 3 sufficient to qualify as an expropriation under
 4 Article 1110. In fact, every indication is that
 5 overall sales continue to increase.

6 As Claimants themselves recognized in
 7 their pleadings, a mere negative impact on an
 8 investment's profitability as a result of
 9 regulation is insufficient to support a finding of
 18:09:15 10 expropriation under international law. Indeed,
 11 Professor Brownly explains that state measures
 12 prima facie a lawful exercise of powers of
 13 government may affect foreign interests
 14 considerably without amounting to expropriation.
 15 With respect to any expropriation, the test is
 16 whether the interference is sufficiently
 17 restrictive to support a conclusion that the
 18 property has been taken from the owner.

19 First and foremost, Claimants had
 18:09:47 20 failed to provide a valuation of their alleged
 21 investment, namely, the Seneca brand, that is
 22 accurate and permitting the Tribunal to determine

1967

1 that an expropriation has occurred. As my
 2 colleague, Mr. Sharp, will explain in greater
 3 detail Navigant made clear that calculating damage
 4 to a brand requires a valuation of that brand
 5 before and after the imposition of the challenged
 6 measure.

7 Without such an analysis, it is
 8 impossible even to ascertain whether the Seneca
 9 brand has any value at all. Yet Claimants'
 18:10:20 10 damages expert, Mr. Wilson, failed to perform
 11 these calculations not only in his original report
 12 but also in his rebuttal report after Navigant
 13 clearly indicated the proper procedure for
 14 conducting a brand impairment analysis. Instead,
 15 citing the difficulty of conducting such an
 16 analysis, Mr. Wilson simply pointed to Claimants'
 17 lost profits as the proper metric of the economic
 18 impact of the challenged measures on the
 19 Claimants' chosen investment.

18:10:51 20 However, as Mr. Sharp will explain
 21 further, Mr. Wilson's data and approach are simply
 22 wrong, and he does not provide the Tribunal with

1969

1 as a whole.

2 The one case Claimants do cite
 3 regarding, quote, the relationship between modern
 4 regulatory takings and the value of geographically
 5 delimited markets, end quote, is Pope & Talbot V.
 6 Canada. That case, however, is inapposite because
 7 the regional market at issue was the entire United
 8 States.

9 Nor as Claimants' argument that such
 18:12:26 10 approach is required by this Tribunal's decision
 11 on objections to jurisdiction tenable. That
 12 decision imposed no limitations on the
 13 consideration of the Seneca brand's performance in
 14 the United States. And understandably so, for
 15 Claimants themselves have characterized their
 16 investment as including the development of the
 17 Seneca brand on-Reservation throughout the United
 18 States.

19 Grand River manufactured cigarettes are
 18:12:51 20 also sold off-Reservation in various states other
 21 than those identified in Claimants' expropriation
 22 claim, and Seneca cigarettes are available on a

1968

1 the credible evidence necessary to support a
 2 finding of expropriation of Claimants' brand.

3 Claimants' fared no better, even using
 4 their own preferred albeit erroneous measure of
 5 impairment, they alleged lost profits on sales of
 6 Seneca cigarettes. As a preliminary matter
 7 Claimants can only point to diminished sales by
 8 artificially limiting their claim to
 9 off-Reservation sales in three states.

18:11:25 10 Claimants argued that their lost
 11 profits on sale in each state which Claimants
 12 considered equivalent to impairment of their brand
 13 in that state, should be considered separately for
 14 purposes of their expropriation claim. Such an
 15 approach has no basis in either law or fact and
 16 should be rejected. Indeed, Claimants are unable
 17 to provide any legal support for this remarkable
 18 proposition which would permit an investor to
 19 divide up his investment into component parts as
 18:11:55 20 he pleases, ensuring that certain parts could have
 21 been argued to be expropriated, even if there's
 22 only a minimal economic impact on the investment

1970

1 variety of Web sites, as well, for shipments
 2 anywhere in the United States. Claimants
 3 cigarettes are ubiquitous on the Internet as basic
 4 search revealed two dozen Web sites on which
 5 Claimants' cigarettes are sold.

6 In light of the reality that anyone in
 7 the United States can purchase Claimants'
 8 cigarettes without even leaving his own home, any
 9 assertion of geographic delineation in Claimants'
 18:13:35 10 sales is without basis. Factually, Claimants'
 11 proposed approach is equally unsupported.
 12 Claimants themselves have admitted that to be sure
 13 from a business perspective the market for tobacco
 14 products is nationwide with regional
 15 differentiation.

16 Furthermore, the record in this case
 17 demonstrates that in the normal course of its
 18 business, Grand River itself does not consider the
 19 cigarettes it sells and the various state market
 18:14:02 20 as separate and distinct property interests. For
 21 example, Grand River has no U.S. state level
 22 subsidiaries and nowhere has it shown that it

1971

1 maintains a sales force or other division
 2 dedicated to increasing market share in an
 3 individual state.
 4 Grand River nowhere identifies state by
 5 state good will in its financial statements and
 6 Claimants' own damages expert testified that,
 7 unfortunately, we are dealing with companies that
 8 don't necessarily track their sales all the way to
 9 individual states in some cases. They would track
 10 them to a regional distributorship ship and it's
 11 just not in their nature. They have clients in
 12 those states and are able to build it back up but
 13 in the normal course of business these aren't the
 14 types of data that they normally keep.
 15 Interestingly, Mr. Wilson also stated
 16 he had not seen cases like this in his career in
 17 which the expropriation claim was based on just a
 18 subset of the assets constituting an investor's
 19 business. Indeed, Grand River makes the
 18:15:06 20 astonishing claim that it does not know how much
 21 of its cigarettes are sold in any given state by
 22 its distributors. Indicating on its MSA

1973

1 (End of open session. Confidential
 2 business information redacted.)
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1972

1 application that it does not have any information
 2 that would allow it to determine the total volume
 3 of cigarettes it produced that were sold in the
 4 U.S. since 1997, much less in any particular
 5 state.
 6 And Seneca cigarettes are not just sold
 7 off-Reservation in the, quote, five original
 8 states but in several other U.S. states, as well.
 9 The Tribunal should reject any attempt by
 10 Claimants to salvage their expropriation claim in
 11 the face of thriving sales by artificially and
 12 self-servingly dividing their investment into
 13 sales by state, taking the more appropriate and
 14 indeed realistic approach to Claimants' investment
 15 by examining Claimants' sales in all U.S. markets,
 16 it becomes clear Claimants' business is strong and
 17 it is fair to say booming.
 18 This success belies any claiming of
 19 expropriation. And the slides I'm about to show
 18:16:10 20 are confidential, so if there's anyone that needs
 21 to leave the room, I would ask they do so at the
 22 moment.

1974

1 CONFIDENTIAL SESSION
 2 In California, for example, sales of
 3 Grand River sale of cigarettes have increased
 4 every year since 2004.
 5 PRESIDENT NARIMAN: Can we go back to
 6 the previous slide?
 7 You said the last slide is Grand
 8 River's products are not just sold off-Reservation
 9 in the five original states but in several other
 10 U.S. states, as well.
 11 MS. MORRIS: Yes.
 12 PRESIDENT NARIMAN: I'm a little
 13 confused because the Claimants' cases and the case
 14 of the United States Government, also, is that it
 15 is because people like Grand River and NPMs like
 16 Grand River concentrated their sales in just a few
 17 states and not nationwide, that the Allocable
 18 Share Amendments were introduced.
 19 MS. MORRIS: Yes.
 18:17:18 20 PRESIDENT NARIMAN: This statement of
 21 yours, that Grand River products also sold in
 22 other states, as well, because it doesn't fit in.

1975

1 MS. MORRIS: I understand what you're
2 saying.
3 PRESIDENT NARIMAN: How do you fit that
4 in?
5 MS. MORRIS: For this, they're
6 indicating that they sell the cigarettes
7 off-Reservation in states beyond the five original
8 states. It doesn't indicate that they don't still
9 sell in a limited number of markets. We're just
18:17:45 10 saying that because they sell beyond the five
11 original states, it's yet another reason why it
12 doesn't make sense to only consider their
13 expropriation claim with respect to their sales in
14 each of those five individual states.
15 PRESIDENT NARIMAN: I understand your
16 -- the expropriation claim, but I want to know the
17 reason for introducing the Allocable Share
18 Amendments is because of the so-called loophole
19 which was there.
18:18:11 20 MS. MORRIS: Yes.
21 PRESIDENT NARIMAN: That's your case.
22 And that one of the groups of people at Grand

1977

1 through NWS and so are arguably on-Reservation
2 sales. So those were not sales on which escrow
3 was deposited, and so those were not subject to
4 either the allocable share release mechanism or
5 the Allocable Share Amendments.
6 It was the sales by Tobaccoville
7 primarily that were subject to escrow deposits and
8 those were sold in a more limited number of
9 states.
18:19:53 10 PRESIDENT NARIMAN: All right. Thank
11 you.
12 MS. MORRIS: Mr. Wilson himself noted
13 over the past four years in California NWS sales
14 increased average 78 percent per year. Similarly,
15 NWS sales of Grand River manufactured cigarettes
16 in New York have increased each year since 2000.
17 And by 2007, accounted for two-thirds of all sales
18 by NWS. Indeed, since 2000 sales of Grand River
19 manufactured cigarettes by NWS throughout the
18:20:32 20 United States have increased every year, including
21 2007.
22 During that time period sales of Grand

1976

1 River and Company who concentrated all their sales
2 in just a few states and not nationwide?
3 MS. MORRIS: Uh-huh.
4 PRESIDENT NARIMAN: This shows they had
5 it nationwide, as well. How did it fall under
6 that?
7 MS. MORRIS: My understanding is that
8 Tobaccoville sold cigarettes in the five original
9 states and in several original states but still a
18:18:43 10 limited number.
11 PRESIDENT NARIMAN: As compared to the
12 past. See the point is, point is the allocable
13 share statutes, originally under that, they sold
14 it to, throughout America, the United States.
15 Apparently. And they restricted it and thereby
16 got releases which are not commensurate with what
17 is originally intended. That is the case. So how
18 does that square with the fact that you're saying
19 they actually sold throughout the United States.
18:19:17 20 MS. MORRIS: So the sales throughout
21 the United States were often Internet sales and my
22 understanding is that the Internet sales were

1978

1 River manufactured cigarettes by NWS have
2 increased more than 2,000 percent. According to
3 customs and border protection data, NWS imports of
4 Grand River manufactured cigarettes increased
5 dramatically from 2007 to 2008 and NWS imports
6 through March 2009 were on track to exceed NWS
7 imports in 2008.
8 It is notable in this respect that
9 Claimants have failed to provide audited financial
18:21:11 10 statements for the years ending in 2006, 2007 or
11 2008 or, indeed, any other reliable data to
12 counter these indicators of remarkable growth.
13 In light of all these facts, then
14 Claimants attempt to limit its expropriation claim
15 to a small subset of its actual market should be
16 rejected. Claimants have not demonstrated and
17 could not demonstrate a sufficiently severe
18 economic impact on its alleged investment, the
19 Seneca brand to constitute indirect expropriation.
18:21:44 20 For this reason alone, Claimants' expropriation
21 claim should be rejected.
22 PRESIDENT NARIMAN: Very nice. Thank

1979

1 you.

2 MS. MORRIS: Thank you. And I hope I

3 answered your question.

4 MR. KOVAR: Mr. President, we're now at

5 a good break point because the next and final part

6 of the analysis under expropriation Article 1110

7 might take Ms. Morris about up to an hour. So

8 it's almost 6:30 now, so unless you had a lot of

9 stamina, this would be a lot of break point.

18:22:18 10 PRESIDENT NARIMAN: I want to know what

11 follows after that presentation, just take us

12 through what is going to happen tomorrow,

13 Mr. Violi, please pay attention.

14 MR. KOVAR: After Ms. Morris finishes

15 with expropriation, looking at the character of

16 the measures, we will then go next to Article

17 1105. We will take you there.

18 PRESIDENT NARIMAN: But your side?

19 MR. KOVAR: Claimants are finished.

18:22:48 20 PRESIDENT NARIMAN: How many you have

21 for presentation, one person and another?

22 MR. KOVAR: Three presentations under

1981

1 to jurisdiction, which under NAFTA's Article 1101,

2 Mr. Feldman will do that and then we will finish

3 up with an examination of damages.

4 PRESIDENT NARIMAN: That will take you

5 through lunch?

6 MR. KOVAR: That will finish the case.

7 My expectation is that will take us

8 into the afternoon.

9 But, Mr. Chairman, finally, you've also

18:24:20 10 asked us to address three different categories of

11 documents and I have a presentation on that, which

12 could take, depending on your questions up to an

13 hour because you asked a bunch of questions.

14 PRESIDENT NARIMAN: What happens after

15 that?

16 MR. KOVAR: After that I think we're

17 ready for closing arguments on Sunday morning. It

18 looks like we'll be able to finish unless you ask

19 us --

18:24:44 20 MR. VIOLI: So you have six

21 presentations, three 1105, one on a duty to

22 consult, one presentation of jurisdiction, one on

1980

1 Article 1105. They will not be long presentations

2 but we've broken it up in three parts, sort of a

3 general introduction plus looking at expectations

4 which we think doesn't come under Article 1105,

5 then discrimination and duty to consult which has

6 been a big part of Claimants' case.

7 PRESIDENT NARIMAN: All that finished

8 by morning tea time?

9 MR. KOVAR: I believe it is. Roughly.

18:23:25 10 It depends on how many questions you have. You

11 may have a lot of questions on duty to consult.

12 PRESIDENT NARIMAN: I want to know how

13 long you will be. We may have questions. We may

14 not.

15 MR. KOVAR: I think if we just did our

16 presentations, it would take us, you know, an

17 hour-and-a-half.

18 PRESIDENT NARIMAN: That's good. Then

19 what's next.

18:23:48 20 MR. KOVAR: After we -- we're finishing

21 our case now, so after we do Article 1105, we will

22 then be done with liability and we will look then

1982

1 damages that adds up to six then you want to

2 address the three categories of documents, right?

3 MR. KOVAR: Yes.

4 MR. VIOLI: You think that will take

5 how long, the six?

6 MR. KOVAR: I think it will take us

7 entire day with lunch and tea time.

8 PRESIDENT NARIMAN: Then what do we do

9 after that?

18:25:13 10 MR. WEILER: Sound like it's going to

11 be the end of the day, so then we'll go to sleep

12 and wake up and do our closings on Sunday morning,

13 two hours each, and we'll fly home.

14 MR. KOVAR: What time do we have to

15 finish on Sunday?

16 PRESIDENT NARIMAN: By one.

17 MR. KOVAR: The schedule provides two

18 hours each side, so one hour for each --

19 MR. WEILER: Want to make it

18:25:44 20 one-and-a-half hours?

21 MR. KOVAR: That's great.

22 MR. WEILER: I haven't consulted my

1983

1 colleagues but if we did 90 minutes each, we'd be
 2 able to make sure the chairman gets out of here.
 3 PRESIDENT NARIMAN: So you take the
 4 whole day tomorrow or major part of the day?
 5 MR. KOVAR: Yes.
 6 PRESIDENT NARIMAN: Even if you finish
 7 earlier, the closing arguments --
 8 MR. KOVAR: Yes. We can start closing
 9 arguments Sunday morning.
 18:26:15 10 MR. LUDDY: We can start closing
 11 arguments when?
 12 MR. KOVAR: Sunday morning and we can
 13 do 90 minutes a side, and then right now --
 14 PRESIDENT NARIMAN: 90 minutes a side,
 15 one-and-a-half hours.
 16 MR. KOVAR: We're scheduled two hours,
 17 we can do 90 minutes each. We're scheduled to do
 18 one-and-a-half hour rebuttals.
 19 PRESIDENT NARIMAN: We must try to
 18:26:43 20 accommodate everybody. Don't feel constrained.
 21 MR. KOVAR: If we begin nine o'clock
 22 Sunday morning, we both do 90 minutes plus a tea

1985

1 the 11 hours because you have 11 hours. If you
 2 feel you can finish, you should finish. That's
 3 all I'm asking.
 4 MR. KOVAR: We expect testimony to take
 5 most of the day tomorrow.
 6 PRESIDENT NARIMAN: No. What I would
 7 like just as we are stopping here, if tomorrow let
 8 us not stop, let's start the concluding argument,
 9 move into something on Sunday.
 18:28:19 10 MR. WEILER: That would mean that the
 11 Claimants would have to go first with closings and
 12 then overnight there would be preparation time for
 13 the Respondent. It seems it would be, I think the
 14 Claimants would prefer to stick with the schedule
 15 we just agreed to which would be finish all day
 16 tomorrow which may take until six o'clock at night
 17 as we know. Off the record.
 18 (Discussion off the record.)
 19 PRESIDENT NARIMAN: Why not we start
 18:29:15 20 earlier on Sunday? We can start at eight o'clock
 21 because I don't want anybody to feel that he's
 22 left out.

1984

1 break, that will take us to 12:30, so we won't
 2 really have time for rebuttals at that point, I
 3 think.
 4 MR. VIOLI: You said one more tonight,
 5 right, about an hour.
 6 MR. FELDMAN: Tomorrow.
 7 MR. VIOLI: That will start with one of
 8 the few presentations.
 9 PRESIDENT NARIMAN: I was thinking if
 18:27:15 10 you could wrap it up by tea time tomorrow or
 11 roughly tea time tomorrow, then you could start on
 12 the closing arguments, so there's more leg room,
 13 you know, elbow room for everybody.
 14 ARBITRATOR CROOK: Could we ask the
 15 second --
 16 SECRETARY YANNACA-SMALL: They have 11
 17 hours.
 18 MR. KOVAR: Our expectation we will
 19 need most of the day tomorrow.
 18:27:43 20 PRESIDENT NARIMAN: Even if you exhaust
 21 the hours, I don't mind. My point is how long
 22 will you take, not that you have to fill in all of

1986

1 MR. LUDDY: I think that's a good idea.
 2 As much as I'm a night person.
 3 PRESIDENT NARIMAN: Eight o'clock on
 4 Sunday.
 5 MR. KOVAR: Okay.
 6 PRESIDENT NARIMAN: So you take all
 7 day, by all means. Thanks very much.
 8 (Whereupon, at 6:30 p.m., the hearing
 9 was adjourned until 9:00 a.m., the following day.)
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CERTIFICATE OF REPORTER

I, John Phelps, RPR, 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 an of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

JOHN PHELPS, CSR, RPR, CRR