

UNDER THE ARBITRATION RULES OF THE
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
AND
THE NORTH AMERICAN FREE TRADE AGREEMENT

**GRAND RIVER ENTERPRISES SIX NATIONS LTD.,
JERRY MONTOUR, KENNETH HILL AND ARTHUR MONTOUR,**

Claimants / Investors

- and -

THE GOVERNMENT OF THE UNITED STATES OF AMERICA

Respondent / Party

**CLAIMANT'S POST-HEARING SUBMISSION
MARCH 31, 2010**

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1. Hereunder the Claimants provide information concerning professional fees expended by them, both in prosecution of the arbitration under NAFTA Chapter 11 and in defending against the measures at issue in the arbitration. Two tables are attached to this submission. The first provides an accounting of the professional fees claimed by the Investors in this arbitration, recoverable as costs. The second provides a final accounting for all professional fees incurred in defence of the measures, which are recoverable as damages, as claimed at paragraph 336 of the Claimants' Memorial, and again at paragraph 201 of the Claimants' Reply Memorial.

I. COSTS

2. The Claimants submit that, in the event that they ultimately prevail in this arbitration, they are entitled to their costs on a full indemnity basis. An award of the Claimants' costs in prosecuting the arbitration is necessary to return the Claimants to the place they would have occupied but for the breach of the Respondent's NAFTA obligations by certain of its state governments.

3. The Respondent has also indicated that it is seeking costs on a full indemnity basis, should it prevail. However, should the Respondent prevail, the Claimants submit that the tribunal should consider the prevailing practice of investment treaty arbitration tribunals, which is not to award costs against an investor/claimant when a legitimate claim has been alleged but dismissed, absent evidence of bad faith or misconduct on the part of the claimants or their counsel.

Applicable Law

4. This arbitration is governed by the *UNCITRAL Arbitration Rules*.¹ Articles 38 and 40 of the *UNCITRAL Rules* provide the Tribunal with the authority to determine allowable costs, and the discretion to apportion such costs as between the parties.

5. Article 38 provides the Tribunal with the authority to fix the costs of the arbitration. It sets out an exclusive list of expenses that qualify as "costs" for the purposes of Articles 38 and 40. Article 38 states:

The arbitral tribunal shall fix the costs of the arbitration in the award. The term "costs" includes only:

(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal in accordance with article 39;

(b) The travel and other expenses incurred by the arbitrators;

(c) The costs of expert advice and of other assistance required by the arbitrators;

¹ *UNCITRAL Arbitration Rules*, 15 December 1976, U.N. Doc. A/31/17.

(d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

(e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;

(f) The fees and expenses of the ICSID Secretariat in administering the hearings, as well as the services of the Acting Secretary General as appointing authority in this arbitration.

6. Article 40 divides these costs into two categories for the purposes of attributing or apportioning costs, namely: costs of legal representation and assistance (**Legal Costs**),² and all other costs (**Arbitration Costs**).³ Arbitration Costs are fixed according to the actual costs incurred by the parties in pursuing the arbitration, as determined by the tribunal. Legal Costs are fixed by the Tribunal, to the extent that such costs were claimed during the proceedings and were reasonable.

7. Once the costs – as defined in Article 38 – have been fixed, Article 40 provides the method by which the Tribunal may, at its discretion, allocate them. The relevant portions of Article 40 provide:

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

8. As per the foregoing text, Article 40 provides a formula for allocating legal costs and a formula for allocating arbitration costs, respectively. Article 40(1) establishes a presumption that the unsuccessful party shall bear the Arbitration Costs. This presumption is rebuttable, as the Tribunal may choose to apportion the Arbitration Costs between the parties if to do so would be reasonable in the circumstances of the instant case. There is no such presumption. Article 40(2) does not provide for a similar presumption with respect to the allocation of Legal Costs. The Tribunal is free to exercise its discretion in determining which party shall bear the Legal Costs, and in what proportion, on the basis of what is reasonable in the circumstances of the case.

Assessing Costs

9. In order to prosecute their claim, the Investors incurred both Legal Costs and Arbitration Costs, as detailed in the following paragraphs.

² *UNCITRAL Arbitration Rules*, Article 40 (2).

³ *UNCITRAL Arbitration Rules*, Article 40(1).

(i) **Arbitration Costs**

10. Thus far, the Claimants have placed \$375,000.00 on deposit with the ICSID Secretariat for payment of Arbitration Costs, including arbitrators' fees and costs incurred for hosting oral hearings. It is submitted that the Tribunal should assess the total for Arbitration Costs in this proceeding based upon the accounts maintained by the Tribunal Secretary, which will reflect the total costs incurred in administering the proceedings and hosting the oral hearings.

(ii) **Legal Costs**

11. The Claimants have claimed Legal Costs from the outset of these proceedings, as required by Article 38(e) of the UNCITRAL Arbitration Rules.⁴ It is submitted that the Legal Costs set out in Table I, attached to this submission, are reasonable in respect of the representation required throughout these proceedings. The arbitration has progressed through two significant phases, in addition to a full exchange of arguments over the production of documents and a lengthy process of argumentation arising from the Respondent's unsuccessful challenge to Professor Anaya's continued appointment to the Tribunal. As such, it is respectfully requested that the Tribunal exercise its discretion under Article 38(e) to "set" the Claimants' Legal Costs in their entirety, as per the sums set out in Table I.

12. The total claimed for legal services and disbursements provided by counsel to the Claimants in the prosecution of this arbitration was: \$2,803,627.10 USD. The total cost for expert witnesses appearing for the Claimants was: \$1,113,749.47 USD. Arguably, the costs of expert advice could be included as Arbitration Costs, as Article 38(c) of the UNCITRAL Rules contemplates costs of expert advice and other assistance required by the arbitral tribunal. Out of an abundance of caution, however, the Claimants have nonetheless included these expert costs as part of their legal representation and assistance, which accordingly totals: \$3,917,376.57 USD.

Apportioning Costs

13. With respect to the appropriate apportionment of costs in these proceedings, the Claimants note that the Respondent has not (yet) prevailed in its any arguments for outright dismissal of a claim for want of jurisdiction. While it was partially successful in pursuing its jurisdictional challenge, on the basis that it was too late for certain claims to be brought in respect of the Escrow Statutes, as originally drafted, the Respondent was nonetheless unable to demonstrate that even these measures fell totally beyond the purview of the Tribunal's jurisdiction. As such, the preliminary hearing on jurisdiction did not categorically remove examination of any of

⁴ See: Notice of Arbitration, March 12, 2004, at para. 81(ii); Particularized Statement of Claim, June 29, 2005, at para. 166(iii); and Memorial on Merits, July 10, 2008, at para. 337(ii).

the measures at issue from necessary consideration during the merits phase of the arbitration. In other words, a hearing on the merits was still necessary to determine whether State Responsibility was incurred through the implementation and/or enforcement of any of the measures originally named in the Notice of Arbitration and Particularized Statement of Claim. This result should be weighed in favour of apportioning a larger share of the burden for Arbitration Costs, for the jurisdictional phase of the proceedings, to the Respondent, in line with the presumption set out in Article 40(1) of the UNCITRAL Arbitration Rules.

14. The Claimants also recall how the Respondent was utterly unsuccessful in persisting in its challenge to the appointment of Professor Anaya to the Tribunal, even though it was clear he had complied with the instructions he had received from the ICSID's Acting Secretary General, as he was forced to confirm following an additional round of arguments by the parties. In addition, the Claimants recall how the Respondent's acts of obfuscation, during the production phase of the proceedings, resulted in significant, negative impacts upon both the parties and the Tribunal, by impairing the Tribunal's ability to find facts as necessary.

15. It is accordingly submitted that – regardless of whether the Claimants prevail on the merits – the Respondent's obvious failure to produce relevant and material documents in its possession should attract a an apportionment against the Respondent of no less than \$100,000.00 to \$250,000.00 in Legal Costs incurred by the Claimants. The Respondent's conduct caused unnecessary argumentation to be made, repeatedly, by the Claimants concerning the production of documents they knew to exist, but which were never provided. More importantly, the Respondent's deliberate omission to provide relevant and material documents in its possession significantly hindered the Tribunal's ability to determine the facts of the case, as demonstrated on a number of occasions during the oral hearings.

If the Claimants Prevail on the Merits

16. In the event that the Claimants prevail on the merits of their claim(s), it is submitted that they are entitled to receive their entire share of the Arbitral Costs, on a full indemnity basis, in accordance with the logic of Article 40(1) of the UNCITRAL Arbitration Rules. As the tribunal in *S.D. Myers* explained:

The logical basis for this policy appears to be that the “successful” claimant has in effect been forced to go through the process in order to achieve success, and should not be penalized by having to pay for the process itself. The same logic holds good for a successful respondent, faced with an unmeritorious claim.⁵

17. While the Claimants acknowledge that the Tribunal has discretion to depart from this basic principle, they submit that if it is successful in this arbitration there is no cause for the Tribunal to do so. In cases in which

⁵ *SD Myers Inc. v Canada*, Final Award and Dissenting Opinion, IIC 251 (2002), 30th December 2002, Ad Hoc Tr (UNCITRAL), at para. 15.

a tribunal has decided to depart from this principle and award less than full Arbitral Costs, factors at play have included:

- a. the manner in which the claimant conducted the arbitration;⁶
- b. the results on various liability issues;⁷ and
- c. the difference between the amounts claimed and the amount ultimately awarded.⁸
- d. the Claimants does not anticipate that any of these factors will apply if its claim is successful.

18. It is further submitted that, in the event that they prevail in any of their claims, the Claimants are entitled to receive an award for their Legal Costs, on a full indemnity basis. If the Claimants prevail in any of their claims, of necessity the Tribunal will have found that the United States manifestly failed to meet international law standards, and has remained non-compliant – continuing to injure the Claimants – for many years. Such conduct by a State requires condemnation in the strongest of terms, as a matter of international public policy. In addition, an award of costs would also be appropriate to ensure that the Claimants would be made whole, as per the fundamental principles of compensation espoused in the customary international law of State responsibility.

If the Claims are Dismissed

19. The Claimants submit that it remains a relative rarity in investment treaty arbitration for an unsuccessful claimant to be directed to pay for more than half of the Arbitration Costs, or any portion of the respondent's legal fees. The exceptions to this general practice include cases where the Tribunal has determined that the claim was manifestly without merit or that its prosecution by the Claimant, or its counsel, fell below commonly accepted professional standards.⁹ The purpose of this policy is to avoid placing additional constraints upon access to justice for small and medium sized investor enterprises, or by individual investors.

20. The policy against awarding costs in favour of a successful respondent was observed in *Azinian v. Mexico*, where the tribunal concluded that – despite the fact that some of the Claimants' claims were manifestly

⁶ See e.g. *S.D. Myers* at para. 26;

⁷ See e.g. *S.D. Myers* at para. 16; *Pope & Talbot Inc. v Canada*, Award on Costs, IIC 196 (2002), 26th November 2002, Ad Hoc Tr (UNCITRAL), at para. 18.

⁸ See e.g. *S.D. Myers* at para. 17.

⁹ See e.g. *Methanex Corporation v United States*, Final Award on Jurisdiction and Merits, IIC 167 (2005), (2005) 44 ILM 1345, August 3rd, 2005, Ad Hoc Tr (UNCITRAL), at Part II, Chapter I, para's. 53-60 where the Claimant was found to have sanctioned trespass to property in order to secure evidence and to have made misrepresentations to both the Tribunal and a United States Federal Court, in respect of its attempt to have the same evidence procured by trespass produced by the Respondent in the arbitration.

without merit – it would not be appropriate to apportion costs in favour of the Respondent. The tribunal observed:

In this case, however, four factors militate against an award of costs. First, this is a new and novel mechanism for the resolution of international investment disputes. Although the Claimants have failed to make their case under NAFTA, the Arbitral Tribunal accepts, by way of limitation, that the legal constraint on such causes of action were unfamiliar. Second, the Claimant's presented their case in an efficient and professional manner. Third, the Arbitral Tribunal considers that. . . [the Mexican authorities] may be said to some extent to have invited litigation. Fourthly, it appears that the persons most accountable for the Claimants' wrongful behaviour would be least likely to be affected by an award of costs. . . .¹⁰

21. As indicated in a recent study on costs awards in investment treaty arbitration, the majority of tribunals have not awarded costs in the cause to victorious respondents.¹¹ According to one commentator, this development:

... raises questions as to whether treaty-based investment arbitration under NAFTA or ICSID gives rise to intrinsically different legitimate expectations of full cost recovery to the victorious investor than is the case in cost recovery in a non-investment commercial arbitration, and *delegitimizes* any expectations of cost recovery on the part of the government party.

Perhaps the unilateral right of an investor to sue means a unilateral expectation of cost recovery? Perhaps this form of arbitration and cost recovery is analogous to non-confidential judicial review of administrative conduct, where the administrative body normally enjoys no possibility of cost recovery in the event of an unsuccessful claim against it? And perhaps assigning the risk to the investor claimant of bearing the government respondent's defence costs is inconsistent with the purpose of such investment treaties?¹²

22. In the present case, the Claimants commenced this arbitration in good faith to seek compensation for wrongs that they believed they had suffered due to the acts and omissions of a number of state governments, in

¹⁰ *Azinian et al v Mexico*, Award on Jurisdiction and Merits, ICSID Case No ARB(AF)/97/2, IIC 22 (1999), (1999) 14 ICSID Rev-FILJ 538, (2000) 39 ILM 537, (2002) 121 ILR 2, (2002) 5 ICSID Rep 272, 18th October 1999, despatched 1st November 1999, ICSID, at para's 125-126. See also *Mondev International Limited v United States*, Award, ICSID Case No ARB(AF)/99/2, (2004) 6 ICSID Rep 192, IIC 173 (2002), (2003) 42 ILM 85, (2004) 125 ILR 110, (2003) 15(3) World Trade and Arb Mat 273, despatched 11th October 2002, ICSID, at para's. 158-159. See, also: *United Parcel Service of America Inc. v Canada*, Award, IIC 306 (2007), 24th May 2007, Ad Hoc Tr (UNCITRAL), at para. 188; *Glamis Gold Limited v United States*, Award, IIC 380 (2009), 14th May 2009, despatched 8th June 2009, at para's. 831-833; and *Loewen Group Inc. and Raymond L. Loewen v. United States*, Award, ICSID Case No ARB(AF)/98/3, IIC 254 (2003), (2005) 7 ICSID Rep 442, (2003) 42 ILM 811, 25th June 2003, despatched 26th June 2003, ICSID, at para. 240: "[T]he Tribunal is of the view that the dispute raised difficult and novel questions of far-reaching importance for each party, and the Tribunal therefore makes no award of costs".

¹¹ Walid ben Hamida, "The Cost Issue in Investor-State Arbitration Decisions Rendered Against the Investor: a Synthetic Table," 2 (2005) T.D.M. Issue No. 5.

¹² Richard H. Kreindler, "Perspectives on State Party Arbitration: The Future of BITs – The Practitioner's Perspective" (2007) 23 *Arbitration International* 43 at 59.

violation of the Respondent's NAFTA obligations. The Claimants' claims were clearly neither frivolous nor vexatious, the type of which ought to be deterred by ordering costs against the Claimants.

23. The Claimants submit that they presented their merits case in an efficient manner and that the arbitration raised novel and difficult questions related both to the highly complex nature of the measures at issue, and their application to tobacco enterprises, and to important legal questions, such as the interaction between customary international law duties owed to investors and customary international law rights enjoyed by indigenous peoples, as individual economic actors.

24. For these reasons, the Claimants respectfully submit that, in the event that the United States of America prevails in this arbitration, the Tribunal should issue an order directing that each party bear its own Legal Costs, and that the Arbitration Costs be divided evenly between the parties, subject to the submissions made above with respect to the Respondent's persistence in maintaining an unmeritorious challenge to Professor Anaya's appointment and its manifest failure to produce relevant and material documents in its possession, contrary to the letter and spirit of the IBA Rules on Evidence.

II. FINAL TOTALS FOR PROFESSIONAL FEES AS PECUNIARY DAMAGES

25. In both their Notice of Arbitration and Particularized Statement of Claimant, the Investors specifically articulated a claim for damages in respect of the professional fees they incurred in defending against the imposition of all MSA implementation measures by state governments on the business of their investment in markets located in within the territory of the United States, including enforcement actions.¹³ As provided in both their Memorial on the Merits and their Reply Memorial on the Merits,¹⁴ the Claimants indicated that they would provide the Tribunal with a total for the professional fees they would be claiming under this head of pecuniary damages, as of the date of the oral hearing.

26. Attached as Table 2 is a record of the professional fees incurred by the Claimants in defending against the imposition and enforcement of any MSA-implementation measures against their investments within the territory of the United States, as of the date of the oral hearing. The amounts have been divided into three categories: (1) fees incurred specifically in response to state government actions targeted at sales of the Claimants' tobacco brands by NWS, to Indian Nations, Indians or Indian Enterprises, in Indian Country (i.e. their "on-reservation sales"); (2) fees and disbursements incurred to challenge the Escrow Statutes before the Federal Court for the Southern District of New York; and (3) all other fees incurred to challenge enforcement of

¹³ Notice of Arbitration, March 12, 2004, at para. 81(iii); and Particularized Statement of Claim, June 29, 2005, at para. 166(iv).

¹⁴ Memorial, July 10, 2008, at para. 336; and Reply Memorial, March 3, 2009, at para. 201.

the MSA measures against the Claimants. The totals for these three categories of fees claimed as pecuniary damages are: \$3,977,129.50 for prosecution of the Federal Court case (seeking to end enforcement of the measures against the Claimants); \$1,287,940.13 for defence of the Claimants' brands distributed in Indian Country; and \$2,817,849.06 for the Claimants' defence of their off-reserve markets from enforcement of the measures at issue in the arbitration.

27. In the event that the Tribunal finds the conduct of any state governments, with respect to some or all of the sales of their brands that took/take place in Indian Country, to have been inconsistent with the Respondent's obligations under NAFTA Article 1105, it is submitted that all of the professional fees incurred by the Claimants – in defending against such unlawful action – should be awarded under the head of pecuniary damages as claimed by the Investors. In addition, it would also lie for the Tribunal to award a portion of the fees incurred by the Claimants, in pursuing their challenge to the Escrow Statutes before the Federal Court for the Southern District of New York, because the object of that claim has been to prevent state officials from applying these measures to the Claimants' business – whether or not sales of their brands took place in Indian Country.

28. In the event that the Tribunal finds the conduct of certain states to be inconsistent with the Respondent's obligations under NAFTA Article 1102, it is submitted that all of the costs incurred by the Claimants in challenging the Escrow Statutes before the Federal Court for the Southern District of New York should be awarded as pecuniary damages, because the focus of the Claimants' challenge before that Court has been on addressing the more favourable treatment made available to the Claimants' competitors under these measures (in addition to fees attributable specifically to defence actions undertaken within the states of Georgia, Arkansas, North Carolina, South Carolina and Tennessee).

29. In the event that the Tribunal finds the conduct of certain of the Respondent's states to have been inconsistent with the Respondent's obligations under NAFTA Article 1105, with respect to the imposition of amended Escrow Statutes (e.g.: on the basis of a failure to consult with First Nations, contrary to applicable customary international law norms, or a manifest denial of justice, contrary to customary international law), it is submitted that the entirety of the professional fees paid by the Claimants in defence of these measures should be awarded as pecuniary damages, in order to make them whole (i.e. to place them in the position they would have occupied if the impugned conduct had never occurred).

III. CONCLUSION

30. For the foregoing reasons, and for the reasons included in the Claimants' previous written and oral submissions, the Claimants respectfully request that the Tribunal render an award pursuant to Article 40(1) and (2) of the UNCITRAL Arbitration Rules, ordering that the Respondent bear the costs

of this arbitration, as well as the Claimants' costs for legal representation and assistance, in the amount of \$3,917,376.57.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 31st day of March, 2010.



Todd Weiler

Barrister & Solicitor

On behalf of the Claimants