

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

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

Claimants/Investors,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

**CLAIMANTS' REJOINDER
TO RESPONDENT'S REPLY ON JURSDICTION**

In accordance with the UNCITRAL Arbitration Rules and the schedule established by the Tribunal on October 26, 2005, Claimants submit the following rejoinder to Respondent's reply submission on the Tribunal's jurisdiction under Articles 1116(2) and 1117(2) of the NAFTA.

**INTRODUCTION AND
SUMMARY OF ARGUMENT**

Respondent's reply presents a shameful if not wanton and reckless disregard for the facts of record and the dignity with which Claimants and this Tribunal should be treated. Reference *ad hominem* to Claimants as, in effect, "scofflaws" who are engaging in chicanery is both unfortunate and disrespectful, to Claimants and the Panel that the parties have chosen to hear this claim. At the end of the day, Claimants are not only entitled to dismissal of this jurisdictional challenge but, rather, the sincerest of apologies.

Distilled to its essence, Respondent's reply is devoted to the principal argument that Claimants should have known of a breach of the NAFTA prior to March 12, 2001, because Grand River was allegedly required to comply with the Escrow Statutes as soon as Claimants' products were sold in an MSA State. Resp. Rep. at 8, 14-15. According to Respondent, the mere passage of the Escrow Statutes created an obligation to pay which caused loss or damage to Claimants, and Claimants purported misunderstanding that the Escrow Statutes did not apply to them "does not excuse their violation of that law" or their lack of knowledge of a NAFTA breach. Resp. Rep. at 15.

In the only case thus far ever to have been finally adjudicated on the merits regarding application and enforcement of any Escrow Statute against Grand River, however, a Wisconsin court specifically held that the Escrow Statute could not be enforced against Grand River. Claim. Rep. Tab 9. Claimants' initial, good faith belief and understanding that the measures at issue did not apply to them was, thus, not based on "chicanery" or any "attempt to evade the law." Indeed, Claimants' belief and understanding was ultimately vindicated in a court of law, after extensive briefing and hearing was held on the subject. It is therefore flagrant and baseless for Respondent, in these proceedings, to brand Claimants with a "purported misunderstanding" or, worse, "violations of law." Indeed, these aspersions by Respondent stand alone, unsupported, and disturbingly naked in the record before this Tribunal.

In addition to avoiding the Wisconsin decision and its significance, Respondent's reply also chooses to ignore the fact that at least two MSA States have officially ceased enforcement of the measures alleged in the PSOC against Claimants with respect to their products, after determining that their Escrow Statutes did not apply to Claimants.

Respondent is persistently and simply hanging on to the untenable position that Claimants had knowledge, prior to March 12, 2001, that legislation with less than clear application nonetheless breached the NAFTA and caused loss to Claimants upon its mere passage. More important, Respondent proffers this untenable argument notwithstanding that the law itself expressly provides that its application and ultimate enforcement could only be determined and mandated by, and after, judicial process.

Unfortunately, as explained in Claimants' response memorial, the Complementary Legislation subsequently adopted by the MSA States effectively removed the aforementioned due process and judicial process required under the Escrow Statutes, and purports to vest the Attorneys General of the MSA States with absolute authority to determine application and violations of the Escrow Statutes, *i.e.*, it confers upon the Attorneys General *de facto* powers of "judge, jury, and executioner." Thus, notwithstanding that a court of law in Wisconsin, for example, has held that the Wisconsin Escrow Statute may not be enforced as against Claimants, the Attorney General there has nonetheless banned and continued his ban on the sale of Claimants' products in that State based solely on his unilateral position and interpretation that Grand River is not compliant with the Wisconsin Escrow Statute and the directory listing requirements of the Complementary Legislation.¹

¹ The accompanying "Contraband List" published by the Wisconsin Attorney General also demonstrates that the application of the Escrow Statute's terms, on their face, are less clear than Respondent posits. The MSA and Escrow Statutes apply to "tobacco product manufacturers," which is a term that is defined identically in both the MSA and Escrow Statutes. For companies that join the MSA, however, if a product is produced abroad, the importer, rather than the physical manufacturer, is deemed to be "the tobacco product manufacturer." Tab C; www.doj.state.wi.us/dls/tobacco/index.html, accessed 28/02/06. For these separate reasons, the Wisconsin Escrow Statute (and all Escrow Statutes) should not apply to Grand River. The Wisconsin court, however, did not need to reach this issue because it found that application of the Escrow Statute to Grand River would violate due process and personal jurisdiction rules.

Despite all the rhetoric and conjecture in Respondent's reply memorial, the Tribunal is faced with a single, yet paramount, question: Did Claimants have knowledge, prior to March 12, 2001, that each of the alleged measures breached the NAFTA in respect of Claimants and their investments; and, did they have knowledge that each breach resulted in an expropriation of Claimants' investments or their having incurred other loss or damage by that date? The incontrovertible answer to this question is: Absolutely not. The first expropriation, loss or damage that Claimants experienced in respect of their investments occurred when the State of Arizona banned the sale of Claimants' products in that State. Until that ban was placed into effect, the use, enjoyment, and operation of Claimants' investments and the sale of their products remained unfettered and completely undisturbed throughout the Free Trade Area, including in the United States.

Under NAFTA Chapter 11, private investors have no inchoate rights of recovery for a breach of its provisions. An investor must first experience and sustain loss or damage before it can bring a claim. Neither the Claimants nor their investments sustained any loss or damage prior to March 12, 2001. Respondent's arguments to the contrary are completely unfounded. Respondent has failed to point to a single fact or legal authority to support its novel theory that Claimants sustained loss or damage, and knowledge of same, immediately upon passage of the Escrow Statutes, or at any time prior to March 12, 2001.

Indeed, if the mere passage of an Escrow Statute could trigger the NAFTA's time limitation provisions, then the mere enactment of the Equity Assessment Law in Michigan should also constitute a breach of the NAFTA and result in damage and loss to Claimants. Of course, Respondent does not see it that way; Respondent argues that, despite its inherent discrimination, the mere passage of Michigan's Equity Assessment law could not, in and of

itself, constitute a breach of the NAFTA or loss or damage to Claimants that would be ripe for review in the current proceeding. Resp. Rep. at pp. 11-12. Thus, according to Respondent, an investor's rights and limitations under the NAFTA are triggered upon the mere passage of some laws but not others, depending on which application best suits the needs of the United States. The NAFTA's provisions clearly do not allow for such an absurd application or interpretation.

Respondent's remaining arguments display a similar conceit and arrogance. For example, Respondent finds it hard to believe that Claimants were unaware, at the time the MSA was negotiated and executed, that the "MSA regime *would* adversely affect their business." Resp. Rep. at 2 (emphasis added). The problems with this argument are many and manifest. The operative concept under the NAFTA's limitations provisions is not "would" but, rather, "when" – *i.e.*, the three-year statute of limitations can only begin to run when Claimants acquire knowledge that they have actually sustained loss or damage as a result of a breach. A fear or anticipation that an investor "would" or might experience a loss or damage to its investments in the future is insufficient to support a claim under the NAFTA.

Respondent's reply also highlights the inconsistency and despair that pervades throughout Respondent's attempts to "back-date" the effective dates of each measure raised in the PSOC. In its initial memorial, Respondent argued that the NAFTA's limitations provisions began to run on no less than eight (8) separate dates: (1) The date the MSA was executed; (2) The dates when reports about the MSA first publicly appeared shortly after its execution; (3) The deadline date given to certain manufacturers to join the MSA with an exemption (February 1999); (4) The date the first Escrow Statue was enacted; (5) The dates that the MSA States first sent letters to any Claimant regarding the potential application of the Escrow Statutes; (6) The date the State of Missouri filed a lawsuit in or about June 2000 (notwithstanding that it was not

served then); (7) The date a newspaper reporter called Grand River's president regarding the Missouri lawsuit; and, (8) The date the Missouri lawsuit was served on an "unidentified owner" of Grand River Enterprises.

With its reply, Respondent now offers new "trigger" dates for the NAFTA's limitations provisions. According to Respondent, Claimants should have known that the alleged measures breached the NAFTA and caused loss or damage to Claimants at the time their products were sold in an MSA State, because, at that time, Grand River became obligated to pay escrow. Resp. Rep. at 13-15. Alternatively, Respondents should have acquired that knowledge, Respondent argues, when their former business associates acquired knowledge of the MSA and Escrow Statutes' requirements. For the reasons explained above and *infra*, the Escrow Statutes did not, and could not, impose anything but a contingent liability, unless and until a judicial determination and decree was made mandating compliance and banning Claimants' products. In short, by its express terms, no loss or damage could be sustained or incurred under an Escrow Statute absent court order. In addition, Respondent fails to explain how entities or persons with whom Claimants were associated, but were no longer associated as of the date of the MSA, could impart knowledge of a breach of the NAFTA and actual loss or damage to Claimants.

Respondent's arguments about the Complementary Legislation and amendments made to the Escrow Statutes' Allocable Share release provisions are similarly myopic. Thus, Respondent argues that Claimants cannot complain about this supplemental or amendatory legislation, because it is part and parcel of the original Escrow Statutes. Focusing only on the original terms of the Escrow Statutes, however, would allow NAFTA parties, for example, to amend a measure years after an original version of the measure is adopted, only to claim later

that the amendment constituted the same measure as the original and, therefore, it is immune from NAFTA scrutiny under its three-year limitation provisions.

The Allocable Share Amendments to the Escrow Statutes were adopted more than three years after the MSA was executed and the original Escrow Statutes were enacted. As explained in Claimants' initial Memorial, the Allocable Share Amendments confer an unfair competitive advantage on Exempt SPMs and threaten to foreclose Claimants from the U.S. market altogether, separate and apart from the operation and effect of the original Escrow Statutes. According to Respondent, however, this amendatory legislation is not – and could never be – actionable under the NAFTA, simply because it was adopted more than three years after the MSA was concluded; or at least more than three years after the original Escrow Statutes were each adopted and enforced against Claimants. Respondent's theory and arguments are plainly illogical, unjust, and unacceptable.

Finally, Respondent relies on general industry "awareness" of the MSA at the time of its execution as a surrogate for imparting knowledge of a breach of the NAFTA – presumably on anyone and everyone in the tobacco industry. Such reliance, much like Respondent's reliance on notice that Claimants allegedly received of a Missouri action filed against Grand River, is misplaced. Respondent simply chooses to ignore that Claimants and their investments received no communication from any MSA State regarding the Escrow Statutes prior to March 12, 2001, and some MSA States have never sought to enforce their Escrow Statutes against Claimants to this day. In the face of the manner in which the measures were actually implemented as against Claimants, general industry awareness (whatever that means) could not, and did not, give rise to actual or constructive knowledge of a breach or, more importantly, knowledge that Claimants had incurred loss or damage arising from such breach for

any given measure at issue in this Claim. Respondent has not come forth with any legally competent argument or probative evidence refuting the fact that Claimants did not incur loss or damage, or had knowledge of such loss or damage, until their products were banned from sale in any MSA State, either through judgments purportedly obtained under the Escrow Statutes, or through the unilateral acts of the various Attorneys General under the Complementary Legislation.

ARGUMENT

POINT I

RESPONDENT MISREPRESENTS AND MISCHARACTERIZES FACTS AND AUTHORITIES THAT ARE BEFORE THE TRIBUNAL

A. Mischaracterization of Claimants' Pleadings

With its Reply, Respondent continues its pattern of misrepresenting and mischaracterizing Claimants' arguments and the facts as pled. Thus, Respondent argues that Claimants do not "contend that they were manufacturing cigarettes for sale in the U.S. market" in 1998, and that Claimants "claim to have no owner who could accept service of lawsuits filed against them." Resp. Repl. At p. 2. As stated in the PSOC, at p. 4, and repeated in Claimants' Response, at pp. 15-16, Claimants have been involved in the manufacture and distribution of tobacco products for sale in the United States since 1992.

Moreover, it is unconscionable for Respondent to maintain that defective service of process in a lawsuit allegedly brought to enforce an Escrow Statute could, nonetheless, translate into knowledge of a breach of the NAFTA and knowledge that loss or damage has already been incurred thereby, irrespective of whether such service was improperly served on Claimants. Indeed, the record demonstrates how the Missouri Attorney General's Office was never

particularly concerned with ensuring Claimants were actually afforded an opportunity to defend themselves. Rather, his apparent goal was to minimally paper the file en route to as speedy a judgment as possible, demonstrating an implicit acknowledgement of the fact that the Escrow Statutes could not cause damage or loss to Claimants and their investments without there first being a judicial decree banning the sale of Claimants' products.

One of the most blatant misrepresentations of Claimants' position in this case, however, is Respondent's allegation that "Claimants allege that the United States breached its NAFTA obligations when it concluded the MSA." Resp. Rep. p. 5. Claimants have never made such an allegation. Claimants could not have been clearer in describing how the MSA did not, and could not in and of itself, constitute a "measure" that could be made the subject of a claim under NAFTA Chapter 11, Claimt. Resp. pp. 22-24. It was only by virtue of judicial decrees entered under the Escrow Statutes, and the unilateral bans imposed by various Attorneys General, that Respondent's constituent States breached the NAFTA in relation to the Claimants and their investments, much less caused them loss or damage. Moreover, Respondent's emphasis on the MSA disregards completely the operation of the Contraband Laws, which were designed to succeed in stamping out small competitors where the Escrow Statutes had thus far failed. Such emphasis also fails to treat with the amendments adopted by the MSA States to the Escrow Statutes' Allocable Share release provisions, which the drafters of the MSA could not have envisaged at the time of the MSA's execution or at the time of the original Escrow Statutes' enactment in the several States.

B. Legal Standards Ignored by Respondent

Rather than addressing the legal tests found in the NAFTA text, Respondent begins its reply by reasserting the untenable position that it is "unnecessary" for Respondent to

accept that any conduct alleged by Claimants constitutes a “measure” under the NAFTA. Resp. Reply, Note 6. Absent such acceptance or acknowledgement, any argument by Respondent as to when one or more measures breached the NAFTA and caused loss or damage to Claimants and their investments is pure sophistry.

Respondent also has the temerity to argue that “Claimants effectively concede” that all “loss or damage” at issue in their claim was somehow suffered as of the date the MSA was concluded, Resp. Rep. p. 6. Claimants have said no such thing. Although the MSA States granted favourable exemptions to only certain manufacturers, the MSA itself did not cause loss or damage to Claimants. It was only after the MSA States obtained judicial decrees banning the sale of Claimants’ products; banned Claimants’ products under the Contraband Laws; and enforced amendments to the Escrow Statutes’ Allocable Share release provisions that Claimants began to experience loss or damage by reason of these discriminatory exemptions. Whereas the original Escrow Statutes required judicial process before compliance with the Escrow Statutes’ terms could be mandated under pain of having an NPM’s products banned from sale, the Contraband Laws effectively conferred that mandate authority solely to the discretion of the Attorneys General of the MSA States. Thus, under the Contraband Laws (euphemistically referred to by Respondent as “Complementary Legislation”), Claimants’ products are immediately banned from sale in an MSA State unless and until Claimants make escrow payments deemed to be satisfactory by an Attorney General.

In addition, under the Escrow Statutes as originally enacted, Claimants were still able to operate, use, and capitalize on their investments and compete with SPMs that were granted exemptions under the MSA. This was true because the Escrow Statute’s Allocable Share release provisions reduced an NPM’s effective escrow payments to levels that allowed Claimants

to compete with these Exempt SPMs. The repeal of the Allocable Share release provisions (when coupled with the Contraband Laws), however, essentially foreclosed Claimants from competing with Exempt SPMs – having the effect of forcing Claimants to relinquish all of their market share to these competitors.²

C. Respondent’s Reply Fails to Provide Authority to Support its Theory that Loss or Damage Must be Presumed to Occur Simultaneously with Breach

Without authority, Respondent speaks of Claimants’ arguments regarding breach and loss as a “contorted interpretation ... unsupported by any legal authorities.” Resp. Rep. at 7-8. Immediately thereafter, Respondent proceeds to do just that, *i.e.*, make arguments that are unsupported by legal authorities and which contradict the NAFTA’s text. Respondent maintains that “a claimant incurs loss or damage as soon as it becomes legally obligated to make a payment” under an Escrow Statute. Resp. Rep. at 8. The problem with Respondent’s reasoning is that Grand River’s “legal obligation” to pay under the Escrow Statutes could only be determined by judicial decree, and the Wisconsin decision, cited *supra*, established that Grand River had no such obligation under the Escrow Statutes. Thus, loss or damage could not result merely per force of the statute’s terms, nor the notices or demands of any Attorney General, as the Wisconsin case demonstrated.

Respondent further argues that damages incurred as a result of the prosecution of the Escrow statutes “are merely an extension of the original loss or damage incurred by virtue of the payment obligation imposed by the Escrow Statutes.” Resp. Rep. p. 8. The first of these statements is unaccompanied by any citation to international law authority and none is found

² Respondent points to Claimants’ preliminary assessment of damages as demonstrating their allegedly exclusive reliance on the MSA exemptions to prove their case. Resp. Rep. at 6. The valuator’s report merely identified the payment exemptions as one means to value Claimants’ investment under an expropriation theory. For Respondent to suggest otherwise is disingenuous at best.

elsewhere. The second is accompanied by citations to international law authority, but not to any which would support the stated proposition. Resp. Rep. pp. 8-9, note 22.

This single note of alleged authority for the proposition that loss or damage occurs simultaneously with breach, and that all loss flows from the existence of the MSA, rather than the measures later employed to remove Claimants from the U.S. market is misplaced. The *Mondev* quotation is taken dramatically out of context, as explained by Claimant already, Claimt. Resp. pp. 31-32; the citation to Canada's Statement on Implementation merely repeats the two-part NAFTA test; and the quotation from the ILC *Draft Articles on State Responsibility* only speaks to the issue of when a breach occurs as a result of state conduct, saying nothing about how that conduct must be manifested in the form of a "measure" relating to an investor or its investments as per NAFTA Article 1101, and nothing about when loss or damage occurs. In this regard, Respondent, again, simply chooses to bury its head in the sand and ignore the fact that no MSA State even claimed that its Escrow Statute applied to Claimants prior to March 12, 2001, and some States to this day maintain that their Escrow Statutes do not apply to Claimants' business in their respective territories.

D. Cases on Jurisdiction Ratione Temporis

Finally, Respondent selectively cites from the discussion of jurisdiction *ratione temporis* in the *Empresas Lucchetti* ICSID case and the *Phosphates in Morocco* PCIJ case, Resp. Rep. At note 24. Respondent elects not to explain, however, that neither of these cases concerned jurisdictional requirements similar to those found in the NAFTA. In fact, neither case involved a treaty requirement that a "measure" must exist about which breach and harm could be alleged.

The question before the PCIJ in the *Phosphates* case,³ was whether an “ongoing breach” could be submitted to dispute settlement under the treaty, even though acts constituting the breach pre-dated the treaty’s effective date. Similarly, the Tribunal in *Empresas Lucchetti*, Resp. Rep. Tab 40, was concerned with the question of whether an “investment dispute” – as defined in the *ICSID Convention* case law – existed prior to the coming into force of the BIT in question. The case involved an industrial facility that was closed down because of successive decrees issued by local authorities, contradicting assurances given by national government officials who had previously encouraged the investment. The first decrees were issued before the treaty entered into force, and were successfully quashed by the investor in local court. The second set of decrees became the focus of the treaty claim, which the Tribunal subsequently dismissed because it concluded that they represented a continuance of the same “investment dispute” that had existed before the treaty had entered into force.

This arbitration does not implicate or involve an “investment dispute” that existed prior to adoption of the NAFTA, and the reasoning found in the two cases cited by Respondent cannot be used to supplant the fundamental definitions contained within NAFTA Articles 1101, 1116 and 1117. In any event, Claimants had no “investment dispute” with the United States until each MSA State actually took steps that resulted in bans on the sale of Claimants’ products in their territories. For example, in Wisconsin, Claimants were awarded judgment that successfully vacated a ban placed on the sale of Claimants’ products that was earlier obtained through a default judgment and which had been entered under the Wisconsin Escrow Statute. The Wisconsin Court held that, despite the Attorney General’s claim that Grand River “indirectly” sold products in Wisconsin through an importer, distributor, or similar intermediary, the

³ See: Tab 15 of this document; not found in the Resp. Rep. Bk. Auths.

Wisconsin Escrow Statute could not be enforced as against Grand River. Notwithstanding this result, the Wisconsin Attorney General subsequently used his authority under Wisconsin's later-enacted Contraband Law to unilaterally impose a ban on Claimants' products – thus effecting an uncompensated taking of Claimants' investment in that State under NAFTA Article.

This example not only demonstrates the difference, in application, of enforcement of the Escrow Statutes versus the immediate bans available under each Contraband Law; it also demonstrates – in spite of Respondent's self-serving statements to the contrary – that there was and is no certainty that any of the Escrow Statutes – on their face – definitely applied or would definitely have been enforced against Claimants in any given state. The harmful effects of these measures could only be sustained as a result of the judicial decrees they made available (which would trigger the indirect taking that constituted a breach of Article 1110). Before such a decree, the Escrow Statutes, at most, create a contingent liability – not actual loss or damage.

To be clear, there was no expropriation of Claimants' investments upon the mere passage of the Escrow Statutes or sales of Claimants' products in an MSA State. Expropriation occurred, and could only occur, when an MSA State obtained a judicial decree banning the sale of Claimants' products, or later through the ability of an Attorney General to unilaterally ban the sale of Claimants' products under his or her state's Contraband Law. Similarly, with respect to the breaches of the national treatment and fair & equitable treatment standards contained within the NAFTA, the arbitrary and discriminatory results contemplated by Big Tobacco the Attorneys General, when they signed the MSA, would not be manifested in the form of a NAFTA breach, nor cause loss or damage to Claimants, until product bans were obtained from a Court under the Escrow Statutes, or imposed under the Contraband Laws.

In any event, Respondent's citation to *ratione temporis* cases is incomplete.

Respondent failed to address more persuasive jurisprudence on the concept of when an "investment dispute" ripens for purposes of triggering a statute of limitations. For example, as two ICSID Tribunals have already noted:

... there tends to be a natural sequence of events that leads to a dispute. It begins with the expression of a disagreement and the statement of a difference of views. In time, those events acquire a precise legal meaning through the formulation of legal claims, their discussion and eventual rejection or lack of response by the other party. The conflict of legal views and interests will only be present in the latter stage, even through the underlying facts predate them ... this sequence of event has to be taken into account in establishing the critical date.⁴

Similarly, Respondent makes no mention of the case of *Técnicas Medioambientales, TECMED S.A. v. United Mexican States*, where the Tribunal was confronted with a situation where most of the conduct giving rise to the claim effectively "weakened" the investor's legal position prior to the entry into force of the treaty. Nonetheless, the Tribunal concluded that the "investment dispute" did not crystallize until after the treaty came into force, because it was not until after that date that a specific measure was implemented that constituted a *de facto* expropriation of the investor's business:

However, it should not necessarily follow from this that events or conduct prior to the entry into force of the Agreement are not relevant for the purpose of determining whether the Respondent violated the Agreement through conduct which took place or reached its consummation point after its entry into force. For this purpose, it will still be necessary to identify conduct —acts or omissions— of the Respondent after the entry into force of the Agreement constituting a violation thereof.

....[E]vents or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach.⁵

⁴ *Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000, at para. 96, Tab 16; cited in: *Impregilo S.p.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, at para. 304, Tab 17.

⁵ *Técnicas Medioambientales, TECMED S.A. v The United Mexican States*, at para. 66, Tab 18, citing: *Mondev v. U.S.A.*, ICSID Case No. ARB(AF)/99/2, Award, at p. 23, Claimt. Resp. Tab 7.

In view of the above precedents and of the Claimant's specific requests, the Arbitral Tribunal will not consider any possible violations of the Agreement prior to its entry into force on December 18, 1996, as a result of isolated acts or omissions that took place previously or of conduct by the Respondent considered in whole as an isolated unit and that went by before such date. In order to reach such conclusion, a relevant fact is that Cytrar, Tecmed and the Claimant did not choose to make any claim in connection with conduct occurring prior to December 18, 1996, not even through a note addressed to the relevant Mexican authorities stating their objections to the measures or resolutions adopted, although they were not under any violence or pressure at the time preventing them from doing so.

On the other hand, conduct, acts or omissions of the Respondent which, though they happened before the entry into force, may be considered a constituting part, concurrent factor or aggravating or mitigating element of conduct or acts or omissions of the Respondent which took place after such date do fall within the scope of this Arbitral Tribunal's jurisdiction. This is so, provided such conduct or acts, upon consummation or completion of their consummation after the entry into force of the Agreement constitute a breach of the Agreement, and particularly if the conduct, acts or omissions prior to December 18, 1996, could not reasonably have been fully assessed by the Claimant in their significance and effects when they took place, either because as the Agreement was not in force they could not be considered within the framework of a possible claim under its provisions or because it was not possible to assess them within the general context of conduct attributable to the Respondent in connection with the investment, the key point of which led to violations of the Agreement following its entry into force.⁶

Respondent's election not to mention the *Tecmed* case goes further than that Tribunal's conclusions on when a measure ripens for the purposes of meeting the ICSID definition of "investment dispute." As it turns out, the respondent in that case made, and lost, a very similar time limitation argument to the one made by Respondent in this case, which was based upon a very similar three-year rule found in the applicable BIT:

The investor may not submit a claim under this Agreement if more than three years have elapsed since the date on which the investor had or should have had notice of the alleged violation, as well as of the loss or damage sustained.⁷

Contrary to the position advocated by Respondent in this case, the *Tecmed* Tribunal determined that the question of when loss or damage occurred – within the context of conduct that commenced before there existed a treaty and which crystallised in the form of expropriatory measures after it came into force – was indeed a material and

⁶ Ibid, at para's. 67-68.

relevant question.⁸ Notwithstanding that the first indications of an “investment dispute” manifested outside of the time period prescribed by the treaty, the *Tecmed* Tribunal concluded that breach of the treaty did not occur, and that loss or damage was not suffered, until after the government issued an official resolution that effectively took the investment.

Similarly, in the instant Arbitration, there existed no official resolution that effectively took Claimants’ investment until resolutions banning the sale of Claimants’ products were effected through judicial decree, or through the unilateral determinations made by the Attorneys General under the Complementary Legislation.

The *Tecmed* Tribunal’s decision is also in accord with that of the NAFTA Tribunal in *Feldman v. Mexico*, where the Tribunal was confronted with claims involving applications for tax rebates. Each of the claimant’s applications involved a request for a rebate allegedly earned over a given period of time. The Tribunal concluded that eligibility to claim loss or damage in respect of each individual rebate application (and each decision on those applications) would be subject to the three-year “cut off date” imposed under NAFTA Articles 1116(2) and 1117(2). All rebates sought before the three-year date were considered inadmissible; all rebates sought after the three-year date were considered admissible.⁹ If Respondent’s arguments in this case had been adopted by the *Feldman* Tribunal, that Tribunal would have dismissed all of the claims as having arisen out of the same regime and having possessed the same character of loss suffered throughout. Instead, each rebate decision was effectively treated as a separate measure, leaving only the earliest to be dismissed for want of time.

⁷ *Ibid*, at para. 72.

⁸ *Ibid*, at para. 74.

POINT II

LOSS OR DAMAGE DOES NOT NECESSARILY OCCUR SIMULTANEOUSLY WITH BREACH OF THE NAFTA

Implicit throughout Respondent's argument is the theory that in every case the breach of an international obligation immediately causes loss or damage. Advocating this theory permits the United States to argue that the date when loss or damage actually takes place does not matter – so long as the legal fiction that “breach” immediately causes “loss or damage” is maintained. The problem with Respondent's theory is that there is no authority at all to support it, and it blatantly contradicts the plain wording of the relevant NAFTA provisions.

Respondent offers no explanation as to why a breach must be deemed to cause simultaneous loss or damage. The legal authority clearly does not support such a principle. For example, in the complementary cases of *Lauder v. Czech Republic* and *CME v. Czech Republic*, both tribunals acknowledged that the alleged losses took place years after the breaching conduct took place. The conduct in question was a requirement arbitrarily imposed by a television regulator having the eventual effect of placing the control of a soon-to-be profitable television station, which had been founded by the investors, in the hands of their mandated local venture partner. The local partner would use this authority years later to effectively take the entire business away from the foreign investors. While the two tribunals disagreed as to whether the conduct in question rose to the level of a breach of the fair and equitable treatment standard, and

⁹ *Feldman v. Mexico*, Final Award, at para's. 63 & 199, Claimt. Resp. Tab 12.

whether proximate cause had been established, neither questioned that the losses alleged by the investors were experienced years after the initial breach occurred.¹⁰

Professor Paulsson, in his treatise on *Denial of Justice*, agrees with the position that breach does not automatically or immediately result in loss or damage. In establishing that a breach occurs, one is not necessarily demonstrating that loss or damage has been suffered simultaneously as a result. Paulsson notes that, as a matter of customary international law, while the breach of a treaty obligation generates a duty of reparation on the part of an offending State, the next logical question is whether loss or damage exists as a result of the breach? If Respondent's theory was correct, there would be no need to ask that question. As Professor Paulsson demonstrates with his analysis, Respondent is wrong.¹¹

Respondent also makes the *ad hominem* allegation that Claimants are "scofflaws" asking the Tribunal to grant them the discretion to extend the NAFTA's limitation period at will. Resp. Rep. p. 10. Respondent argues that, if Claimants succeed, the NAFTA's limitation period "would begin only when a claimant chose to recognize that it was aggrieved" Resp. Rep. p. 10. The applicable test, however, is straight-forward and not the subject of any investor's "choosing." It involves ascertaining actual or constructive knowledge of how each measure at

¹⁰ *Ronald S. Lauder v. The Czech Republic*, UNCITRAL Tribunal, Final Award, 3 September 2001, at ¶¶ 234-235, Tab 19; and *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL Tribunal, Partial Award (Merits), 13 September 2001, at ¶¶ 575-585, tab 20.

¹¹ *Denial of Justice in International Law* (Cambridge: Cambridge University Press, 2005), at pp. 223-224, Tab 21:

"If one goes back to a *locus classicus* of international law, the *Chorzow Factory* case, one finds that the court identified three fundamental questions presented in this logical sequence:

- (1) The existence of the obligation to make reparation.
- (2) The existence of the damage which must serve as a basis for the calculation of the amount of the indemnity.
- (3) The extent of this damage."

issue breached the NAFTA; and it involves ascertaining actual or constructive knowledge of how each individual breach caused actual loss or damage to an investor. An investor does not choose when a measure breaches the NAFTA and it does not choose when it suffers loss or damage as a result. There is no room for discretion on the part of the investor to decide when a breach occurs or when it experienced loss or damage as a result. The evidence of both is on the record. Although Respondent claims that the “legal certainty” in the NAFTA’s limitation provisions can only be achieved if Respondent’s arguments are upheld, the reality is that the only way in which legal certainty can be obtained is if the text of Articles 1116(2) and 1117(2) is faithfully interpreted and applied.

POINT III

RESPONDENT OFFERS NO PROBATIVE EVIDENCE THAT COMMENCEMENT OF THIS ARBITRATION WAS UNTIMELY

A. Breach of the NAFTA and Loss were not Self-Evident

In its reply, Respondent introduces domestic case law on time limitation provisions to modify the test set out in the NAFTA, in order to push back the date upon which Claimants should be deemed to have had knowledge of the measures that they allege breached the NAFTA. Resp. Rep. at 12-13. Claimants could cite better examples from other legal systems, for example from the European Court of Justice;¹² the relevant test for this case nonetheless remains that which is reflected in Articles 1116(2) and 1117(2).

¹² *Friedhelm Quiller & Johann Heusmann v Council of the European Union & Commission of the European Communities*, ECJ, Case Nos. T-195/94 & T-202/94, 9 December 1997, at ¶ 6, Tab 22: “The limitation period for actions to establish non-contractual liability on the part of the Community, laid down by Article 43 of the Statute of the Court, cannot begin to run before all the requirements governing the obligation to make good the damage are satisfied and, in particular, in cases where liability stems from a legislative measure, before the injurious effects of the measure have been produced ... The damage to be redressed is not damage caused instantaneously but damage which occurred from day to day over a period of time, as a result of the maintenance in force of an unlawful measure.”

Respondent speaks of a “simple reading” of the Escrow Statutes and “exercising reasonable diligence” in respect of learning of State conduct that breaches NAFTA standards, Resp. Rep. at 13; yet, Respondent omits the obvious, express language of the NAFTA which is clear about the kinds of conduct that fall within the scope of NAFTA Chapter 11. NAFTA Article 1101 states that the Chapter applies to “measures” adopted or maintained by a Party that relate to an investor or investment. No matter how much Respondent wishes it were not so, the text says what it says. One cannot be construed to have possessed knowledge that a Chapter 11 breach existed unless the measure in question was itself in existence and actually being applied to Claimants and their investments, causing them to suffer loss or damage as a result.

With respect to the Escrow Statutes, the facts demonstrate that this is not a simple case of “ignorance of the law [being] no excuse” – as Respondent would have the Tribunal believe, Resp. Rep. p. 13. There were forty-six Escrow Statutes that could have been enforced against Claimants, even though prosecutions under each of them varied, sometimes dramatically, from state-to-state. Some targeted the importer; some only targeted the defined manufacturer. Some initially appeared to be concerned with direct sales in each state; others (and eventually all) were focused on all sales in the state, direct or indirect. Some limited enforcement to sales made off-reserve; others did not. In other instances, for example in Wisconsin, it was judicially determined that the Escrow Statute could not be enforced as against Claimants. For Respondent to suggest that all of these measures were merely the manifestation of a single, coherent policy that was the *true source* of all of the harm suffered reveals a very naïve – if not intentionally opaque – understanding of how these measures actually worked in practice. Contrary to Respondent’s wishful thinking, “simply reading” either the text of the Model Escrow Statute annexed to the MSA, or the text of any given Escrow Statute, Resp. Rep. p. 15, would not give

anyone a sufficient understanding of the depth and complexity of these measures, as they were applied in practice.

B. Knowledge Allegedly Possessed by Claimants' Former Business Associates is Irrelevant

Respondent states that Claimants “assiduously avoid discussing” whether a list of purported “affiliates and associates,” as well as each individual Claimant and their investment enterprises had knowledge of a measure that breached the NAFTA prior to March 12, 2001. This allegation is patently false.¹³ Claimants are not responsible for proving or disproving any alleged state of knowledge on the part of entities with which Claimants may have been previously associated prior to the measures alleged in the PSOC. The relevant inquiry is when did Claimants know, or should they have known, that any given measure breached NAFTA Chapter 11 in relation to *Claimants* and their investments, and caused Claimants loss or damage. Far from avoiding discussion of Claimants’ state of knowledge with respect to breaches detailed in the PSOC, they have consistently and forcefully denied that such knowledge could or should have been possessed before March 12, 2001, for all Claimants.

Respondent suggests – without evidence – that Claimants should be presumed to have known about the existence of NAFTA-offending measures because entities formerly involved in business with Claimants had allegedly received knowledge of the existence and requirements of the MSA and Escrow Statutes, Resp. Rep. pp. 18-20. It is not “reasonable to assume” that legal strangers to Claimants could impart to them sufficient knowledge of any one

¹³ Respondent also states that Claimants represent that they have been associated or affiliated in business with the Seneca Nation. Resp. Reply 17. Claimants never made such a

measure – much less all of them – so as to allow Claimants to form an opinion as to whether a NAFTA breach had occurred. Claimants’ business relations with each of the “affiliates and associates” referred to by Respondent terminated prior to the date of execution of the MSA, and none has been re-established since that date.

C. *Defective Service of Process in a Missouri Action does not Establish Knowledge of Breach of the NAFTA or Loss or Damage for that or Any of the Other Measures at Issue*

Respondent makes the further argument that Claimants avoided discussing when Claimant Arthur Montour Jr. learned of a Missouri case through his ownership of Native Tobacco Direct, Resp. Rep. p 21. Respondent also complains that Steve Williams (President of Grand River Enterprises Six Nations, Ltd.) only spoke for Grand River in his Statement attached to Claimant’s Reply, Resp. Rep. p 21. Respondent apparently fails to comprehend that it bears the burden of proving the facts to support its objection; Claimant is not obligated to discuss that which Respondent has failed or omitted to allege.

In any event, Respondent did not deem fit, in its discussion, to mention the date or circumstances surrounding the alleged service of process in the lawsuit in question. As the accompanying Affirmations of Arthur Montour, Jr. and Missouri counsel, W. Bevis Schock, confirm, neither NTD nor NWS received process in the Missouri action. Tab A at ¶¶ 11-14; Tab B at pp. 1-2. Process was allegedly served on NTD through a person who was not an agent, officer or director of NTD, and which was apparently delivered to that person at her home address.¹⁴ Moreover, the Missouri Attorney General apparently attempted to correct his service errors *after* March 12, 2001, and then ultimately dismissed the lawsuit against all parties except

representation, and it would behove the Tribunal to discern the reasons for Respondent’s blatant misstatements to the contrary.

¹⁴ Process was never attempted on, and the lawsuit does not name, Native Wholesale Supply.

Grand River. Respondent fails to explain how defective service allegedly effected on parties to a lawsuit that was subsequently dismissed imparted knowledge of a breach of the NAFTA in respect of every measure at issue and, more importantly, Claimants' suffering loss or damage. Indeed, as noted in Claimants' Response, at p. 11, and not disputed on reply, the Missouri Attorney General has, to this day, apparently not sought to enforce the injunction he obtained in that action which banned the sale of Claimants' products in Missouri.

Respondent also suggests that Claimants knew that all the measures alleged in the PSOC breached the NAFTA and caused loss or damage to Claimants by reason of a letter having been mailed to NTD on or about October 11, 2000. The Montour Affirmation confirms that the letter was not mailed to NTD's business address and not received by NTD, irrespective of whether it was returned to the sender. Tab A, at ¶¶ 9-10. In addition, Respondent does not state whether the sender, who apparently sent the same form letter via U.S. bulk mail to approximately 250 companies, requested return of service. In any event, the letter states that it is for "Potential" Non-Participating Manufacturers, and requests disclosure of the entities from whom the recipient purchased cigarettes, if the recipient is not the manufacturer. Leaving aside that NTD never sold any of Claimants' cigarettes *in Iowa* to the distributors mentioned in that letter (but rather, to a Native American corporation wholly owned by the Winnebago Tribe of Nebraska) and that the Iowa Attorney General never sought to enforce the Iowa Escrow Statute against NTD, the correspondence does not warn of, nor constitute, under any theory or understanding, an expropriation of Claimants' business in that State, nor cause the loss or damage connected to a

breach of the national treatment or fair & equitable treatment standards contained within the NAFTA.¹⁵

Similarly, the letter that the Iowa Attorney General claims was sent to Grand River on or about April 7, 2000, and the letter that was allegedly mailed to Grand River by the Missouri Attorney General on April 25, 2000, were sent to a previous mailing addresses for Grand River. The sworn statement of Grand River's president confirms, in any event, that the letters were not received by Grand River, and Respondent has not come forth with *any* evidence to refute that confirmation. Any claim by Respondent regarding Grand River's alleged receipt of that correspondence would thus be, and is, based upon pure speculation. Moreover, like the letter sent by the Oregon Attorney General, dated March 14, 2001, the April 7th letter states that the Escrow Statute applies to a manufacturer "who sells cigarettes to consumers within the State of Iowa." Neither Grand River nor any Claimant sold cigarettes to consumers within any State, including Iowa.

In summary, the correspondence referred to by Respondent cannot, and does not, impart knowledge of a breach of the NAFTA, even for the particular state's measures in question. The correspondence did not constitute an expropriation; it did not constitute a breach of the national treatment or fair and equitable treatment standards; and it did not cause or loss or

¹⁵ It should be mentioned that, although the Iowa letter states that it enclosed a copy of the Iowa Escrow Statute, that letter (like the other letters sent out by the various Attorneys General) did not include a copy of the statute. Resp. App., at tab 129. If it did, either the Iowa Attorney General or Respondent has manipulated that correspondence to bolster Respondent's arguments on this jurisdictional challenge. The letter is dated October 11, 2000; however, the copy of the statute (which purports to be an enclosure to that letter) is taken from a website copyrighted in 2001 and updated on January 22, 2001. Obviously, if the letter was sent on or about October 11, 2000, it could not have included an enclosure that listed it was last updated in 2001.

damage to Claimants by mere fact of its purported delivery. Any claim or argument to the contrary is completely unfounded and untenable.¹⁶

CONCLUSION

Respondent does not, and obviously cannot, provide evidence that all of the various types of measures at issue in this claim were made known – or should have been known – to Claimants before March 12, 2001, much less that they constituted a breach of the NAFTA as of that date. Moreover, Respondent provides no evidence rebutting Claimants’ showing as to when loss or damage actually occurred for each measure. Accordingly, because it has failed to meet its burden of proof in this preliminary phase of the proceedings, Respondent’s request to dismiss this arbitration should be denied in all respects.

For the forgoing reasons, the Claimants respectfully request:

- a) that this Tribunal dismiss Respondent’s objection to jurisdiction;
- b) that this Tribunal move immediately to set a date for a single and final hearing on the merits of the Investors’ claim; and
- c) that costs be ordered against Respondent pursuant to Article 40 of the UNCITRAL Rules, including costs for legal representation and assistance.

¹⁶ Respondent’s reply re-hashes Respondent’s construction of a newspaper article that purports to quote Grand River’s president. Respondent’s efforts add nothing to the discussion of that article that has not already been addressed. Significantly, Respondent failed to do anything to answer the affirmed statements of Mr. Williams, such as providing a statement from the reporter who authored the article upon which so much of its case appears to stand.

Dated: February 27, 2005

By: SIGNED IN ORIGINAL
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