

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT  
DISPUTES  
WASHINGTON, D.C.**

**IN THE PROCEEDINGS BETWEEN**

**GRAND RIVER ENTERPRISES SIX NATIONS, LTD., ET AL.  
(CLAIMANTS)**

**V.**

**UNITED STATES OF AMERICA  
(RESPONDENT)**

**(NAFTA / UNCITRAL ARBITRATION)**

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**DECISION ON OBJECTIONS TO JURISDICTION**

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*Before the Tribunal comprised of*  
Fali S. Nariman, President  
James Anaya, Arbitrator  
John R. Crook, Arbitrator

*Secretary of the Tribunal*  
Ucheora Onwuamaegbu

*Representing the Claimants:*  
Mr. Leonard Violi  
Mr. Todd Weiller

*Representing the Respondent:*  
Mr. Mark A. Clodfeleter  
Ms. Andrea Mennaker  
Ms. CarrieLyn D. Guymon

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## I. INTRODUCTION

1. The Claimants brought this claim on March 12, 2004 under Chapter 11 of the North American Free Trade Agreement (hereinafter “NAFTA”). As is more fully explained below, the Claimants contend that various actions taken by states of the United States to implement the 1998 Master Settlement Agreement, concluded to settle litigation by several U.S. states against certain U.S. cigarette manufacturers, violate their rights under Chapter 11 of NAFTA. While the specific actions complained of are taken by various states of the United States, the United States acknowledges that it is internationally responsible under NAFTA for their actions.<sup>1</sup>

2. The Claimants are Grand River Enterprises Six Nations, Ltd. of Ohsweken, Ontario, Canada, a corporation incorporated under the laws of Canada in April 1996 (hereinafter, “Grand River”); and Messrs. Jerry Montour and Kenneth Hill, also of Ohsweken, and Mr. Arthur Montour, Jr., of Seneca Nation Territory, Perrysburg, New York (hereinafter, “the individual Claimants”). The individual Claimants were all born in Canada and are members of indigenous peoples or First Nations belonging to the Six Nations of North America (also known as the Iroquois Confederacy or Haudenosaunee). The Claimants aver that Messrs. Jerry Montour and Kenneth Hill are controlling stockholders of Grand River, with Mr. Montour holding 30% of the common shares and Mr. Hill holding 10%. Both Mr. Jerry Montour and Mr. Hill reside on the Grand River Reserve in Ohsweken, Ontario Canada. Mr. Arthur Montour resides on Seneca Nation Territory in northern New York State, where he carries on a tobacco distribution business through Native Tobacco Direct Company and Native Wholesale Supply Company.

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<sup>1</sup> NAFTA Article 5 requires the parties to “ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments.” See Article 4, paragraph 1, International Law Commission’s Articles on State Responsibility (“The conduct of any State organ shall be considered an act of that State under international law ...whatever its character as an organ of the central government or of a territorial unit of the state.”) For this purpose, “[i]t does not matter...whether the territorial unit in question is a component unit of a federal State or a specific autonomous area, and it is equally irrelevant whether the internal law of the State in question gives the federal parliament power to compel the component unit to abide by the State’s international obligations.” ILC Commentary to Art. 4, para. 9, in J. Crawford, *The International Law Commission’s Articles on State Responsibility. Introduction, Text and Commentaries*, p. 97 (Cambridge University Press, 2002).

3. This Decision on Objections to Jurisdiction addresses a single jurisdictional issue raised by Respondent and identified for separate treatment as a preliminary issue by the Tribunal: whether certain of the Claimants' claims must be barred as not timely under NAFTA Articles 1116(2) and 1117(2). Article 1116(2) provides:

“An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.”

Article 1117(2), which deals with claims by an investor on behalf of an enterprise, is similar:

“An investor may not make a claim on behalf of an enterprise ... if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.”

4. The Parties are agreed that March 12, 2004, the date on which the Claimants' Notice of Claim was served on the Respondent, is the date on which the claim was brought and is therefore the relevant date for purposes of the jurisdictional issue considered here.<sup>2</sup>

5. There has been no discovery in the case, and the Tribunal has so far heard no testimony. The factual descriptions contained in this Decision are largely based upon the Claimants' descriptions of their activities and related documents. Except as indicated

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<sup>2</sup> See *Feldman v. Mexico*, Interim Decision on Preliminary Jurisdictional Issues, Dec. 6, 2000, ICSID Case No. ARB(AF)/99/1, 40 ILM p. 615 at p. 622 (para. 44) (2001) (receipt of notice of arbitration by the ICSID Secretary-General interrupts the Chapter 11 limitations period in case under ICSID Additional Facility Rules).

herein, these descriptions do not reflect findings of fact by the Tribunal, and should not be taken to indicate conclusions by the Tribunal concerning disputed factual issues.

## **II. THE MASTER SETTLEMENT AGREEMENT AND SUBSEQUENT EVENTS**

6. Since the early 1990's, the individual Claimants have been engaged in "the licensing, manufacture, packaging, production, importation and or sale of tobacco products"<sup>3</sup> through various ventures carried on within Indian reservations in the United States or First Nations reserves in Canada. They have not engaged in direct retail sales. Instead, they have sold cigarettes manufactured by Grand River or predecessor companies, or purchased from other manufacturers, to wholesalers and distributors. These wholesalers and distributors sell them on for eventual retail sale to consumers in lower priced segments of the cigarette market. A significant portion of the Claimants' business apparently involves cigarettes ultimately sold at retail to consumers on Indian reservations in the United States or First Nations reserves in Canada. The Claimants also engage in the manufacture and distribution of cigarettes ultimately sold to consumers in U.S. markets off reservation.

7. The claim has its origins in litigation brought by more than 40 U.S. state attorneys general against the four major U.S. tobacco producers<sup>4</sup> in the 1990's, claiming compensation for medical costs incurred by the states in treating tobacco-related illnesses. An initial effort to settle this litigation through a comprehensive settlement requiring legislative approval by the U.S. Congress failed in June 1998. Thereafter, resumed negotiations sought to develop a comprehensive settlement not requiring Congressional approval and legislation. Those negotiations ended successfully in November 1998, when a group of state attorneys general and the four major U.S. tobacco producers concluded the Master Settlement Agreement (hereinafter, "MSA"). Other

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<sup>3</sup> Claimants' Particularized Statement of Claim (hereinafter "PSOC") p. 4 (para. 5).

<sup>4</sup> Phillip Morris Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corp. and Lorillard Tobacco Company (hereinafter "the Majors").

states subsequently adhered to the MSA as well, and eventually 46 states, the District of Columbia and five U.S. territories became parties.

8. The MSA is a long and detailed document. Very briefly, it required each company adhering to it (“Participating Manufacturers” or “PMs”) to make in perpetuity cash payments to a central account in respect of each cigarette sold by the PM, as measured by the number of cigarettes taxed by the participating states. Each participating state received a share of the substantial sums paid annually by the PMs, proportional to the share of covered cigarette sales in that state. The amounts charged per cigarette increased each year in accordance with an agreed formula. PMs also agreed to extensive restrictions on advertising and other marketing practices and to fund smoking prevention and cessation programs.

9. Compliance with the MSA significantly increased the cost of PMs’ cigarettes to consumers. The Tribunal received evidence indicating that wholesale per carton prices increased by \$4.50 per carton of cigarettes during the first year, with additional large increases in following years. Because of these higher costs, PMs stood to lose sales and market share to competitors not subject to the MSA’s financial obligations and other restrictions. Accordingly, the MSA incorporated elements aimed at encouraging other, mostly smaller, manufacturers to adhere to the MSA, or otherwise limiting their ability to gain market share at the expense of higher-cost PMs.

10. The MSA included a key provision intended to encourage other companies to join the MSA regime. This provision, referred to by the Claimants as the “Renegade Clause,” allowed additional cigarette manufacturers to join the MSA during the sixty days, later extended to ninety days, following the agreement’s conclusion in November 1998. Companies that joined the MSA during this 90-day period or subsequently were called “Subsequent Participating Manufacturers” or “SPMs.” An SPM adhering to the MSA during the ninety-day sign-up period received an exemption from the MSA’s payment obligations for up to 125% of its 1997 or 100% of its 1998 market share. Sales exceeding this were subject to the mandatory payments, but all sales below it remained permanently

exempt. The remaining large manufacturer, Liggett Group, took advantage of this provision and adhered to the MSA during the ninety-day period. The Tribunal received evidence indicating that about 40 other cigarette manufacturers also did so. However, the Claimants contended that they did not know that they could adhere to the MSA during the ninety-day period, and it is undisputed that they did not do so prior to filing their claim. They remained a “Non Participating Manufacturer,” or “NPM.”

11. When the MSA was concluded in 1998, the manufacture of cigarettes for the U.S. market was highly concentrated. The Tribunal received evidence indicating that the Majors accounted for more than 97% per cent of sales in 1997, with Liggett Group and all other producers accounting for the remainder. Of this, Liggett and other SPMs accounted for 2.6%, while NPMs accounted for just 0.37% of 1997 market share. (Liggett settled state suits against it in a separate settlement in 1996, and did not participate in the MSA negotiations).

12. The MSA’s primary means to limit NPMs’ ability to wrest market share from PMs was its requirement that each of the 46 participating states adopt escrow legislation precisely replicating a draft law annexed to the MSA. Under the prescribed state legislation, each NPM annually must place in escrow in a state a sum roughly corresponding to the amount it would have paid in respect of its taxed sales in that state, had it joined the MSA.<sup>5</sup> These funds must be escrowed by April 15 of the year following the year in which the cigarettes were sold. Sales volume is determined based on the number of cigarettes receiving state tax stamps for sale in the state. The cigarette manufacturer retains title to escrowed funds and to any accrued interest, but the funds remain locked in escrow for 25 years, and can be used to pay any judgment against the manufacturer stemming from litigation by the state involving the health consequences of the manufacturer’s product. All of the 46 states party to the MSA adopted escrow laws in the required form, 38 in the year 1999 and the remaining 8 in the year 2000.

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<sup>5</sup> The Tribunal was informed that the amount to be escrowed per cigarette was slightly larger than the amount paid by MSA manufacturers to the central account. The difference was designed to reflect additional payments made by the Majors pursuant to separate settlements they reached with four States prior to conclusion of the MSA.

13. As initially adopted, the escrow laws included provisions, called the “allocable share” provisions, that in certain circumstances could significantly lower the amount an NPM had to escrow in a given state. These provided that an NPM need not escrow in any state more than that state would have received in respect of that NPM’s total sales in all MSA states, were the manufacturer a PM. This significantly reduced the amount to be escrowed for NPMs that concentrated their sales in a few states. This is because each state’s share of MSA funds is based on its proportionate share of national cigarette sales covered by the MSA regime. Thus, for example, a state with 1% of all national sales of covered cigarettes would receive 1% of all funds paid in by the Participating Manufacturers. If a NPM sold all of its cigarettes in that state, it would have to escrow there an amount roughly corresponding to the amount it would have paid to the national MSA fund were it a PM. However, pursuant to the allocable share provisions, it could then receive an immediate refund of 99% of the escrowed funds, because the state would receive only 1% of the manufacturer’s payments if it were a party to the MSA.

14. As indicated above, when the MSA was concluded in November 1998, small manufacturers that did not join the MSA regime had less than 0.4% of the total U.S. cigarette market. However, as the MSA was implemented, PMs raised their prices and were also subject to the MSA’s restrictions on advertising and other marketing practices. There was evidence indicating that increases in major manufacturers’ wholesale prices were significant. There followed a reduction in PM’s total sales and market share, while NPMs’ sales and market share increased. This concerned both the PMs and the states, since both stood to lose revenue from this shift.<sup>6</sup> There was evidence indicating that the market share of Non-Participating Manufacturers increased to 8.1% in 1993.

15. States participating in the MSA responded by intensifying efforts to enforce their escrow laws. In addition, late in 2001 or early in 2002, states began to enact

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<sup>6</sup> In addition to declines in states’ revenues due to fewer cigarettes being sold under the MSA regime, the MSA provided for possible reductions in the payments required per cigarette if PMs’ market share declined.

“complementary legislation” (referred to by the Claimants as “contraband laws”) to strengthen enforcement of the escrow laws. These statutes required state attorneys general to maintain lists of NPMs not in compliance with the escrow laws, and prohibited state stamping agents from placing tax stamps on cigarettes from non-complying manufacturers. Cigarettes stamped for sale in violation of one of these laws are subject to forfeiture as contraband.

16. Beginning in 2003, states also began to amend the escrow laws to repeal the allocable share provisions. The states came to regard these provisions, which authorize substantial rebates of escrowed funds to NPMs with sales concentrated in a few states, as a “loophole,” and the evidence indicated that 38 states had adopted amendments to “plug the loophole” by September 2004.

17. The evidence did not clearly address the volume of Claimants’ sales in the United States before or after the MSA, but Claimants’ initial written pleadings portrayed the escrow statutes as having draconian effects on their business. Their June 2005 Particularized Statement of Claim contended that compliance with the escrow laws resulted in:

“the complete destruction of Investors’ business and their investments. On the other hand, if an NPM does not make the payments required under a State’s Escrow Statute, the NPM will be subjected to civil penalties and its products will be prohibited from being sold in the State ... [T]he effect of non-compliance...is a complete prohibition against the operation of the Investor’s business and their investments within the territory claimed by the USA, again resulting in its complete destruction.”<sup>7</sup>

18. However, in subsequent pleadings and at the hearing, Claimants suggested that their products continued to be sold profitably in a few jurisdictions. Basing itself on

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<sup>7</sup> PSOC p. 16 (para. 67).

Claimants' preliminary calculation of its losses, Respondent averred that "approximately 2.2 billion cigarettes manufactured by Grand River were sold in the United States in 2004, out of a total of 400.8 billion cigarettes sold nationwide that year."<sup>8</sup> Legal filings in the records of some states' cases against Grand River alleging non-compliance with the escrow laws in 2002 and thereafter suggest that sales of Claimants' products significantly increased in some markets.

19. Documents brought on record showed that the State of Missouri initiated two separate court actions against Native Tobacco Direct and Grand River Enterprises Six Nations Ltd., one in June 2000 and the second in December 2001, for non-compliance with Missouri's escrow statute during July – December 1999 and during all of 2000. (Missouri's escrow statute became effective on July 1, 1999.) The first action resulted in a June 10, 2002 default judgment against Native Tobacco Direct and Grand River Enterprises. The court's Order and Judgment, after recording that "the Grand River Enterprises appears not, after notice," found that Grand River Enterprises "knowingly" failed to escrow funds in respect of 1999 sales of its products in Missouri, and it imposed a civil penalty of \$402,444.87. A second default judgment was rendered against Grand River in the second Missouri action. This default judgment states as follows:

"The Court finds that respondent, Grand River Enterprises knowingly failed to escrow \$225,184.55, as required by [the Missouri escrow statute]...for cigarette sales in Missouri during 2000. The Court orders Grand River Enterprises to pay a civil penalty of 300% for knowing violations of the statute, to total \$675,553.65... The Court further finds that respondent Grand River Enterprises was previously held to have knowingly violated [the escrow statute] by failing to escrow for cigarette sales in Missouri during 1999 by the Honourable Byron Kinder of the Circuit Court of Cole County Missouri. The Court therefore finds that this is respondent Grand River Enterprises' second knowing violation and ...orders that respondent is prohibited from selling cigarettes to consumers within the State

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<sup>8</sup> Respondent's Objection to Jurisdiction p. 5.

(whether directly or through a distributor, retailer or similar intermediary) for a period of two years from the date of this order.”

20. Claimants vigorously denied receiving service of process in either of these actions, and denied having any knowledge of them or of any other comparable litigation during the relevant period prior to March 12, 2001. However, there is no assertion by the Claimants that they challenged or sought to set aside either default judgment, including the July 27, 2002 judgment prohibiting sales of Grand River’s products in Missouri for two years.

21. The record also included complaints and other pleadings in proceedings to enforce escrow statutes or complementary legislation/contraband laws brought against Grand River in several states after March 12, 2001, as well as default judgments against Grand River entered after that date in state courts in Arizona, Idaho, Illinois, Indiana, North Carolina, Ohio, Kentucky, Washington, West Virginia and Wyoming. All of these are for different periods in and after the year 2001. There is also an undated “Stipulation and Agreement” concluded sometime after 2002 by Grand River and Oklahoma State authorities, pursuant to which Grand River and its sole U.S. distributor, without prejudice or admission of liability or guilt, escrowed funds in respect of 1999-2002 Oklahoma sales and waived the right to future challenges to application of the Oklahoma escrow statute to those sales.

### **III. THE CLAIM AND THE PROCEEDINGS**

22. As noted, these NAFTA proceedings were initiated by service of the Claimants’ Notice of Claim on the Respondent on March 12, 2004. The Claimants contend that the United States bears international responsibility for breaches of the following NAFTA Articles: 1102 (national treatment), 1103 (most-favored-nation treatment), 1105 (minimum standard of treatment/fair and equitable treatment) and 1110 (expropriation). The merits of these claims alleging breach of particular substantive NAFTA obligations are, of course, not at issue at this stage of the proceedings. The only issue here is whether

more than three years elapsed from the date on which the Claimants “first acquired” or “should have first acquired” knowledge of the alleged breach and knowledge that they had incurred “loss or damage.”

23. The Claimants’ description of their claim in their Notice of Claim and subsequent Particularized Statement of Claim (“PSOC”) devoted many pages to the 1998 negotiations leading to the MSA (characterized in the PSOC as the “background to measures forming the basis of the claim”), and to Claimants’ contentions that they were wrongfully excluded from these negotiations and were not told they could join the MSA as a NPM with “grandfathered” market share during the 90-day window after the MSA was signed. The PSOC states that “the device, artifice and contrivance employed by the Majors” – the four largest U.S.-based manufacturers of cigarettes – and the MSA States to make the MSA’s payment scheme applicable to the Major’s competitors “constitutes the principal gravamen of the investors’ claim.” The PSOC goes on to aver that this payment scheme “was designed, and would later be implemented by each State, to restrict the sale of smaller competitors’ products to the point that these competitors would effectively be eliminated from the marketplace.”<sup>9</sup>

24. However, in their subsequent written pleadings and at the hearing, Claimants distanced themselves from these initial pleadings, and maintained that their claim was not predicated upon the MSA *per se*. Instead, they emphasized subsequent state actions taken pursuant to the MSA, including adoption and enforcement of the escrow statutes, more recent amendments to these statutes, and other enactments and actions aimed at cigarette manufacturers outside the MSA regime. The Claimants initially stressed in this regard the enactment and enforcement of the complementary legislation/contraband laws. At the hearing (though not in any of their pleadings), the Claimants also cited adoption of more recent amendments to the allocable share provisions of the escrow statutes, resulting in the loss of substantial refunds of escrowed funds to NPMs that concentrated sales in a few states.

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<sup>9</sup> PSOC p. 10 (para. 37).

25. In August 2004, the Claimants notified the International Centre for the Settlement of Investment Disputes (ICSID) and the Respondent that they had named Professor James Anaya to serve as a member of the Tribunal. In November 2004, the United States named Mr. John R. Crook as the second member. The Parties were unable to agree upon the third and presiding arbitrator. Under Article 1124 of NAFTA, the Secretary General of ICSID serves as the Appointing Authority in Chapter 11 arbitrations. In December 2004, with the concurrence of the Parties, the Secretary-General of ICSID appointed Mr. Fali S. Nariman to serve as the third and presiding arbitrator. The Parties subsequently agreed to request ICSID to assist in administering the proceedings, and ICSID agreed.

26. The Parties and the Tribunal held an organizational meeting at the World Bank's offices in Washington, D.C., on March 31, 2005. The Parties agreed at that meeting that the Tribunal was properly constituted and settled other administrative and procedural matters. At the meeting, the Respondent stated that it would ask that the proceedings be bifurcated, and that the Tribunal consider several objections to jurisdiction as preliminary matters. The Tribunal accordingly directed that the Claimants file a Statement of Claim, and the Respondent a Statement of Defense together with any motion to bifurcate the proceedings. These would be followed by a separate exchange of shorter pleadings addressing the issue of bifurcation. All of these pleadings were filed in accordance with the schedule as established by the Tribunal and twice modified with the Parties' agreement. Accordingly, the Statement of Claim was filed on June 30, 2004; the Respondent's Statement of Defense and Request to Bifurcate on August 29, 2004; Claimants' responsive pleading on bifurcation on September 12, 2004; and the Respondent's reply on bifurcation on September 26, 2004.

27. In its August 30, 2004 Request for Bifurcation, the Respondent requested the Tribunal to suspend proceedings on the merits and consider its jurisdiction as a preliminary matter. The Respondent also asked the Tribunal, if necessary, to consider the merits and damages in separate phases. The Respondent identified five objections to jurisdiction. It maintained that:

- the claims are time barred under NAFTA Articles 1116(2) and 1117(2);
- the claims are not within the scope and coverage of NAFTA Chapter 11;
- Mr. Arthur Montour had not submitted sufficient proof of Canadian nationality;
- claims are included with respect to tax measures barred by NAFTA Articles 1105(1) and 1110; and
- claims are included that were not specified in the Notice of Intent and that were not properly submitted under NAFTA Articles 1119 and 1120.

28. The Claimants opposed the Respondent's request, contending that the matters it raised went to the merits and were not properly of a preliminary character, and that bifurcation would result in unwarranted expense and delay.

29. Since Articles 1116(2) and 1117(2) introduced a clear and rigid limitation defence – not subject to any suspension, prolongation or other qualification - the Tribunal decided to bifurcate the time limitation issue for trial as a preliminary issue. On October 26, 2005, the Parties were informed of the Tribunal's decision that the only issue that should be bifurcated was whether the claims were time barred under Articles 1116(2) and 1117(2) of NAFTA, and that the other objections raised as jurisdictional objections by the Respondent would be joined to the merits. The Tribunal also asked the Parties to file their evidence relating to the nationality of Mr. Arthur Montour, Jr., not for determination as a preliminary issue, but only to clarify whether there was a dispute as to Mr. Montour's nationality (including any possible issue of dual nationality) at an early stage of the arbitral proceedings. The Tribunal directed the Respondent to file its objection to jurisdiction by December 5, 2005, the Claimants to respond by January 16, 2006, the Respondent to file a brief reply by February 6, 2006, and the Claimants a rejoinder by February 27, 2006. All of these pleadings were filed within the specified times.

30. The Tribunal held a hearing on the jurisdictional objection based on NAFTA Articles 1116(2) and 1117(2) at the offices of the American Arbitration Association in New York City on March 23 and 24, 2006, continuing on March 25 at the offices of the firm of Windels Marx Lane & Mittendorf, LLP, as agreed by the parties. The Claimants

were represented by Mr. Leonard Violi, Mr. Todd Weiler, Ms. Chantell Macinnes Montour, Mr. Steve Williams, Mr. Arthur Montour, Jr., and Mr. Robert J. Luddy. The Respondent was represented by Mr. Mark A. Clodfelter, Ms. Andrea T. Menaker, Ms. CarrieLyn D. Guymon, Mr. Mark E. Feldman, and Ms. Renee Gardner, of the Office of the Legal Adviser, U.S. Department of State; Mr. William Lieblich, National Association of Attorneys General; and Mr. Lewis Polishook, Office of New York State Attorney General.

31. At the hearing, the Tribunal granted requests to produce documents after the filing dates previously established. The Claimants sought and were given leave to file additional documents concerning activities of the National Association of Attorneys General related to enforcement of the MSA regime. Claimants explained that they had recently received these from a third party who had obtained them through civil discovery in U.S. court litigation. The Tribunal allowed admission of these documents, and several of them were referred to at the hearing.

32. For its part, the Respondent requested that Mr. Arthur Montour, Jr. agree to have certain of his applications for U.S. federal licenses and other U.S. federal tax related documents protected by U.S. law used in the proceedings. Mr. Montour provided written consent to the disclosure of these documents for the limited purposes of the arbitration proceedings in the form required by U.S. law, and the Claimants introduced certain of them at the hearing.

#### **IV. THE LEGAL FRAMEWORK UNDER NAFTA**

33. The fundamental issue at this preliminary stage is whether, as Respondent contends, the claims are barred by operation of Articles 1116(2) and 1117(2) of NAFTA because they were not brought in a timely fashion. The principle of extinctive prescription (bar of claims by lapse of time) is widely recognized as a general principle of law constituting part of international law, and has been accepted and applied by arbitral

tribunals.<sup>10</sup> It is also well established in the domestic law of the United States<sup>11</sup> and of Canada.<sup>12</sup>

34. NAFTA is an international agreement, to be construed in accordance with the ordinary rules of treaty construction as indicated in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.<sup>13</sup> Thus, Articles 1116(2) and 1117(2) must be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>14</sup>

35. Mindful that negotiating history constitutes a supplementary guide to interpretation under Article 32 of the Vienna Convention,<sup>15</sup> the Tribunal requested the Parties to inform it of any potentially relevant negotiating history, if available. The Respondent advised that the provisions that became Articles 1116(2) and 1117(2) were based upon a Canadian draft text originally providing for a two-year limitations period triggered by the breach of a NAFTA obligation. The Respondent also cited a January 1994 statement by the Government of Canada indicating Canada’s interpretation that Article 1116(2)’s requirement of knowledge of loss or damage was satisfied by

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<sup>10</sup> See, e.g., *Oppenheim’s International Law, Vol. 1 – Peace* p. 526 (para 154) (9<sup>TH</sup> Ed., R. Jennings & A. Watts eds.)(1992); C. A. Fleischhauer, “Prescription”, in *Encyclopedia Of Public International Law*, Installment 10, p. 327, at pp. 329-30 (R. Bernhardt ed.)(Amsterdam, 1987); B.E. King, “Prescription of Claims in International Law”, XV *Brit. Y’bk Int’l Law* p. 82 (1934).

<sup>11</sup> See, e.g., *Yakus v. U.S.*, 321 U.S. p. 414 at p. 444 (1944) (“[N]o procedural principle is more familiar that even a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right....”)

<sup>12</sup> See, e.g. *Soper et al. v. Southcott et al*, 39 O. R. (3d) p. 737 (1998); *Albert v. Victoria Hospital Corp*, 2001 O.T.C. p. 1629; [2001] O.T.C. p. 48 (Jan. 18, 2001).

<sup>13</sup> See, e.g., *Mondev Intl. v. United States*, Award, Oct. 11, 2002, ICSID Case No. ARB(AF)/99/2, 42 ILM p. 85 (para 43) (2003); *S.D. Meyers v. Canada*, Partial Award, Nov. 12, 2000, 40 ILM. p.1408 at p. 1429 (paras 201-203)(2001).

<sup>14</sup> Article 31(1), Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.

<sup>15</sup> Article 32 allows recourse to supplementary means of interpretation “including the preparatory work of the treaty..., in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”

knowledge of “a” loss or damage. Claimants did not offer specific suggestions in this regard.

36. The materials provided by the Parties have identified awards in some other NAFTA cases, as well as various court decisions and arbitral awards, that help to illuminate some of the unusual issues presented here. As NAFTA Article 1136(1) makes clear, NAFTA arbitral awards do not constitute binding precedent, and in any event are rooted in their specific facts. The Tribunal has given such authorities due consideration. However, it has decided the preliminary issue of limitation based upon the law and its independent assessment of the peculiar facts of the case.

37. The Parties differed as to which of them bore the burden of proof on disputed facts bearing on the existence of jurisdiction. Claimants contended that, as the moving party opposing jurisdiction, the Respondent bore the burden of proof. Respondent disagreed, maintaining that the Claimants were obliged to establish the facts required for the Tribunal to have jurisdiction. Nevertheless, both Parties presented extensive evidence to support their positions regarding the application of Articles 1116(2) and 1117(2). For its part, the Tribunal considered all of the extensive documentation produced and did not exclude any evidence on the ground that it was belatedly produced. Accordingly, the Tribunal did not find it necessary to determine which Party had a burden of going forward with the evidence.

38. NAFTA Articles 1116(2) and 1117(2) establish several conditions that must be met in order to trigger operation of the three-year limitation periods created by those provisions. Claims are barred as untimely only if the investor or enterprise:

- First acquired certain specified knowledge, or
- Should have first acquired such knowledge, and
- Did so within three years of the alleged breach.

The requisite knowledge has two elements:

- Knowledge of the alleged breach, and
- Knowledge that the investor has incurred loss or damage.

## V. THE CLAIMANTS' CONTENTIONS

39. *Actual Knowledge of Breach.* The Claimants emphasized the first of these elements, contending that they had no actual knowledge of the alleged breaches of NAFTA prior to March 12, 2001, the relevant date for jurisdictional purposes. Claimants' counsel indicated that Claimants did learn of the MSA some time prior to this date, and Claimants' PSOC refers to the MSA as having been "presented to the public" as a settlement of the states' suits against the Majors. Nevertheless, Claimants insisted that they did not learn of the possibility for adhering to the MSA as a SPM; of the potential application of the escrow laws, contraband laws or other implementing measures to their activities; or of any state actions to implement the MSA, until first consulting counsel licensed to practice in the United States in May 2002, and then receiving additional advice from U.S. counsel in July 2002.

40. Claimants denied receiving any of the three communications from state authorities concerning their potential obligations under the escrow laws, communications that the Respondent maintained were dispatched to certain of them by state authorities prior to March 12, 2001, and that Respondent cited as evidence of Claimants' actual knowledge. Claimants contended that none of these communications was addressed to the addressee's then-current mailing address. Moreover, in their view, the wording of these notices was not sufficient to provide actual notice to the Claimants, even had they been received. The Claimants also disputed that July 2000 newspaper reports in the Respondent's evidence quoting Mr. Steve Williams (President of Grand River) showed awareness that Grand River was involved in the Missouri litigation described above.

41. Claimants contended that their lack of actual knowledge regarding measures to implement the MSA was understandable in light of their position as Native American or First Nations participants in the U.S. cigarette trade. They indicated that, at the relevant times, their cigarettes were produced at a factory on a First Nations reserve in Ontario. They were then imported into the United States duty free and transported to Six Nations territory in New York States in the exercise of the Claimants' trading rights as members

of the Six Nations under the Jay Treaty and otherwise. Claimants indicated that they did not engage in any retail sales, and that all of their products were sold to wholesalers or distributors. They contended that, given their situation, it was reasonable to assume that any state regulatory or taxation measures to implement the MSA would not or could not be applied to them. In this regard, Claimants stated that they did not know of provisions in the MSA that expressly extended that agreement's requirements and prohibitions to areas within states' boundaries "including...Indian country or Indian trust lands within such geographic boundaries."<sup>16</sup>

42. *Constructive Knowledge of Breach.* Counsel for both Parties characterized NAFTA's second, alternative knowledge test – whether the Claimant “should have” known certain things – as involving “constructive knowledge,” and the Tribunal will use this same terminology. The Claimants contended that it was not reasonable to hold them to constructive knowledge of any NAFTA violations related to the MSA and its implementation. They argued that the MSA was a private agreement settling U.S. court litigation to which they were not parties; that they were not a party to the MSA and took no part in its negotiation; and that they never were sued for any alleged health consequences involving their activities.

43. Claimants also cited in this context their position as Native American or First Nations participants in the U.S. cigarette trade who did not engage in direct retail sales. They maintained that it was reasonable for persons in their situation to assume that any state measures to implement the MSA did not apply to them because of their status as members of the Six Nations carrying on operations on tribal territories in Ontario and New York. However, the Claimants did not develop the basis for their arguments in this regard in their written or oral presentations, nor did they address the express provisions of Chapter XVIII(ff) of the MSA, referred to above.

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<sup>16</sup> MSA Chapter XVIII(ff).

44. Finally, Claimants argued that there was uncertainty and ambiguity regarding the scope and application of the MSA and its implementing measures, and that they should not be held to constructive knowledge of an unclear regime. They acknowledged that the state escrow statutes were uniformly worded, but claimed that their enforcement prior to March 12, 2001 was limited and uneven. In Claimants' view, these alleged vagaries of enforcement demonstrated uncertainty as to who constituted a cigarette manufacturer subject to escrow payment requirements. They cited in this regard several settlement agreements in which tobacco distributors or importers agreed to make escrow payments, even though they did not manufacture cigarettes. Claimants also introduced internal documents of a working group of the National Association of Attorneys General that they contended showed uncertainty on the part of state legal officers as to who was a cigarette manufacturer. Claimants also contended that in the only case against Grand River litigated on the merits, a Wisconsin trial court held that it did not have *in personam* jurisdiction over Grand River.

45. *Loss or Damage Incurred.* Claimants denied actual knowledge that they had incurred any loss or damage prior to March 12, 2001, but maintained in addition that they did not in fact suffer any such loss or damage during that period. They maintained that any retail sale of taxed cigarettes manufactured by Grand River in any of the 38 states adopting escrow laws in 1999 did not automatically trigger a legal obligation to escrow funds by April 2000 causing loss or damage to Grand River. In Claimants' view, the obligation to escrow funds resulted in loss or damage only when the requirement was enforced against them by the initiation of judicial proceedings. Claimants maintained that no such judicial enforcement action against any of them was validly initiated until after March 12, 2001. They maintained that the Missouri action filed in June 2000 had to be disregarded in this regard, because service was defective and Claimants had no actual knowledge of the suits until 2002.

46. At the March 2006 hearing (and only at the hearing), Claimants advanced a further argument, contending that in fact they were injured (at least for purposes of

certain of their claims) only when States passed the allocable share amendments in 2003 and 2004, long after the jurisdictional cut-off date.

## **VI. THE RESPONDENT'S CONTENTIONS**

47. *Actual Knowledge.* The Respondent contended that the evidence showed that Claimants had actual knowledge of the MSA and of state implementing measures relevant to their activities prior to March 12, 2001. The Respondent portrayed the MSA as an event of fundamental importance in the U.S. tobacco trade, and presented evidence showing that it received extensive national attention. This evidence included approximately 40 sample articles in newspapers and other print publications, as well as transcripts of radio and television broadcasts, addressing aspects of the MSA or its implementation during the relevant period. Among these were several newspaper articles published in media markets in the areas of the Grand River Reserve in Ontario and the Six Nations territories in upstate New York. Claimants asserted that they had not in fact read or seen any of the specific articles or seen or heard any of the broadcasts, and the Respondent could offer no positive evidence that they had done so.

48. The Respondent then contended that Claimants received actual knowledge of the MSA and of state actions to implement it through several pieces of official correspondence describing the escrow laws' requirements sent to them, or to their past affiliates, by state authorities prior to March 12, 2001. The Respondent particularly cited the following documents in the record:

-- an April 7, 2000 letter from the Iowa Department of Revenue and Finance, addressed "To Whom It May Concern," which Iowa sent to 250 tobacco product manufacturers and distributors. Iowa State records in evidence show a copy to have been mailed to "GRAND RIVER ENTERPRISES SIX NATIONS LTD, RR 2, OHSWEKEN ON NOA1MO, CANADA."

-- an April 25, 2000 letter from the Missouri Department of Revenue addressed to Grand River Enterprises, RR #2, Ohsweken, Ontario NOA 1 MO, and

-- an October 11, 2000 letter from the Iowa Department of Revenue and Finance, addressed to Native Tobacco Direct Co., 14411 Four Mile Level Road, Gowanda, NY, 14070.

49. In response to Claimants' argument that these documents were not addressed to the correct mailing address of the recipient at the time, Respondent noted that Claimants did receive a March 14, 2001 communication addressed to Grand River Enterprises in Ohsweken without a street address or postal code; that the Gowanda, N.Y. address was regularly used by Arthur Montour and Native Tobacco Direct as late as November 1999; and that Canadian postal regulations provide for mail forwarding in case of address changes.

50. The Respondent also cited a series of similarly-worded articles appearing in newspapers in July 2000 describing the Missouri enforcement action, naming Grand River Enterprises as the manufacturer of the cigarettes at issue, and quoting Mr. Steve Williams, Grand River's President, in terms that Respondent believed showed that he had actual knowledge of the MSA escrow regime.

51. *Constructive Knowledge.* The Respondent maintained that, whether or not the evidence established actual knowledge, the Claimants should be held to constructive knowledge of the regulatory actions they complained of. In this regard, they contended that the MSA and its implementing measures were events of fundamental importance in the U.S. tobacco industry, and that information regarding them would have been widely known in the trade prior to March 12, 2001. Respondent further contended that any actor in a market had a responsibility to know of the laws affecting its product, and that ignorance of the law was no excuse. Additionally, according to the Respondent, it was incumbent upon prospective investors with operations of the scale and complexity described by the Claimants, as prudent business operators, to familiarize themselves with major regulatory developments with a heavy impact on that market.

52. *Was Loss or Injury Incurred?* The Respondent argued that the 46 state escrow statutes adopted in 1999 and 2000 were clear and consistent, and triggered an

unambiguous obligation for Grand River to escrow funds when the first taxed cigarette it manufactured was sold in 1999 in a state with such a statute in effect. In any case, the obligation to escrow funds became fully operative with respect to all such 1999 sales by April 15, 2000, and this constituted injury or loss for purposes of NAFTA. The Respondent disputed the argument that injury or loss occurred only after enforcement action is taken against a manufacturer, drawing an analogy to the obligation to pay income tax, which operates fully even without judicial enforcement.

## **VII. THE TRIBUNAL'S FINDINGS**

### **A. CLAIMANT'S KNOWLEDGE**

53. *Actual Knowledge.* The Tribunal will consider the issues within the framework of the relevant elements of NAFTA Articles 1116(2) and 1117(2) as set forth above. Thus, the first issue is whether the documents brought on record and affidavit evidence sufficiently establish Respondent's contention that Claimants had actual knowledge of the MSA and the implementing measures complained of in their Notice of Arbitration of June 30, 2005 and their Particularized Statement of Claim of June 30, 2005, prior to March 12, 2001.

54. This is foremost a question of fact. In assessing the evidence, the Tribunal necessarily must take account of the preliminary state of these proceedings, in which there has been no discovery of documents, no witnesses have appeared and deposed before the Tribunal, and no opportunity has been afforded to either side to question or cross-examine statements made in documents or affidavits submitted to the Tribunal.

55. Several articles cited by Respondent appearing in various Canadian and U.S. newspapers in late July 2000, expressly quoting Mr. Steve Williams, President of Grand River, regarding aspects of the June 2000 Missouri action involving Grand River,

referred to above, indicate the difficulties in this regard.<sup>17</sup> As to a July 31, 2000 article by reporter Kate Barlow in the Hamilton, Ontario *Spectator*,<sup>18</sup> Mr. Williams filed an affidavit in which he did not assert lack of knowledge of this article or of other similar articles appearing at that time. He did, however, maintain that Ms. Barlow did not tell him that Grand River had been sued, and reiterated that Claimants had no actual knowledge of any material events prior to March 12, 2001.

56. It is true that the Respondent has presented documentary evidence that, standing alone and uncontested, and interpreted in the manner that it urges, could sustain the conclusion that the Claimants did have actual knowledge of at least some of the matters they complain of prior to March 12, 2001. However, Mr. Arthur Montour (an individual claimant), Grand River's President Mr. Williams, and Claimants' counsel all have denied in sworn submissions to the Tribunal that any of the Claimants had such knowledge. The Claimants have also cast doubt on whether the three communications from Iowa and Missouri prior to March 2001 ever reached them, emphasizing that none was addressed to the recipient's then-current address. They argued that these communications were in any case phrased in general terms, and were insufficient to confer actual knowledge of potential liability under the escrow laws if received. They denied having received service in the 2000 Missouri actions against Grand River and Native Wholesale Direct, and maintained that the comments of Mr. Williams quoted in the July 2000 newspaper stories should not be interpreted as Respondent urged.

57. Given the conflicts and ambiguities in the evidence as it now stands, it is not possible for the Tribunal to determine with requisite certainty that the Claimants, or any of them, had actual knowledge of the MSA or of any associated enforcement measures potentially affecting them. Accordingly, the Tribunal finds that the documents brought on record and the affidavits are not sufficient to establish that prior to March 12, 2001, the Claimants first acquired actual knowledge of the MSA, and of the implementing

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<sup>17</sup> Respondent's Exhibits 110, 111, 112, 113 and 114, Appendix to Objection to Jurisdiction, Factual Materials, Vol. IV.

<sup>18</sup> *Id.*, Respondent's Exhibit 112.

actions specifically cited in their Notice of Arbitration and Particularized Statement of Claim, prior to March 12, 2001.

58. *Constructive Knowledge.* The Tribunal accordingly must consider whether the Claimants “should have” first acquired knowledge of these matters. The word “should” is the past tense of “shall” – ordinarily implying a duty or obligation (although usually an obligation of propriety or expediency, or a moral obligation).<sup>19</sup> The duty or responsibility involved usually falls short of a legal obligation to do something, although the Tribunal believes that the existence of such a legal obligation may help to show that something “should” have been done or known.

59. As noted above, both Parties used the term “constructive knowledge” to describe the relevant requirements under Article 1116(2) and 1117(2). The Tribunal agrees that this concept, well rooted in national legal systems familiar to both Parties, is useful in this regard. “Constructive knowledge” of a fact is imputed to person if by exercise of reasonable care or diligence, the person would have known of that fact.<sup>20</sup> Closely associated is the concept of “constructive notice.” This entails notice that is imputed to a person, either from knowing something that ought to have put the person to further inquiry, or from willfully abstaining from inquiry in order to avoid actual knowledge.

60. The Tribunal must then proceed to assess the documentary evidence brought on record intended to show such “constructive knowledge” of the measures complained of as breaches of relevant Articles of NAFTA, having regard to the trade or business in which the Claimants operated.

61. Claimants presented themselves to the Tribunal as experienced and substantial participants in the tobacco industry trading throughout the United States and Canada. At the hearing, Mr. Violi, Claimants’ lead counsel summarized their situation as follows:

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<sup>19</sup> See *Black’s Law Dictionary* p. 1379 (7<sup>th</sup> Ed, St. Paul, Minn, 1999).

<sup>20</sup> See *Id.*, p. 876.

“As of June 1999, [Claimants had] invested tens of millions of dollars in U.S. and Canadian markets, completed and formalized their manufacturing and distribution plans, and anticipated continued success in those markets.”<sup>21</sup> The Claimants’ activities were not restricted to sales on First Nations reserves and Native American reservations. Substantial amounts of their products were also ultimately sold to U.S. consumers off-reservation.

62. The record in the case shows that the distribution and sale of tobacco products in the United States are heavily regulated and taxed activities. Cigarettes are subject to Federal labeling requirements and excise taxes (although these are not at issue this claim). State laws limit cigarette sales to those made by authorized dealers, regulate sales to young people, and impose various other conditions and limitations. Each state imposes excise taxes on cigarettes sold within its jurisdiction, although state authorities generally do not tax cigarettes sold on reservation to Native American consumers. Private tobacco distributors acting as “stamping agents” must affix state tax stamps to show that states taxes have been paid on cigarettes sold off-reservation.

63. Claimants could not have been unaware of the extensive regulation and taxation of trade in cigarettes by U.S. states. The PSOC describes the individual Claimants as all having been engaged in the tobacco business in the United States and Canada continuously since 1992. Claimants’ pleadings emphasized the U.S. experience and contacts of Mr. Arthur Montour, head of their U.S. distribution entities, initially first Native Tobacco Direct and later Native Wholesale Supply. Mr. Jerry Montour lived in Omaha, Nebraska from late in 1996 until 1998 while working with the Omaha Tribe to develop a cigarette manufacturing business. The record includes letters showing interactions between both Mr. Arthur Montour and Grand River’s in-house counsel and several state taxing and regulatory authorities on matters relating to off-reservation distribution of Grand River’s products during the relevant period. These letters also show

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<sup>21</sup> Transcript Vol. 2 p. 0566 (Mr. Violi).

that Claimants were in contact with at least some of the concerns distributing Grand River's products for sale in off-reservation U.S. markets.

64. Other documents in the record also indicate Claimants' well-developed awareness of tax and regulatory measures bearing upon the tobacco trade. The 1999 "Cigarette Manufacturing Agreement" between Grand River Enterprises Six Nations Ltd. and Native Tobacco Direct Company includes a precise and detailed allocation of responsibility for compliance with Canadian and U.S. export, import and tax requirements between the parties.<sup>22</sup> Agreements in the record between Grand River and its distributors are similar.<sup>23</sup>

65. The Claimants were not passive observers of the U.S. market. As noted previously, there is little in the record to indicate their total sales in the U.S. market, but there is evidence showing that during the period between conclusion of the MSA and March 2001, sales of Claimants' products significantly increased in several U.S. states. Some of the complaints filed by states against Grand River after March 12, 2001, for non-compliance with the escrow laws indicated such significantly increased sales of Grand River's products in those states.

66. The question is whether the documents brought on record establish constructive knowledge on the part of the Claimants. What do Articles 1116(1) and 1117(2) of NAFTA require of an actual or prospective investor? The Tribunal believes that it is appropriate to consider in this connection what a reasonably prudent investor should have done in connection with extensive investments and efforts such as those described to the Tribunal. In the Tribunal's view, parties intending to participate in a field of economic activity in a foreign jurisdiction, and to invest substantial funds and efforts to do so, ought to have made reasonable inquiries about significant legal requirements potentially

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<sup>22</sup> Respondent's Appendix to Reply on Jurisdiction, Factual Materials, Exhibit 142.

<sup>23</sup> See, e.g., Cigarette Distribution Agreement of Sept. 26, 2000, between Grand River Enterprises Six Nations Ltd. and White River Distributing L.L.C., Respondent's Appendix to Reply on Jurisdiction, Factual Materials, Exhibit 143.

impacting on their activities. “[A] foreign investor has to know the rules to build up, run and secure his business abroad.”<sup>24</sup> This is particularly the case in a field that the prospective investors know from years of past personal experience to be highly regulated and taxed by state authorities.

67. The Tribunal agrees in this respect with other NAFTA and ICSID arbitration tribunals which have emphasized that agreements intended to protect international investment are not substitutes for prudence and diligent inquiry in international investors’ conduct of their affairs. As the tribunal in *MTD Equity v. Chile* observed “it is the responsibility of the investor to assure itself that it is properly advised, particularly when investing abroad in an unfamiliar environment.”<sup>25</sup> The *Maffezini v. Spain* tribunal similarly noted that treaties for the protection of investment “are not insurance policies against bad business judgments.”<sup>26</sup> And, the tribunal in *Feldman v. Mexico* rejected claimant’s expropriation claim growing out of the enforcement of a long-standing statutory requirement, partly based upon its conviction that as the claimant’s business “depended substantially on the terms of the IEPS law, the Claimant was or should have been aware at all relevant times that the separate invoice requirement existed....”<sup>27</sup>

68. The record shows that the MSA and its implementing measures were developments of fundamental significance in the U.S. tobacco trade, and that information concerning them was widely available in that trade in the period between conclusion of the MSA in November 1998 and March 12, 2001. Even limited inquiries by the Claimants would have shown, at a minimum, the existence of a significant and potentially burdensome new body of state legal requirements bearing on off-reservation sales of their products, and warned of the need for further diligent investigation.

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<sup>24</sup> A. Escher, “Legal Issues for Foreign Investors,” in *Legal Aspects Of Foreign Direct Investment* p. 25 (D. D. Bradlow & A. Escher eds.) (The Hague, 1999).

<sup>25</sup> *MTD Equity Sdn. Bhd. & MTD Chile SA v. Republic of Chile*, Award, May 25, 2004, para. 164, ICSID Case No. ARB/01/7.

<sup>26</sup> *Emilio A. Maffezini v. Kingdom of Spain*, Award, Nov. 12, 2000, para. 12, ICSID Case no. ARB/97/7.

<sup>27</sup> *Feldman v. Mexico*, Award, Dec. 16, 2004, para. 128, ICSID CASE No. ARB(AF)/99/1.

69. The Respondent also argued that as a matter of U.S. and Canadian domestic law, parties are presumed to know the law applicable to their situations, and cited this as further reason to attribute constructive knowledge to the Claimants. State courts in the United States, including the Missouri courts referred to above, clearly held some of the Claimants to knowledge of the law. The Missouri courts, for example, made recorded findings – even though *ex parte* - that Grand River Enterprises “knowingly” failed to deposit large escrow amounts as required by the Missouri escrow statute for sales during the year 1999 and the year 2000. Other state courts entered specific findings appearing in the record (although all made after March 12, 2001) that Grand River “knowingly failed” to escrow stated amounts for cigarettes sold during the year 1999 and the year 2000. Claimants identified only one case (in Wisconsin) in which they applied to the court and succeeded in vacating such an adverse judgment.

70. The argument that there was a legal duty to “know the law” received limited discussion in the pleadings and at the hearing, and the Tribunal need not decide whether NAFTA in effect imposes an international legal obligation on prospective investors mirroring such rules in some national legal systems. Nevertheless, this doctrine of national law is a further reason why it is incumbent upon foreign investors entering into significant ventures in a foreign land to take reasonable steps to learn of major features of the legal order that will regulate their activities.

71. For the foregoing reasons, the Tribunal finds that prior to March 12, 2001, the Claimants should have known of the MSA and of the Escrow Laws and other state actions taken prior to that date to implement the MSA with respect to off-reservation sales of their products, as complained of in their Notice of Claim and Particularized Statement of Claim.

72. This finding does not extend to any state actions with respect to sales of the Claimants’ products on lands within the United States set aside for the use and benefit of indigenous tribes or nations and designated under Federal law as reservations or their

equivalent. It is apparent from the Claimants' pleadings that some of their tobacco products are imported into the United States for sale to Native Americans on reservation lands, although it is unclear the extent to which such sales are alleged to be affected by any of the escrow laws or other state actions that are the basis of Claimant's claim. On-reservation sales of tobacco products, at least such sales to members of federally-recognized Indian tribes, are generally exempt from regulation by the states within the United States as a matter of Federal law.<sup>28</sup> Hence, unlike the situation with regard to off-reservation sales, a reasonable and prudent investor in the position of the Claimants would not expect the state escrow laws or related actions to apply in connection with such on-reservation sales. For this reason, the Tribunal does not find that, absent actual knowledge, the Claimants should have known of the application of state escrow laws or other state laws forming the basis of its NAFTA complaint in relation to the sale of its products to Native Americans within reservation lands.

## **B. LOSS OR DAMAGE**

73. The next issue is whether the Claimants also should have known that they had incurred loss or damage from such state actions. The Tribunal's conclusions in this regard mirror those indicated above. Given the Claimants' situation as experienced participants in the U.S. tobacco market, the scale of their investments and plans as presented to the Tribunal, and the availability of relevant information from multiple possible sources, they should have acquired knowledge of the escrow statutes and other measures being taken by U.S. states to implement the MSA. And, to the extent that these measures necessarily resulted in loss or damage to the Claimants before March 12, 2001, appropriate diligence would have disclosed that fact.

74. Did Claimants sustain such loss or damage? They maintained that they could not do so until a competent authority initiated judicial enforcement proceedings against them

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<sup>28</sup> See *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. p. 463, pp. 475-481 (1976) (no state authority to tax on-reservation sales of cigarettes to Indians). See also Getches et. al; *FEDERAL INDIAN LAW* P. 542 (5<sup>th</sup> ed., 2005) ("tribes are generally free of direct regulation and taxation by states").

to oblige them to place funds in escrow or seeking other penalties or disabilities, and that no such enforcement proceedings were validly initiated until after March 12, 2001. The Respondent countered that, as of the moment cigarettes they manufactured were sold in a State with an escrow statute, Claimants incurred a legal obligation to escrow funds by April 15 of the following year. Because Claimants provided only very general indications regarding U.S. sales of their products, Respondent could not identify precisely when this occurred. However, it noted that 38 states had enacted such statutes in 1999, including several states where cigarettes produced by Grand River were sold.

75. The Tribunal thus confronts interrelated interpretive tasks: what constitutes “loss or damage,” and at what point is it “incurred”? As indicated previously, these terms are to be construed in accordance with their ordinary meaning, in light of the NAFTA’s object and purpose. The Claimants initially suggested a broad conception of “loss” and “damage,” describing them in their Reply as:

“[g]eneric terms whose use together demonstrated that an investor can make claim on the basis of any sort of loss, from deprivation of access to market to simple out-of-pocket costs. Loss or damage can arise either ‘by reason of’ the breach or merely ‘arising out of’ the breach.”<sup>29</sup>

However, as the case progressed, Claimants appeared to take a narrower view, maintaining that in their circumstances, loss or damage could be incurred only after enforcement action was taken to bring about compliance with an escrow statute or to impose other penalties as provided by law. Claimants based this position on:

“[t]he language of the Escrow Statutes, themselves, which by their express terms do not, and cannot, cause loss or damage to Claimants unless and until an Attorney General seeks to obtain and enforce a court order that (1) mandates

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<sup>29</sup> Claimant’s Reply to Respondent’s Objection to Jurisdiction (hereinafter “Claimant’s Reply”).

compliance with an Escrow Statute; (2) imposes penalties; or (3) bans the sale of Claimant's products."<sup>30</sup>

76. Claimants emphasized in support of their argument a 1997 judgment of the European Court of First Instance in the *Quiller* case,<sup>31</sup> finding that for purposes of a limitations period under the Statute of the European Court, the plaintiffs first incurred damage on the date on which a new regulatory measure prevented them from marketing milk they previously could have marketed, not on the date the measure was adopted. The Tribunal does not find *Quiller* to be of assistance, however. Respondent indicated in its written materials and at the hearing that it viewed Claimants as having incurred loss or damage on the date in 1999 when cigarettes manufactured by Grand River were first sold in a state with an escrow statute in force, not when the various escrow statutes were enacted. Accordingly, both parties agreed that damage could be incurred after the date of enactment of the escrow statutes. The difference between them went to the point in the operation of those statutes at which this occurred. Claimants also cited Jan Paulsson's recent work on *Denial Of Justice Under International Law* to support the proposition that compensable damage need not occur as the immediate or automatic result of a breach of an international obligation, such as the enactment of a statute claimed to violate a treaty obligation.<sup>32</sup> Instead, damage can be incurred subsequently, as Claimants maintain occurred here. For the reasons just indicated, the Tribunal does not find this reference to be helpful either. The issue is not whether Claimants incurred damage when the escrow statutes were adopted, but at what later time.

77. At the hearing, the Parties exchanged dueling dictionary definitions of the word or concept "incurred." The Claimants advocated an interpretation conveying the idea that

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<sup>30</sup> *Id.*, p. 6. The Tribunal notes that this argument involves something of a reversal of the customary positions in debates involving exhaustion of remedies. Here, the claimant-investor – and not the respondent-government – contends that there must be recourse to domestic judicial remedies before there is loss or damage.

<sup>31</sup> *Quiller & Heusmann v. European Council & European Commission*, 1997 European Court Reports p. II-02247.

<sup>32</sup> Jan Paulsson, *Denial Of Justice In International Law*, pp. 223-224 (Cambridge, 2005).

loss or damage is only incurred when funds are actually paid out. The Respondent countered that “incurred” means to become liable or subject to something, noting that in everyday language, a person may “incur” an expense or obligation to pay even before payment is actually required. In many sources, the verb is regularly taken to mean “become liable to.”<sup>33</sup> Judicial dicta likewise suggest that one incurs a loss when liability accrues; a person may “incur” expenses before he or she actually dispenses any funds.<sup>34</sup> In the Tribunal’s view, this interpretation corresponds most closely to the ordinary meaning of the term. The verb “to incur” in ordinary usage is often used to describe situations where there is no immediate outlay of funds by the affected party. A party is said to incur losses, debts, expenses or obligations, all of which may significantly damage the party’s interests, even if there is no immediate outlay of funds or if the obligations are to be met through future conduct. Moreover, damage or injury may be incurred even though the amount or extent may not become known until some future time.

78. In this respect, the Tribunal’s views parallel those of the NAFTA Tribunal in *Mondev*. The claimant there also faced difficulties arising from the time limitations of Articles 1116(2) and 1117(2). The claimant sought to surmount these with the argument that it could have certain knowledge that it had incurred injury from events prior to the limitations period only after it knew the outcome of subsequent litigation that stood to quantify the extent of loss was known. The Tribunal did not agree, finding that “a Claimant may know that it has suffered loss of damage even if the extent of quantification of the loss or damage is still unclear.”<sup>35</sup>

79. The relevant provisions of the Escrow Statutes (which appear in a section captioned “Requirements”) uniformly provide that:

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<sup>33</sup> See, e.g., *Black’s Law Dictionary*, *supra* note 22 p. 771 (“to suffer or bring on oneself (a liability or expense)”); *Compact Edition of the Oxford English Dictionary*, Vol. 1, p. 1410 (Oxford, 1971); (“to become through one’s own action liable or subject to”); *The American Heritage Dictionary* p. 425 (3d ed., New York, 1994) (“to become liable or subject to as a result of one’s actions”);

<sup>34</sup> See, e.g., *U.S. v. Nancy*, 189 F3d p. 954 at p. 966 (9<sup>th</sup> Cir., 1999), *Christoph v. U.S.*, 931 F. Supp. p. 1564 (S.D. Ca., 1999).

<sup>35</sup> *Mondev Int’l. Ltd. v. United States*, *supra* note 13, p. 31 (para 87).

“Any tobacco product manufacturer selling cigarettes to consumers within the state (whether directly or through a distributor, retailer or similar intermediary or intermediaries) after the date of enactment of this Act shall do one of the following:

(a) become a participating manufacturer ...; or

(b) (1) place into a qualified escrow fund by April 15 of the year following the year in question the following amounts (as such amounts are adjusted for inflation) --”

The statute then specifies the amount to be escrowed per individual cigarette.<sup>36</sup> The term “manufacturer” is defined in a manner that appears to clearly cover Claimant Grand River. “Tobacco product manufacturer” is defined as an entity that:

“Manufactures cigarettes anywhere that the manufacturer intends to be sold in the United States, including cigarettes intended to be sold in the United States through an importer ...”<sup>37</sup>

At the hearing, Claimants’ counsel acknowledged that Grand River met this statutory definition, at least as to Seneca brand cigarettes, which are produced for the U.S. market and appear to constitute a large proportion of its production relevant to this claim.

80. These statutory provisions set out a clear legal obligation for manufacturers to place funds in escrow with respect to each sale of taxed cigarettes in a state no later than April 15 of the year following the sale. It is correct, as Claimants contend, that the escrow statutes also authorize state attorneys general to bring enforcement actions to remedy non-compliance and to obtain substantial additional civil penalties (including financial penalties and a 2-year ban on future sales in case of recurring knowing

<sup>36</sup> Model Statute, Exhibit T to the MSA, section \_(i)(1) (p. 3) at U.S. Factual Materials, Vol. I (Dec. 5, 2005).

<sup>37</sup> Model Statute, Exhibit T to the MSA, section \_ (p. 3) at *Id.*

violations), but these provisions do not in any way indicate that the obligation to escrow funds is conditional or operates only after a manufacturer is sued for non-compliance.

81. At the hearing, the Claimants advanced a further argument, to the effect that the limitations periods under Articles 1116(2) and 1117(2) applied separately to *each* contested measure taken by *each* state implementing the MSA. Hence, they maintained, there is not one limitations period, but many. This is not how the Claimants pleaded their case. Their pleadings did not indicate, except in a limited and anecdotal way, the particular states and times where their products were sold to consumers. Instead, the claims were directed against the adoption and enforcement of the escrow statutes and other measures in a generic manner. Moreover, this analysis seems to render the limitations provisions ineffective in any situation involving a series of similar and related actions by a respondent state, since a claimant would be free to base its claim on the most recent transgression, even if it had knowledge of earlier breaches and injuries. In any case, the argument is unconvincing on the facts as it pertains to the escrow statutes. All of the 46 concerned states adopted such legislation by 2000, so that in all of them there was an existing duty to escrow with respect to any past sales in that State as of January 1, 2001.

82. *The Tribunal's Conclusions.* The Tribunal believes that becoming subject to a clear and precisely quantified statutory obligation to place funds in an unreachable escrow for 25 years, at the risk of serious additional civil penalties and bans on future sales in case of non-compliance, is to incur loss or damage as those terms are ordinarily understood. A party that becomes subject to such an obligation, even if actual payment into escrow is not required until the following spring, has incurred "loss or damage" for purposes of NAFTA Articles 1116 and 1117.<sup>38</sup>

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<sup>38</sup> Even if damage is viewed as having been incurred only when payment into escrow was actually required, funds covering 1999 sales had to be escrowed by April 15, 2000 in all of the 38 states adopting escrow laws during 1999.

83. Accordingly, the Tribunal holds that the Claimants should have known prior to March 12, 2001 of the MSA, the escrow statutes, any related measures and enforcement actions taken prior to that date, and of loss or damage they incurred as a result in relation to off-reservation sales of their products. Claimants' claims with respect to all of these matters are accordingly barred by NAFTA Articles 1116(2) and 1117(2). For reasons discussed above, this holding extends only to U.S. sales of Claimants' products off-reservation and does not bar any claims with regard to on reservation sales.

### **VIII. IMPLICATIONS FOR ACTIONS AFTER MARCH 12, 2001**

84. The Parties disagreed regarding the possible consequences of such a holding by the Tribunal. The Respondent argued that all actions taken by the states after March 12, 2001, to strengthen enforcement of their escrow laws, such as the complementary legislation/ contraband laws and the allocable share amendments, did not alter the fundamentals of the existing regime. In Respondent's view, such actions only provided added enforcement tools, but did not alter Non-Participating Manufacturers' prior legal obligations to comply with the escrow laws. Thus, Respondent contended, if the Tribunal accepted its limitation argument, the entire claim should be dismissed (except for limited portions dealing with Minnesota and Michigan's equity assessment laws, as to which the Respondent lodged other jurisdictional objections that have been joined to the merits.)

85. Claimants disagreed. In their view, the complementary legislation/contraband laws adopted after March 12, 2001, taken in conjunction with the allocable share amendments adopted after 2003, fundamentally changed their situation and inflicted new and significant injury. Claimants accordingly maintained that they had substantial claims of breach and injury under NAFTA Chapter 11 that deserved consideration on the merits, even if the Tribunal found that their claims with respect to the escrow laws were not allowed.

86. In the circumstances here, the Tribunal has difficulty seeing how NAFTA Articles 1116(2) and 1117(2) can be interpreted to bar consideration of the merits of properly

presented claims challenging important statutory provisions that were enacted within three years of the filing of the claim and that allegedly caused significant injury, even if those provisions are related to earlier events. As the Permanent Court observed, while “a dispute may presuppose the existence of some prior situation or fact ... it does not follow that the dispute arises in regard to the situation or fact.”<sup>39</sup> The *Mondev* and *Feldman*<sup>40</sup> tribunals both considered the merits of claims regarding events occurring during the three-year limitations period, even though they were linked to, and required consideration of, events prior to the limitations period or to NAFTA’s entry into force. In *Mondev*, the Tribunal considered (and rejected) the Claimant’s claim that it had suffered a denial of justice in connection with state court proceedings occurring after NAFTA entered into force, although the dispute underlying the litigation arose years before. In *Feldman*, the Tribunal awarded damages in respect of discrimination occurring during the three-year limitations period, but its analysis of this and other claims again required consideration of earlier events.<sup>41</sup>

87. The adoption and implementation of the states’ complementary legislation/contraband laws in late 2001 or 2002 (that is, less than three years before the claim was filed) were clearly identified as included in the claim in the Notice of Arbitration and the Particularized Statement of Claim. Accordingly, Claimants’ claims in respect of those enactments remain for consideration at the merits stage.

88. The situation is less clear with respect to the claims regarding the allocable share amendments adopted in 2003-2004. As described above, these were adopted to eliminate the possibility of substantial refunds of escrowed funds to NPMs with sales concentrated

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<sup>39</sup> *The Electricity Company of Sofia and Bulgaria*, Judgment, 1939, PCIJ Series A/B No. 77, p. 64 at p.82.

<sup>40</sup> *Feldman v. United Mexican States*, Award, ICSID Case No. ARB (AF)/99/1 (Dec. 16, 2002).

<sup>41</sup> The tribunal in *CMS v. Argentina* addressed a different issue: whether claimant raised incidental or additional claims that fell within the tribunal’s jurisdiction under Article 46 of the ICSID Convention. *CMS Gas Transmission Co. v. Argentina*, Decision on Objections to Jurisdiction, July 17, 2003, ICSID Case No. ARB/01/8, 42 ILM p. 788 (2003) at p. 807 (para 127). The tribunal in *Lucchetti v. Peru* likewise addressed a different question, whether there was an ongoing “dispute” under the particular facts of the case for purposes of the governing bilateral investment treaty. *Empresas Lucchetti S.A. v. Peru*, Award, Feb. 7, 2005, ICSID Case. No. ARB/03/4.

in a few states. During the proceedings, the Claimants' focus appears to have undergone a significant shift, perhaps in light of the difficulties posed by Articles 1116(2) and 1117(2). The March 2004 Notice of Arbitration devoted seven single-spaced pages and 39 paragraphs to a detailed and often critical discussion of the negotiation and characteristics of the MSA and of the escrow laws. The allocable share amendments were not mentioned. The Particularized Statement of Claim (filed in June 2005, before the Respondent filed its objections to jurisdiction) is similar (almost eight single-space pages and 39 paragraphs). Again, the allocable share amendments were not mentioned.

89. The Particularized Statement of Claim lists the measures at issue to include only the escrow statutes (without any reference to amendments), the contraband laws, and the equity assessment laws. It describes the escrow statutes in harsh terms, leaving the impression that these laws were the heart of the claim. Claimants contended that compliance with the escrow laws resulted in:

“the complete destruction of Investors' business and their investments. On the other hand, if an NPM does not make the payments required under a State's Escrow Statute, the NPM will be subjected to civil penalties and its products will be prohibited from being sold in the State...[T]he effect of non-compliance...is a complete prohibition against the operation of the Investor's business and their investments within the territory claimed by the USA, again resulting in its complete destruction.”<sup>42</sup>

90. However, as the proceedings advanced, the Claimants came to place much greater emphasis on developments after March 2001. Their January 16, 2006 Reply (filed roughly two months before the jurisdictional hearing) for the first time highlighted the amendments to the allocable share provisions of the escrow laws. The Reply expanded the list of measures at issue in the case, describing them as follows:

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<sup>42</sup> Claimants' PSOC p. 16 (para 67).

“The first measures to be applied against Claimants, and about which Claimants complain, were the Escrow Statutes. Claimants also independently and separately complain about the Contraband laws; the Equity Assessment Laws; and the amendments made to the Escrow Statutes eliminating the “allocable share” mechanism.”<sup>43</sup>

91. At the hearing, Claimants gave much greater prominence to the allocable share amendments. Claimants’ counsel even contended (contrary to Claimants’ initial case in their PSOC) that Claimants had suffered no injury with respect to their discrimination claims until these amendments were adopted. Counsel also suggested that Claimants had been able to arrive at a sort of *modus vivendi* with the escrow statute regime before these amendments, and might not have brought their Chapter 11 case had they not been adopted.

92. In response to the Tribunal’s questions, the Claimants acknowledged that the allocable share amendments were not specifically cited in their Notice of Claim and Particularized Statement of Claim. However, they maintained that the numerous references to the escrow laws in those documents setting out their case should be taken to include the escrow laws as they might be amended from time to time. Accordingly, they should be construed to include as well the allocable share amendments. Claimants cited in support of this analysis the reasoning of the NAFTA arbitral panel in *Pope & Talbot*, which found jurisdiction to consider claimant’s claims with respect to a new “super fee” added to an evolving regulatory regime,<sup>44</sup> the recent bilateral investment treaty award in *EnCana Corp. v. Ecuador*<sup>45</sup> and other similar cases in which tribunals took account of events occurring after a claim was filed.

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<sup>43</sup> Claimants’ Reply to Respondent’s Objection to Jurisdiction p. 30 (Jan. 16, 2006).

<sup>44</sup> *Pope & Talbot Inc v. Canada*, Award Concerning the Motion by Government of Canada Respect the Claim Based upon Imposition of the “Super Fee,” Aug. 7, 2000, paras. 24-25.

<sup>45</sup> *EnCana Corp. v. Ecuador*, Award, Feb. 3, 2006, para. 163, London Court of Int’l Arbitration Case No. UN 3481.

93. The Tribunal does not find this line of argument helpful. The measures at issue in *Pope & Talbot*, *EnCana* and *Metalclad*<sup>46</sup> did not entail significant changes in the scope of the claim. More important for purposes here, they involved developments after the claim was filed. In *Pope & Talbot*, the arbitration was initiated in March 1999, and the “super fee” was implemented beginning in October 1999. In *EnCana*, the relevant procedural issue concerned references by the claimant to political developments in Ecuador in 2004, after the claim was initiated in March 2003. *Metalclad* involved an ecological decree issued after the claim was submitted that was presented in the claimant’s memorial. The Tribunal found the decree to have been raised “in a timely manner and consistently with the principles of fairness and clarity. Mexico has had ample opportunity to respond and has suffered no prejudice.”<sup>47</sup> That is not the situation here. At least eighteen states had adopted allocable share amendments as of the time this claim was filed in March 2004. The Tribunal was informed that forty-three states and two territories had adopted allocable share amendments as of June 30, 2005, when the Particularized Statement of Claim was filed. Claimants could have clearly identified these amendments as principal targets of their claim at least by June 2005, rather than leaving this central issue to become clear to the Respondent (and to the Tribunal) only at the March 2006 hearing.

94. Excessive formalism should be avoided in investor-state arbitration, particularly in matters involving the forms and formalities of pleadings; “[i]nternational law does not place emphasis on merely formal considerations.”<sup>48</sup> At the same time, fundamental fairness and good order require that a party receive sufficient notice of the claim that it is expected to answer. The Notice of Arbitration and Particularized Statement of Claim did not do so with respect to the allocable share amendments. The Claimants presumably knew of these amendments when they were preparing these pleadings, but they were not identified as a significant element of the claims in either document. If the Claimants

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<sup>46</sup> *Metalclad Corp. v. Mexico*, Award, Aug. 30, 2000, ICSID Case No. Arb(AF)/97/1, 40 ILM p. 36 (2001).

<sup>47</sup> *Id.*, 40 ILM p. 46 (para 69).

<sup>48</sup> *Mondev*, *supra* note 15, p. 28 (para, 86).

intended the amendments to be a major component of their case (as indicated by the arguments at the oral hearing), the Respondent (and the Tribunal) had a right to know this at a much earlier time. Accordingly, the Tribunal concludes that the Claimants' claims that the allocable share amendments violated NAFTA and gave rise to compensable loss or damage are not and cannot be regarded as a part of the claim as filed.

## **IX. THE CLAIMANTS' REQUEST TO AMEND**

95. Apparently recognizing that their claims regarding the allocable share amendments might not (or could not) be regarded as part of the claim as filed, the Claimants' counsel orally submitted (in Claimants' March 25, 2006 rebuttal arguments – the final presentation at the hearing) that if the Tribunal found that these amendments were not covered with sufficient clarity in the Notice of Claim and Particularized Statement of Claim, the claim should be (and would be) amended. Specifically, the Claimants' counsel orally moved as follows:

“[S]hould the Tribunal believe that it has no jurisdiction to hear the claim in respect of the allocable share amendments, the Claimants hereby seek leave to amend the claim to add them as separate and distinct measures that did not breach the NAFTA, nor cause loss or damage until they came into force.”<sup>49</sup>

96. The Respondent had no opportunity to respond to this motion made in the final presentation at the hearing. Accordingly, the Tribunal gave the Respondent two weeks in which to comment on the motion in light of the requirements of Article 20 of the UNCITRAL Arbitration Rules, which apply in this proceeding. Article 20 states:

“During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or

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<sup>49</sup> TR. Vol. 3 p. 1161, lines 9-18.

prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.”

97. Not surprisingly, Respondent’s communication of April 17, 2006 objected to allowing the amendment, on several grounds. Respondent cited (i) Claimants’ unjustifiable delay, (ii) prejudice to the United States and (iii) “other circumstances.” The Respondent also maintained that the claim as amended would be outside the Tribunal’s jurisdiction under NAFTA Articles 1116(2) and 1117(2), essentially on the same grounds urged with respect to Claimants’ other claims.

98. Under Article 20 of the UNCITRAL Rules, the decision whether to allow amendments to a claim is at the Tribunal’s discretion, taking into account all circumstances. The first consideration specifically identified by the Rule is the delay in offering the amendment. In this regard, the issue whether Claimants sufficiently identified the allocable share amendments was not identified clearly in the Parties’ written submissions. Indeed, attention was focused on it only during the Claimants’ presentation at the hearing on jurisdiction. After members of the Tribunal raised questions in this regard, the Claimants offered to amend the next day, during their second (albeit final) presentation at the hearing. The Tribunal notes that the cases cited by Respondent in which other tribunals have refused such amendments often involve amendments offered at a considerably later stage in the proceedings, sometimes at the final hearing<sup>50</sup> or even in a submission after the final hearing.<sup>51</sup> In any case, as a Chamber of the Iran-U.S. Claims Tribunal observed in interpreting an almost identical rule derived from UNCITRAL Rule 20, the rule “accords wide latitude to a party who

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<sup>50</sup> As in *Methanex Corp. v. United States or America*, Final Award on Jurisdiction & Merits, Aug. 3, 2005, ICSID Case no. ARB (AF)/98/3, 44 ILM p. 1342 (2005) (amendment offered after first week of final hearing), and *Westinghouse Electric Corp. and the Islamic Republic of Iran*, Iran-U.S. Claims Tribunal, Awd., No. 579-389-2 (Mar. 26, 1997) (amendment offered at final hearing).

<sup>51</sup> *Dallal and Islamic Republic of Iran*, Iran-U.S. Claims Tribunal, Awd. No. 53-149-1 (June 10, 1983), 3 *Iran-U.S. Claims Trib. Rpts.* at p. 10, 11 (1983) (claim for unjust enrichment made only in post-hearing submission).

seeks to amend the claim, and the Iran-U.S. Claims Tribunal's Practice is in accordance with this liberal approach."<sup>52</sup>

99. The further issue cited in UNCITRAL Rule 20 is the possibility of prejudice. Respondent contended that it would be prejudiced by the amendment, not least because the United States had already filed its Statement of Defense based upon the Claimants' Notice of Claim and Particularized Statement of Claim, which, as the Tribunal found above, did not identify this issue adequately. Accordingly, (as the Respondent rightly contends) if the amendment is to be allowed, the briefing schedule for future proceedings must take account of this imbalance and make appropriate provisions to assure equal treatment of the Parties. But this circumstance cannot result in denying the Claimants an opportunity to plead changes in the law occurring after March 12, 2001 (in the form of the amendments to the escrow statutes) and their consequent results.

100. In this connection, the Tribunal must take account of the fact that, should the amendment be refused, the Claimants could seek to file a second, separate arbitration against the Respondent before a separate tribunal based on the allocable share amendments.<sup>53</sup> The Tribunal believes that in the interests of judicial economy, efficiency and coherence, it is better for all of the Claimants' claims regarding the MSA and its associated enforcement measures to be considered in the context of a single proceeding.

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<sup>52</sup> *International Schools Services, Inc. and the Islamic Republic of Iran*, Iran-U.S. Claims Tribunal, Awd. No. ITL 57-123-1 (Jan. 30, 1986), 10 *Iran-U.S. Claims Trib. Rpts.* at p. 12 (1986-1). See D.D. Caron, L.M. Caplan & M Pellonpää, *The Uncitral Arbitration Rules. A Commentary* p. 465 (Oxford, 2006) ("For practical and economic reasons, the tribunal should maintain a flexible attitude toward the acceptance of such modifications, as the alternative may be the commencement of new arbitral proceedings."); J. J. van Hof, *Commentary On The Uncitral Arbitration Rules. The Application By The Iran-U.S. Claims Tribunal* p. 137 (Deventer, 1991).

<sup>58</sup> The evidence indicates that 18 states adopted such amendments in 2003, with others adopting them in 2004. However, Claimants might be expected to argue before another ICSID panel that the three-year limitations period with respect to any of these amendments does not run until they actually result in reduced refunds of escrowed funds to Grand River. Cf. *Waste Management, Inc. v. Mexico*, Award, June 26, 2002, ICSID Case No. ARB(AF)00/3, 41 ILM p. 1315 (2002) (dismissal of claim for claimant's failure to provide satisfactory waiver does not preclude resubmitting the claim in a separate Chapter 11 proceeding); *Mondev Int'l Ltd. v. United States*, *supra* note 15, p. 28 (para. 86) (international law does not require new proceedings to remedy a merely procedural defect.).

The Tribunal notes in this regard that the three NAFTA Parties included in the Chapter 11 arbitration system a mechanism (Article 1126) for the very purpose of consolidating separate Chapter 11 claims having “a question of law or fact in common,” where this would be “in the interests of fair and efficient resolution of the claims.”

101. The Respondent also urged that the amendment should be refused because it would permit claims outside the Tribunal’s jurisdiction. This argument essentially reiterated the Respondent’s contention that Claimants knew or should have known of injury they incurred on account of the escrow statutes in 1999, when they first became obliged to escrow funds. As noted above, the Tribunal is not persuaded that the time bars under 1116(1) and 1117(1) can be applied to preclude Claimants from seeking to show that they suffered legally distinct injury on account of legislative actions occurring within the three years prior to the filing of their claim (or even after it was filed).

102. For the foregoing reasons, the Tribunal grants the Claimants’ oral motion to amend their claim to add the allocable share amendments, as specified in that motion.

#### **X. THE TRIBUNAL’S DECISION:**

103. The Claimants’ claims of breach of the North American Free Trade Agreement with respect to

-- the Master Settlement Agreement,

-- the Escrow Statutes (as they existed prior to March 12, 2001), and

-- any related enforcement measures adopted or implemented by U.S. States prior to March 12, 2001, with respect to cigarettes manufactured or distributed by any of the Claimants, and sold at retail off-reservation,

are hereby dismissed with prejudice as barred by Articles 1116(2) and 1117(2) of the North American Free Trade Agreement. (Any such claims with respect to retail sales on reservation will be considered at the stage of the merits.)

104. The Claimants' oral motion to add claims with respect to the allocable share amendments is granted. Accordingly, the Claimants' claims of breach of NAFTA directly arising out of the adoption and implementation of the allocable share amendments are reserved for consideration on the merits.

105. The Respondent's remaining jurisdictional objections and each Party's claims for costs are reserved, and will be dealt with in subsequent proceedings on the merits.

106. A revised schedule of further pleadings will be intimated to the Parties in due course.

(signed)

Fali S. Nariman  
President of the Tribunal

(signed)

Professor James Anaya  
Arbitrator

(signed)

John R. Crook  
Arbitrator

Done at Washington D.C., on the 20<sup>th</sup> day of July 2006.