

NAFTA/UNCITRAL ARBITRATION RULES PROCEEDING

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 :  
 In the matter of the Arbitration :  
 between: :  
 :  
 GRAND RIVER ENTERPRISES SIX NATIONS LTD., :  
 et al., :  
 :  
 Claimants/Investors, :  
 :  
 and :  
 :  
 UNITED STATES OF AMERICA, :  
 :  
 Respondent/Party. :  
 ----- x Volume 3

HEARING ON THE MERITS

Wednesday, February 3, 2010

The World Bank  
 1818 H Street, N.W.  
 MC Building  
 Conference Room 4-800  
 Washington, D.C.

The Hearing in the above-entitled matter  
 came on, pursuant to notice, at 9:00 a.m. before:

MR. FALI S. NARIMAN, President

PROF. JAMES ANAYA, Arbitrator

MR. JOHN R. COOK, Arbitrator

**Also Present:**

MS. KATIA YANNACA-SMALL,  
Secretary to the Tribunal

**Court Reporters:**

MR. JOHN PHELPS  
Registered Professional Reporter  
Certified Realtime Reporter  
B&B Reporters  
529 14th Street, S.E.  
Washington, D.C. 20003  
+1 (202) 544-1903

MR. DAVID KASDAN  
Registered Diplomat Reporter  
Certified Realtime Reporter  
B&B Reporters  
529 14th Street, S.E.  
Washington, D.C. 20003  
+1 (202) 544-1903

**APPEARANCES: (Continued)****On behalf of the Respondent/Party:**

MR. HAROLD HONGJU KOH  
Legal Adviser  
MR. JEFFREY D. KOVAR  
Assistant Legal Adviser  
MR. MARK E. FELDMAN  
Chief, NAFTA/CAFTA-DR Arbitration  
Division  
Office of International Claims and  
Investment Disputes  
MS. ALICIA L. CATE  
MS. DANIELLE M. MORRIS  
MR. JEREMY SHARPE  
MS. JENNIFER THORNTON  
Attorney-Advisers,  
Office of International Claims and  
Investment Disputes  
Office of the Legal Adviser  
U.S. Department of State  
Suite 203, South Building  
2430 E Street, N.W.  
Washington, D.C. 20037-2800  
(202) 776-8443

**APPEARANCES:****On behalf of the Claimants/Investors:**

MR. TODD WEILER  
#19 - 2014 Valleyrun Blvd.  
London, Ontario N6G 5N8  
Canada  
(613) 686-3636

MR. ROBERT LUDDY  
Windels Marx Lane & Mittendorf, LLP  
156 West 56th Street  
New York, New York 10019  
(212) 237-1114

MR. LEONARD VIOLI  
Law Offices of Leonard Violi, LLC  
910 East Boston Post Road  
Mamaroneck, New York 1053  
(914) 698-6200

MS. CHANTELL MACINNES MONTOUR  
MS. CATHERINE McINNES  
Inch Hammond Professional Corporation  
1 King Street, West Suite 500  
Hamilton, Ontario L8p 4XP  
(905) 525-4481

**On behalf of the Wahta Mohawks:**

PROF. MATTHEW FLETCHER

**ALSO PRESENT:****On behalf of the United Mexican States:**

SR. JOSE LUIS PAZ,  
Head of Trade and NAFTA Office  
SR. SALVADOR BEHAR,  
Legal Counsel for International Trade  
SRA. LAURA MARTINEZ  
Embassy of Mexico  
Secretaria de Economia  
Trade and NAFTA Office  
1911 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006  
(202) 728-1707

**On behalf of Canada:**

MS. CHRISTINA BEHARRY  
Department of Foreign Affairs  
and International Trade, Canada  
Trade Law Bureau (JLT)  
Lester B. Pearson Building  
125 Sussex Drive  
Ottawa, Ontario K1A 0G2  
Canada  
(613) 944-0027

MR. SEAN CLARK  
Embassy of Canada

B&B Reporters

529 14th Street, S.E. Washington, DC 20003

(202) 544-1903

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1 MR. VIOLI: Actually, they're not. I  
2 was on NAAG's website this morning. NAAG is not a  
3 state government and it's not a Respondent in this  
4 case. We've requested the updated, complete  
5 version of the MSA. I asked for that at the  
6 jurisdictional hearing. I asked for that prior to  
7 the hearing. And I would like a copy from the  
8 Respondent, a complete version of this measure.

9 PRESIDENT NARIMAN: Even if it's  
10 available on the website?

11 MR. VIOLI: It's not.

12 MR. FELDMAN: We will print one out  
13 from the website.

14 MR. VIOLI: With all of the amendments,  
15 please, Mr. Feldman.

16 MR. FELDMAN: We will print the  
17 amendments out from the website.

18 MR. VIOLI: Okay -- the amendments from  
19 the website are incomplete. There was an  
20 amendment -- let's address this right now.

21 There's an amendment that amended or  
22 purported to amend the Model T Statute to remove

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

1 MR. VIOLI: I would like to start  
2 before we get the witness or ask the witness to  
3 step up.  
4

5 PRESIDENT NARIMAN: Okay. We are on.

6 MR. VIOLI: Mr. President, yesterday we  
7 asked Mr. Hering some questions regarding the MSA,  
8 and we have an earlier version of the MSA that was  
9 provided to us, not by Respondent in the record,  
10 but it appears that there is an updated version of  
11 the MSA, with all amendments and attachments.

12 And we would request the Respondent to  
13 produce to the Tribunal and to Claimants the  
14 current version of the MSA with all of the  
15 amendments. We need it for certain questions that  
16 we need to ask and certain points we'd like to  
17 make.

18 So with that, I don't see it should be  
19 a problem. It's a major document of the case.

20 MR. FELDMAN: Thank you. Mr. Luddy,  
21 the amendments are available on the NAAG's  
22 website. They're publicly available.

1 the Allocable Share Amendment. And this is very  
2 relevant to what Mr. Crook brought up yesterday  
3 regarding changes in the law and changes at what  
4 point in time they occurred, and when did the  
5 measures come into effect, and what was offered or  
6 what was on the table for the Claimants in this  
7 case at any given point in time.

8 What I'm asking for, not printing from  
9 the website. We would like the MSA in its  
10 complete form. That includes amendments,  
11 addendum, agreements, forbearance agreements,  
12 these are all part of the MSA, and amend the MSA.  
13 We want a complete and accurate version of the  
14 MSA.

15 PRESIDENT NARIMAN: You want an  
16 alternative version, which is --

17 MR. VIOLI: Indeed. Thank you.  
18 Authoritative.

19 MR. FELDMAN: We can discuss this off  
20 the record.

21 (Discussion off the record.)

22 MR. VIOLI: Back on the record. A

1 member of NAAG and the Respondent have spoken with  
2 Claimants regarding the MSA and we were advised  
3 that some documents which may be considered  
4 amendments to the MSA were not executed by all but  
5 were executed by some parties to the MSA but  
6 they're amendments to the MSA, and some might not  
7 be regarded as amendments to the MSA.

8 Respondent has offered to give what  
9 they regard as a complete version with amendments  
10 to the MSA. I specifically know of one document  
11 which -- or I've been told there is a document  
12 that is an amendment whereby the parties, the  
13 manufacturers to the MSA acknowledged that if they  
14 change, if the parties or if the Model T Statute  
15 is changed to do away with the allocable share,  
16 that the Model Statute will still constitute a  
17 qualifying statute under the MSA.

18 So that material change in the MSA was  
19 reflected in an amendment. I haven't seen it in  
20 completely executed form, and I'm not sure I have  
21 the most current version, but there was a point in  
22 time when the MSA was amended and parties agreed

1 Claimant's claims and it's relevant to the matters  
2 before the Tribunal.

3 So we have agreed to accept what they  
4 will provide us as amendments, particularly the  
5 one I mentioned about the allocable share  
6 provisions of the Model T and what other  
7 agreements they believe reflect an amendment to  
8 the MSA, and we'll go from there. But with that,  
9 I think we're so far okay or have come to an  
10 agreement. Thank you.

11 MR. FELDMAN: Thank you, counsel. I  
12 would just clarify, we've made this point over and  
13 over again in our briefs and I would just  
14 articulate it once more. The MSA is not a  
15 challenged measure in this arbitration.

16 PRESIDENT NARIMAN: Okay. What's next?

17 MR. LUDDY: Mr. Thomson?

18 MR. FELDMAN: Yes.

19 PRESIDENT NARIMAN: You are  
20 cross-examining your witness or the other side?

21 MR. LUDDY: It's the other side's  
22 witness.

1 to an amendment of the MSA in that respect.

2 We'll see what they provide and we'll  
3 go from there. So we've reserved our right to ask  
4 for other and additional documents. The other  
5 thing Respondent has identified or informed us is  
6 that when a party joins the MSA, there are  
7 sometimes agreements, forbearance agreements or  
8 other agreements in connection with that entry  
9 into the MSA. And it was left open, I believe,  
10 that the idea was left open that it -- that these  
11 agreements may not be amendments to the MSA.

12 We respectfully disagree because if a  
13 law says joined an agreement or follow this  
14 schedule of payments, right, the agreement has to  
15 be complete. It has to have fixed terms,  
16 definitions, obligations, liabilities and  
17 responsibilities. We want to know what those are.

18 If people are joining, exercising this  
19 right under the statute or this obligation with a  
20 certain set of parameters that remains beyond the  
21 public view and beyond our view is not offered to  
22 us, then we believe it's relevant to the

1 MR. FELDMAN: We'll have a few  
2 questions and I'll have a couple of preliminary  
3 remarks.

4 THE WITNESS: I'm going to sit on the  
5 witness side, rather than the expert side.

6 PRESIDENT NARIMAN: Yes?

7 MR. FELDMAN: Mr. President, I just had  
8 a few at the outset of Mr. Thomson's testimony, I  
9 just had a few preliminary remarks. We appreciate  
10 the guidance from the Tribunal yesterday regarding  
11 the scope of cross-examination and we understand  
12 that the scope of cross-examination in this  
13 matter, in fact, can exceed the scope of direct  
14 testimony.

15 PRESIDENT NARIMAN: May exceed.

16 MR. FELDMAN: May exceed the scope of  
17 direct testimony. Particularly with respect to  
18 Mr. Thomson, I would emphasize that his one page  
19 declaration in this matter was on an exceptionally  
20 narrow issue concerning particular volumes of  
21 sales of Seneca cigarettes entering into New  
22 Mexico and confirming that those cigarettes were

1 sold to a certain set of retailers within the  
2 state of New Mexico. That was his declaration.

3 I would also add that Mr. Thomson and  
4 his office have active prosecutions going on,  
5 including as you're aware, of prosecution against  
6 Native Wholesale Supply and any internal  
7 deliberations, work product consistent with those  
8 prosecutions, Mr. Thomson will obviously have to  
9 respond, if there's any sort of questioning along  
10 those lines.

11 But I would just impress upon the  
12 Tribunal that his declaration in this matter was  
13 exceptionally narrow and I am comforted to hear  
14 from the Claimants that they do not plan to take  
15 any extended period of time cross-examining  
16 Mr. Thomson.

17 PRESIDENT NARIMAN: Okay. We've noted  
18 that.

19 MR. LUDDY: Did you have preliminary  
20 questions, Mark?

21 MR. FELDMAN: Just to clarify, any  
22 questions implicating work product of

## CROSS-EXAMINATION

1 BY MR. LUDDY:

2 Q. Good morning, sir. Rob Luddy on behalf  
3 of the defendants.

4 A. Good morning. I don't think we have --

5 Q. We have. Nice to meet you. I don't  
6 think it was intentional or maybe I misunderstood  
7 it, Mr. Feldman suggested in his opening remarks  
8 that you have ongoing prosecutions against--

9 A. No.

10 Q. NWS. I take the word "prosecution" to  
11 suggest criminal actions. You don't have any  
12 criminal actions against NWS, correct?

13 A. That's correct. It's a civil matter  
14 filed in civil court.

15 Q. Okay. How long have you been with the  
16 New Mexico AG's office?

17 A. I think my ten-year anniversary was in  
18 September, so a little over ten years, I suppose.

19 Q. Ten years?

20 A. Yes, sir.

21 Q. So after the MSA was signed?  
22

1 Mr. Thomson's office, he, in fact, would not be in  
2 a position to respond to those questions.

3 PRESIDENT NARIMAN: You object to it?

4 MR. FELDMAN: Thank you.

5 DAVID K. THOMSON, RESPONDENT'S WITNESS, CALLED  
6 DIRECT EXAMINATION

7 BY MR. FELDMAN:

8 Q. Good morning, Mr. Thomson.

9 A. Good morning.

10 Q. Thank you for appearing today. Would  
11 you please state your full name for the record?

12 A. David K. Thomson, T-H-O-M-S-O-N.

13 Q. What is your current position?

14 A. I am Deputy Attorney General with the  
15 State of New Mexico. I oversee all the civil law  
16 divisions. Our office is divided into criminal  
17 and civil law. I oversee all the civil law  
18 divisions.

19 Q. Have you submitted a declaration in  
20 this matter?

21 A. Yes.

22 Q. Thank you.

1 A. Yes. That's correct. I did not  
2 negotiate the MSA, no, sir.

3 Q. And what types of matters do you  
4 oversee in the office?

5 A. As I said, our office is divided into  
6 the civil section and the criminal section. We're  
7 not a big office, we're a small state. I don't  
8 know who else you've had on here from probably  
9 larger states, so I oversee the Environment  
10 Division, the Consumer Protection Division, the  
11 regulatory phone lines, electricity and the  
12 Litigation Division, which handles litigation on  
13 behalf of state agencies.

14 And then I'm, also, what's described as  
15 states often called tobacco contacts, they're the  
16 person that gets most involved in tobacco-related  
17 matters.

18 Q. And how long have you been the tobacco  
19 contact?

20 A. I think since beginning of my Attorney  
21 General King's Term 2006. I was not the tobacco  
22 contact in the previous administration.

1 Q. Who was the contact in the previous  
2 administration?  
3 A. I think his name was Glen Smith.  
4 Q. Good. Can you open to core  
5 Document 38?  
6 A. 38, yes.  
7 Q. Can you identify that document, please?  
8 A. Yes, that is a letter to the Foreign  
9 Trade Zone.  
10 Q. And this was dated August 1st, is it?  
11 A. Yes.  
12 Q. August 1, 2008. How did this letter  
13 come about, just generally, tell me the background  
14 to it?  
15 A. I think we had information that certain  
16 tobacco products was entering into the state of  
17 New Mexico through the Foreign Trade Zone.  
18 Q. And when did you first obtain that  
19 information?  
20 A. I don't recall.  
21 Q. From whom did you obtain that  
22 information?

1 thinking about it, also, we may have and I can't  
2 tell you for sure whether we found out from  
3 products showing up in New Mexico, I'm not sure if  
4 this was prior or subsequent to the location of  
5 product found in Albuquerque, but to answer your  
6 question, I think I did also find out through  
7 NAAG.  
8 Q. And did you have conversations with  
9 these other Attorney Generals from California,  
10 Idaho, Oklahoma, et cetera?  
11 A. Generally, we -- a group get together,  
12 we often share information if there's working  
13 groups and things like that. Yeah, I would  
14 assume.  
15 Q. And out of those discussions, with  
16 respect to the issue of product coming out of the  
17 FTZ, was there an agreed course of action that  
18 developed from those discussions?  
19 A. Actually, not really. I sort of took  
20 this, evaluated our statute and I had concerns.  
21 So I believe I was the first state to write the  
22 FTZ. So, we may have discussed what we know about

1 A. I don't -- I'd have to go back and  
2 look. It may have been through NAAG contact. I'm  
3 not sure.  
4 Q. Who -- with whom did you discuss the  
5 matter of NWS cigarettes coming out of the FTZ  
6 before you wrote this letter?  
7 A. I think I may have discussed it with  
8 other states and NAAG contacts and, of course,  
9 internally in our office.  
10 Q. Who's the NAAG contacts?  
11 A. Is it -- Bill --  
12 Q. Michael Hering, Bill Lieblich?  
13 A. I think it was probably Bill Lieblich  
14 and probably Michael. I don't know.  
15 Q. And what other states?  
16 A. As best I can recall, California,  
17 Oklahoma, maybe Idaho, Nevada maybe because it was  
18 located near Nevada.  
19 Q. Did somebody from NAAG contact you to  
20 advise you that NWS or that there was shipments of  
21 Seneca brand from the FTZ to New Mexico?  
22 A. I think they may have. Now that I'm

1 the product entering the different states, but I'm  
2 not sure we had conversations about -- well, we  
3 may have conversations, different remedies,  
4 different states may pursue.  
5 Q. Right, I'm sorry?  
6 A. I'm sorry.  
7 Q. Were you finished?  
8 A. Yeah.  
9 Q. And you say you reviewed the statute.  
10 What statute did you review?  
11 A. Our, what I call our tobacco statutes.  
12 Q. Is that the complementary legislation?  
13 A. I suppose people, yeah, people --  
14 complimentary versus escrow. I deal in, I call  
15 them tobacco statutes, Title 7, Title 6.  
16 Q. Okay. But your letter doesn't  
17 implicate the Escrow Statute, per se, it focuses  
18 more on the complimentary statute, correct?  
19 A. I think that's right. I have to review  
20 it.  
21 Q. Go ahead. You can review it. I have  
22 to ask you some questions about it anyway.

1 A. Okay. (Reviewing document.)  
 2 Okay. I would be mostly involved in  
 3 what I call a directory issue.  
 4 Q. I'm sorry?  
 5 A. A directory issue.  
 6 Q. And that's under the complimentary  
 7 statute?  
 8 A. I suppose that's true, yes.  
 9 Q. This is not a trick question. We have  
 10 developed common terminology, I just want to make  
 11 sure --  
 12 A. Yeah, I'm trying to fit into that mode,  
 13 but okay.  
 14 Q. And the purpose of the complimentary  
 15 statute in the eyes of New Mexico is to help  
 16 enforce its Escrow Statute, correct?  
 17 A. I don't know -- I think that's one of  
 18 the purposes. You know, another purpose, it's  
 19 really what I would describe as a -- to aid the  
 20 state in -- it's also sort of like a help policy  
 21 statute. It aids the state in trying to  
 22 understand what product is entering the state and

1 kind of term of art we're using. In New Mexico,  
 2 we have Pueblos, they're not -- we have  
 3 reservations but I use the term "reservation".  
 4 Actually in New Mexico it's fee land. As long as  
 5 we understand, I don't want to misuse a term.  
 6 Q. I appreciate that clarification.  
 7 Look at the first paragraph of your 8/1  
 8 letter. This is directed to the FTZ, it's the  
 9 second line. "We are, however, concerned about  
 10 the large quantities of non compliant contraband  
 11 cigarettes being released from FTZ 89 to carriers  
 12 bound from New Mexico."  
 13 The term "contraband" there, when those  
 14 cigarettes were sitting in the possession of FTZ  
 15 in Nevada, they were not contraband cigarettes,  
 16 were they?  
 17 A. I don't know. You'd have to ask  
 18 Nevada. That, I don't know.  
 19 Q. Okay. Well, you called them  
 20 contraband, I didn't. You called them contraband  
 21 cigarettes. Why were they contraband cigarettes  
 22 when they were in the possession of FTZ?

1 where it's going.  
 2 Q. Okay. And the product that was the  
 3 subject of this letter coming through the FTZ, you  
 4 determined that that was going to the Indian  
 5 reservations in New Mexico?  
 6 A. Some of it was. I can't tell you  
 7 factually because I don't have any personal  
 8 knowledge where exactly it went. The invoices  
 9 seem to indicate they were going to Boskit Farms  
 10 and Amos.  
 11 Q. Both of those are located on Indian  
 12 reservations, correct?  
 13 A. Yes, but I'm not sure. You know, I  
 14 can't represent that all of them went there.  
 15 Q. But you don't have any evidence of  
 16 shipments, other than to an Indian reservation?  
 17 A. No, I don't have any evidence of  
 18 shipments, other than Indian reservations. I do  
 19 have some evidence of products showing up off of  
 20 the reservation.  
 21 Q. Okay.  
 22 A. I shouldn't say -- I don't know the

1 A. Well, I said being released from FTZ to  
 2 carriers bound for New Mexico.  
 3 Q. Okay. Well, when they were released  
 4 from FTZ, they were still in Nevada, correct?  
 5 A. Yeah, but once they were bound for New  
 6 Mexico . . .  
 7 Q. So your position is they became  
 8 contraband when they reached New Mexico's border,  
 9 and crossed it, correct?  
 10 A. Our jurisdiction would begin when they  
 11 crossed into New Mexico.  
 12 Q. Okay. So to the extent you were  
 13 telling the FTZ that the cigarettes it was holding  
 14 belonging to NWS were contraband, that wasn't  
 15 correct, right?  
 16 A. No, I mean -- the letter stands -- if  
 17 you're going to ask me to read -- you're putting  
 18 words into my mouth. We are, however, concerned  
 19 about large quantities of non compliant contraband  
 20 cigarettes being released. I didn't opine as to  
 21 whether while they were holding it. The point of  
 22 it was if it's contraband in New Mexico and you're

1 allowing it to enter, then you're aiding and  
2 abetting.

3 Q. Okay. Forgive me for parsing your  
4 letters closely, sir, but you are writing a letter  
5 to a third-party telling them that they are  
6 holding contraband cigarettes of my client and I  
7 think I'm entitled to ask exactly what you meant  
8 by that.

9 A. And that's fine. And I'll explain to  
10 you the best I know but I'm not going to allow you  
11 to tell me what I meant.

12 PRESIDENT NARIMAN: Please explain.

13 THE WITNESS: The purpose of the letter  
14 was to advise the FTZ that we have information  
15 you're releasing into the state of New Mexico,  
16 that a carrier from New Mexico is coming in and  
17 you're releasing, and there's an address that  
18 says, it's located in New Mexico and you're  
19 releasing it to them, please be advised that  
20 you're on notice that you know that product is  
21 entering into the state of New Mexico. That's the  
22 purpose of the letter.

1 Q. Has a civil action ever been brought by  
2 New Mexico under that provision against any type  
3 of common carrier?

4 A. Against a common carrier? Not that I  
5 know of.

6 Q. Okay. And FTZ in the capacity in which  
7 they serve is essentially a common carrier in this  
8 capacity, correct?

9 A. To be honest with you, sir, I'm not  
10 exactly sure what FTZ is.

11 Q. Okay. Do you think it might have been  
12 useful to look into that before you threatened to  
13 bring an action against them for violation of your  
14 complementary legislation?

15 A. By not -- we did try to understand what  
16 the Foreign Trade Zone was. We were comfortable  
17 with what we knew about the Foreign Trade Zone  
18 that we would have had jurisdiction to bring a  
19 civil action.

20 Q. Okay. I thought you just said you  
21 didn't know what the FTZ was. What is the FTZ?

22 A. I'm not entirely clear. It appears to

1 Q. Did you have -- let's look at the  
2 second page for a minute. You referred to the  
3 NMSA statute which I guess is the contraband  
4 statute or the complimentary statute?

5 PRESIDENT NARIMAN: NMSA.

6 MR. LUDDY: New Mexico SA.

7 PRESIDENT NARIMAN: Is that New Mexico  
8 escrow fund?

9 MR. LUDDY: Complementary legislation,  
10 I believe.

11 Q. Correct?

12 A. I believe that's right.

13 Q. And you cite the statute here then you  
14 say FTZ may be in violation of that section,  
15 correct?

16 A. Yes.

17 Q. Did you do any analysis as to whether  
18 you, your office had jurisdiction over FTZ to  
19 prosecute them for violation of that statute?

20 A. We believe we would. If it came to  
21 that, we would have jurisdiction if we wanted to  
22 pursue a civil action.

1 be a large warehouse where product comes in, and  
2 then it's released.

3 Q. And the function it serves in the  
4 stream of commerce is essentially distinguishable  
5 from that of a common carrier, is it not?

6 A. That could be your argument. I don't  
7 know.

8 Q. What is your argument, sir? I'm not  
9 really arguing. I just want to know what your  
10 argument is. I want to know what you determined  
11 the FTZ to be, and how when you determined it to  
12 be to give you authority to take action against it  
13 under your complementary legislation? That's what  
14 I would like to know.

15 A. I determined FTZ to be an entity that  
16 was holding, that took cigarettes in, was holding  
17 cigarettes, releasing cigarettes into the state of  
18 New Mexico.

19 Q. It was the FTZ that was releasing them  
20 into the state of New Mexico?

21 A. They were releasing them to either a  
22 common carrier or some form of distributor.



1 Q. And did you determine then on the basis  
2 of those facts that your office in the state of  
3 New Mexico had personal jurisdiction over them  
4 under the U.S. Constitution?

5 A. I did not sue them, so I didn't make  
6 that determination. This isn't a lawsuit. This  
7 is a notice letter. FTZ --

8 Q. You didn't --

9 A. Can I finish? Let me finish. FTZ very  
10 well to this letter could have responded and said  
11 here's what we are, here's what we do.

12 Q. Okay. That's fine. Not a lawsuit.  
13 What you were really trying to do is just threaten  
14 them so that they would stop being involved with  
15 NWS cigarettes; isn't that correct?

16 A. That is completely false.

17 Q. I'm sorry then. What was the intent of  
18 your letter?

19 A. The intent of the letter is the same as  
20 -- in all practices with regard to non compliant  
21 product, if we find someone dealing in non  
22 compliant product, we always make a good faith

1 I'd have to go back through my records. I  
2 apologize.

3 PRESIDENT NARIMAN: It is peculiar.  
4 Anyway -- okay.

5 Q. Okay. Let's go back to that for a  
6 minute, so I can determine exactly what your goal  
7 was in writing this letter. On Page 2, you say  
8 that you believe that the FTZ may be violating New  
9 Mexico law?

10 A. Yes.

11 Q. Did you hope by saying that, that they  
12 would extricate themselves from the chain of  
13 commerce between NWS and the Indian entities that  
14 were purchasing Seneca brand cigarettes?

15 A. Ask that question again?

16 Q. Fair enough. By telling them that they  
17 may be in violation of New Mexico law, even though  
18 you're not determining whether you had any  
19 jurisdiction to pursue such claims, by telling  
20 them that, was it your expectation or hope that  
21 they would no longer conduct commerce in Seneca  
22 brand cigarettes?

1 effort to write them and say, whether it's a  
2 distributor or it's a common carrier or it's a  
3 retailer and we say, "Look, under our statute we  
4 believe you are selling, importing one version of  
5 this, of this product. Please review the statute,  
6 review the directory. We are concerned that  
7 you're" -- and they can write back and they can  
8 agree or disagree. To characterize it as to block  
9 them from that particular product is not true.

10 I'm not threatening them, I'm advising  
11 them.

12 PRESIDENT NARIMAN: May I just  
13 interrupt here? Did you receive any response from  
14 Nevada International Trade Corporation to this  
15 letter?

16 THE WITNESS: I think we did. I don't  
17 know if that's part of the record.

18 PRESIDENT NARIMAN: Is that --

19 MR. LUDDY: I don't believe it is. I  
20 don't know of a response which does not mean --

21 THE WITNESS: I don't know if it was  
22 part of this particular letter or something else.

1 MR. FELDMAN: Counsel is the question  
2 expectation or hope?

3 MR. LUDDY: Either one.

4 MR. FELDMAN: Let's take them one at a  
5 time.

6 MR. LUDDY: Fair enough.

7 Q. Expectation?

8 A. The expectation and hope is that the  
9 Foreign Trade Zone as an entity, I suppose is  
10 interested in following the law, would review what  
11 they're doing and review the statute and make  
12 their own determination and will either agree on  
13 it or will disagree. I have no particular hope  
14 one way or the other. I'm not their attorney.

15 Q. Okay. But you were trying to get them  
16 to stop, correct?

17 A. I was trying to advise them that we  
18 believe that they were aiding and abetting in the  
19 transportation of this product that's not on the  
20 directory.

21 Q. Now, you also threatened that there may  
22 be federal violations associated with their

1 conduct?

2 MR. FELDMAN: Object to the  
3 characterization.

4 Q. The last sentence of that paragraph?

5 A. Last sentence?

6 Q. Sentence that reads, "There may be  
7 federal violations, as well"?

8 A. Yeah, we thought there may be some, I  
9 guess that was with regard to, I don't know if  
10 it's Jenkins or CCTA violations.

11 Q. I take it you don't have authority as  
12 the New Mexico AG to pursue federal violations,  
13 correct?

14 A. No, I don't.

15 Q. But that didn't stop you from  
16 threatening them with federal violations--

17 MR. FELDMAN: Objection.

18 A. I was not threatening them with federal  
19 violations.

20 PRESIDENT NARIMAN: Mr. Luddy, I'm  
21 sorry, this line of cross-examination is not very  
22 fair to the witness, unless you produce the

1 questions on a related matter.

2 CROSS-EXAMINATION

3 BY MR. VIOLI:

4 Q. Good morning, Mr. Thomson.

5 A. Good morning, Mr. Violi.

6 Can I -- for my own information, I'm  
7 not sure who's representing, just so I know the  
8 context.

9 Q. We're both representing the Claimants.

10 A. Thank you.

11 Q. Mr. Thomson, you testified a few  
12 minutes ago that one of the purposes of the  
13 complementary legislation was to aid in the  
14 enforcement of the escrow statutes, right?

15 A. Yes, because it requires some -- I  
16 suppose their length, in a sense.

17 Q. And Mr. Luddy just asked you about the  
18 collection of taxes in New Mexico for cigarettes.  
19 New Mexico collects state excise taxes; is that  
20 right?

21 A. New Mexico collects state excise taxes.

22 Q. And the mechanism in New Mexico for the

1 response of Nevada. Otherwise, there's no point  
2 in all this.

3 MR. LUDDY: I'll move on.

4 PRESIDENT NARIMAN: If it's on record,  
5 you produce it. If it's not on record, still you  
6 are entitled to produce it, but without that, you  
7 are asking him all these questions. The recipient  
8 of the letter would probably have said what he  
9 wanted -- what the true position was.

10 MR. LUDDY: Fair enough.

11 Q. If you could look at the complaint that  
12 you filed against NWS which is 37 in your  
13 documents there, sir?

14 A. Okay.

15 Q. Now, this complaint does not seek the  
16 collection of any taxes due in New Mexico, does  
17 it?

18 A. No.

19 PRESIDENT NARIMAN: What document?

20 MR. LUDDY: It's 37.

21 That's all the questions I have of  
22 Mr. Thomson. Mr. Violi has a few follow-up

1 collection of state excised cigarettes taxes is  
2 affixing New Mexico tax stamps to the packages,  
3 correct?

4 A. Yes. As I understand it, and I'm not a  
5 revenue attorney, the stamp is attached, a state  
6 excise stamp and I think there's a tax exempt  
7 stamp that is also attached. So it's not one and  
8 not the other. I think there's a non SET stamp.

9 Q. And under the Escrow Statute, an MPM  
10 must pay escrow for New Mexico based on the escrow  
11 statute based on the units sold in New Mexico,  
12 right, the term units sold?

13 A. I'm pretty sure that's right but say  
14 the question again and I'll --

15 Q. In New Mexico an MPM must pay under the  
16 Escrow Statute based upon what's called units sold  
17 in New Mexico?

18 A. That's correct.

19 Q. And unit sold is defined as cigarettes  
20 to which or for which the New Mexico state  
21 cigarette excise taxes have been paid, correct?

22 A. Yes.

1 Q. As evidenced by the affixing of the tax  
2 stamp to those cigarettes, correct?

3 A. Yes.

4 Q. Now, with respect to the sales, to the  
5 Jemez Pueblo and the Isleta Pueblo that were  
6 mentioned earlier, has the state of New Mexico  
7 ever asked that, to your knowledge, has the state  
8 of New Mexico asked that either to NWS or to the  
9 entities in Jemez or in Isleta that they pay the  
10 state excise taxes for those cigarettes?

11 A. To my knowledge, no, but I don't -- the  
12 Department of Revenue is a separate entity from  
13 the Attorney General's office, to my knowledge no.  
14 Have they asked Jemez or Isleta to pay --

15 Q. The cigarettes that are at issue in  
16 this letter that went to Jemez and Isleta, the  
17 Seneca cigarettes that you mentioned from the  
18 Foreign Trade Zone, and that came from NWS, has  
19 the State of New Mexico, I guess the Department of  
20 Revenue, has it asked for the payment of state  
21 excise taxes, cigarette excise taxes for those  
22 cigarettes, to your knowledge?

1 Q. By the way, you're familiar with the  
2 MPM adjustment proceedings?

3 A. Honestly, I'm not. I tried to -- the  
4 MPM adjustment proceedings were prior to me  
5 starting the -- I never really handled the MPM  
6 adjustment proceedings, but I'll do my best.

7 Q. Fair enough. Have any participating  
8 manufacturer under the MSA taken the position that  
9 New Mexico failed to diligently enforce its Escrow  
10 Statute because New Mexico policy or otherwise,  
11 New Mexico law does not require that the  
12 cigarettes that we're talking about be considered  
13 units sold under the Escrow Statute or that they  
14 do require, I'm sorry, not required?

15 PRESIDENT NARIMAN: I'm sorry I didn't  
16 follow the question.

17 MR. VIOLI: I withdraw it. I'll  
18 rephrase it.

19 Q. Has any tobacco manufacturer in the MSA  
20 taken the position that the cigarettes that we're  
21 talking about in the last few questions,  
22 constituted units sold?

1 A. To my knowledge they haven't. To my  
2 knowledge, it would be difficult because the  
3 tobacco product at issue here was not on the  
4 directory. So I'm not sure it could have obtained  
5 any kind of stamp.

6 Q. Did it ask, the Department of Revenue  
7 ask that the state tax stamp be affixed to those  
8 cigarettes in the Isleta or Jemez Pueblos, to your  
9 knowledge?

10 A. To my knowledge, they didn't -- I'm not  
11 sure they could have asked a state stamp be put on  
12 a non directory product, so I don't think they  
13 would.

14 Q. Is it fair to say that those cigarettes  
15 would then not constitute units sold under the  
16 Escrow Statute?

17 A. For the cigarettes at issue in this  
18 case, I don't suppose they would count as units  
19 sold because, again, they're not on the directory.  
20 They couldn't obtain a stamp because they couldn't  
21 obtain the stamp by -- I don't believe they would  
22 be counted as units sold.

1 PRESIDENT NARIMAN: He said no.

2 MR. VIOLI: No, no, he was about to  
3 say --

4 PRESIDENT NARIMAN: The answer was --

5 MR. VIOLI: No, earlier on he said  
6 they're not units sold. I'm asking him if the  
7 tobacco companies -- you see, let me explain  
8 something.

9 Under the MSA, the tobacco companies  
10 that are there get to reduce their payments to the  
11 state if they say the state is not diligently  
12 enforcing the law. So some of the tobacco  
13 companies, not some of them, the major ones are  
14 saying, "New York, you're not diligently enforcing  
15 this law because you're not collecting the money  
16 from the Indians," right. So that's lack of  
17 diligent enforcement.

18 Therefore, we want to take three  
19 percent reduction in our payments to you for every  
20 one percent market share we lose, so when you  
21 allow Indians to sell cigarettes, right, we're  
22 going to take three times that amount and deduct

1 it from your payments. And this is called lack of  
2 diligent enforcement.

3 And the states, we know New York's view  
4 that that's not lack of diligent enforcement.  
5 These laws don't apply on Indian -- with respect  
6 to Indian commerce on U.S. land. So I wanted to  
7 find out from the witness, did -- are you aware  
8 whether or not the tobacco companies have taken  
9 that position vis-a-vis New Mexico's enforcement  
10 of the Escrow Statutes?

11 A. I understand the question.

12 Q. Sorry if it was confusing.

13 A. No, this whole area of law is somewhat  
14 confusing. They are challenging New Mexico's  
15 diligent enforcement. We haven't started the  
16 arbitration in that, I'm sorry, if you can't hear  
17 me. We haven't started the arbitration, so I  
18 don't know what their legal theory is. I assume  
19 they will make that argument, but I don't know, I  
20 don't have their statement of claim, but we would,  
21 I suppose, fight the concept that we are  
22 responsible for collecting escrow on product that

1 Q. The certification process, let's talk  
2 about that. One of the things that a manufacturer  
3 must do to certify under the directory is certify  
4 that it is in compliance with the Escrow Statute,  
5 right?

6 A. Yes.

7 Q. That's a principal provision of the  
8 certification statute?

9 A. Yes.

10 Q. And New Mexico just recently passed its  
11 certification statute, or its most recent version,  
12 correct?

13 A. Uh-huh.

14 Q. It hasn't been in effect for many  
15 years, correct?

16 A. Yeah, I don't know how long it's been.

17 Q. And one of the second things the  
18 certification statute requires is that a  
19 manufacturer waive its personal jurisdiction in  
20 the state of New Mexico, doesn't it?

21 A. Yes.

22 Q. So if you're a company in the

1 was imported in this state that was not on our  
2 directory, that didn't have the stamp on it.

3 Q. That you're not responsible for that?

4 A. Right.

5 Q. You should not get a deduction for  
6 that?

7 A. Right, as far as the diligent  
8 enforcement element to this, but it raises an  
9 important point which is the directory statute has  
10 an element to it that goes beyond that because  
11 it's also, again, it's also, it's a health-related  
12 document. Not only for purposes of escrow but  
13 it's also for purposes when there's a stamp on it  
14 and it's a distributor to this license, we know  
15 where this product is going. So if it shows up  
16 somewhere, we know where it's been and where it's  
17 going and we know if that product, you know, when  
18 it goes through its certification that it's met  
19 all the requirements of the certification.

20 So my only point there is it's not just  
21 about the escrow fight or the diligent enforcement  
22 fight with the PMs.

1 Philippines, India or China as we've seen or even  
2 Canada, the certification statute would require,  
3 and assuming that these companies don't have any  
4 nexus or contacts with this foreign jurisdiction,  
5 that is the United States or even the Jemez or  
6 Isleta Pueblo, notwithstanding those lack of  
7 jurisdictional contacts, the certification statute  
8 requires if your cigarettes are going to be sold  
9 in the state of New Mexico, you have to fill out  
10 this certification that you're in compliance with  
11 the Escrow Act, that you're a manufacturer under  
12 the Escrow Act, and that you are waiving personal  
13 jurisdiction under this complementary legislation  
14 for purposes of enforcement of the Escrow Act,  
15 right?

16 A. That's one of the many requirements.

17 Q. And you have to certify that way before  
18 your products can come into the state of New  
19 Mexico, correct?

20 A. Yes.

21 Q. Otherwise, the State of New Mexico says  
22 it's contraband, it can't cross our borders,

1 right?

2 A. Yes.

3 Q. All right. Are you familiar -- we're  
4 talking a lot about the Escrow Statute. Are you  
5 familiar with the term qualifying statute?

6 A. No.

7 Q. I'm going to read for you  
8 Section 9(d)(2)(e) of the MSA. I'll read it into  
9 the record. A, quote, qualifying statute, end  
10 quote, means a settling state's statute,  
11 regulation law and/or rule applicable everywhere,  
12 the settling state has authority to legislate.

13 That effectively and fully neutralizes  
14 the cost disadvantages that participating  
15 manufacturers experience vis-a-vis non  
16 participating manufacturers within each settling  
17 state as a result of each of the provisions of  
18 this agreement.

19 Have you ever heard that agreement  
20 before?

21 A. Yes.

22 Q. And that's language in the MSA,

1 attached to the MSA as Exhibit T?

2 A. I believe. I wasn't there. I think  
3 they passed what would be called a model statute  
4 or qualifying statute.

5 Q. Or qualifying statute?

6 A. Right.

7 Q. Why is it important to pass what is  
8 called a qualifying statute or the Model T  
9 Statute?

10 A. I suppose, again, I wasn't there when  
11 the statute passed. Again, I'm enforcing statutes  
12 on the books now. I suppose that they agreed in  
13 the MSA to pass what would be deemed a model  
14 statute, so that the enforcement statutes were  
15 somewhat uniform.

16 Q. And the reason is because if a state  
17 doesn't pass the model statute, the qualifying,  
18 what's called the qualifying statute, then the  
19 state can't qualify for an exemption from those  
20 draconian consequences we talked about before and  
21 that is the --

22 MR. FELDMAN: Object to the

1 correct?

2 A. That's my understanding, yes.

3 Q. And it provides a definition of or  
4 purpose for a qualifying statute, correct?

5 A. That's my understanding.

6 Q. And the purpose is here, quote,  
7 effectively and fully neutralizes the cost  
8 disadvantages that participating manufacturers  
9 experience versus non participating manufacturers?

10 A. That's a purpose as stated in the MSA,  
11 correct.

12 Q. Then the MSA states again in that  
13 provision, quote, each participating manufacturer  
14 in each settling state agree the model statute in  
15 the form set forth in Exhibit T, is enacted  
16 without modification or addition, except for  
17 particularized state procedural or technical  
18 requirements, and not in conjunction with any  
19 other legislative or regulatory proposal shall  
20 constitute a qualifying statute, right?

21 A. I suppose you can all read the MSA.

22 Q. Now, did New Mexico pass what is

1 characterization.

2 Q. Right?

3 A. Well --

4 MR. VIOLI: I'll withdraw.

5 Q. If you don't pass a qualifying statute?  
6 PRESIDENT NARIMAN: Mr. Violi, are you  
7 testing his knowledge on the subject?

8 MR. VIOLI: I would like him to confirm  
9 that there's, the state will face a reduction in  
10 MSA payments if it doesn't pass the Escrow  
11 Statute.

12 A. That is true and, again it also  
13 involves the public health provisions of the MSA.  
14 It allows us -- look, we understand that tobacco  
15 is, I think it's undisputed tobacco is a nefarious  
16 product, it's a product like liquor that's  
17 regulated. So it sets up a system of uniform  
18 regulation. That's what it also does.

19 Q. But this particular qualifying statute  
20 if passed, and assuming diligent enforcement,  
21 would prevent the state from facing an adjustment  
22 or reduction under the MSA, correct?

1 A. Yes, I think that's right.

2 Q. Now, I would like to read into the  
3 record now 9(d)(2)(g) of the MSA, quote, in the  
4 event a settling state proposes and/or enacts a  
5 statute, regulation, law and/or rule applicable  
6 everywhere the settling state has authority to  
7 legislate, that is not the model statute and  
8 asserts that such statute, regulation, law and/or  
9 rule is a qualifying statute, the firm shall be  
10 jointly retained by the settling states and the  
11 original participating manufacturers for the  
12 purpose of determining whether or not such  
13 statute, regulation, law and/or rule constitutes a  
14 qualifying statute.

15 Are you familiar with that provision of  
16 the MSA?

17 A. I've read that provision, yes.

18 Q. And that provision, let's try to  
19 summarize, provides that when a state is going to  
20 pass a law, rule or regulation, that is not  
21 exactly like the Model T that's attached, that's  
22 called the model legislation, that -- and the

1 MR. VIOLI: Indeed.

2 THE WITNESS: I'll do my best.

3 MR. VIOLI: And you're doing a good  
4 job.

5 Q. Mr. Thomson --

6 MR. VIOLI: And you're a great guy.

7 THE WITNESS: Thank you, that means a  
8 lot.

9 MR. VIOLI: Where I come from, it does.

10 THE WITNESS: Okay, sorry.

11 Q. Mr. Thomson, there came a time when New  
12 Mexico changed the escrow, its Escrow Statute,  
13 correct?

14 A. Yes, I believe so.

15 Q. And it changed it to remove what's  
16 called the allocable share release provision,  
17 correct?

18 A. That's my understanding, sir.

19 Q. Did New Mexico retain a firm or to your  
20 knowledge did anybody retain a firm, an economics  
21 firm to make the determination that's noted here  
22 in 9(d)(2)(g)?

1 state wants to still claim that it's a qualifying  
2 statute, therefore, their payments shouldn't be  
3 reduced, if it wants to do that, then they will  
4 hire with this firm, this accounting firm, this  
5 econometric or economics firm, they will hire them  
6 to determine whether it still constitutes a  
7 qualifying statute, correct?

8 A. I suppose that's true. I'm not an  
9 expert on that provision. You know the MSA is  
10 huge.

11 Q. Fair enough?

12 A. That provision says what it says.

13 Q. Thank you, that's fine. I'm not here  
14 to test your knowledge. It says what it says.

15 MR. FELDMAN: Mr. President, I would  
16 reiterate again that Mr. Thomson has put in a  
17 one-page declaration in this arbitration.

18 MR. VIOLI: I agree. I only have a  
19 couple more questions and it has to deal with  
20 enforcement, what he said enforcement --

21 PRESIDENT NARIMAN: This is a provision  
22 in, ask him. So far if he can he can.

1 A. I don't know the answer to that. I  
2 wasn't there. I don't know. I'm not sure they  
3 did but --

4 Q. Have you seen any reports from an  
5 economics firm?

6 A. No, I haven't.

7 Q. Have you seen any reports at the time  
8 the Allocable Share Amendment was proposed and  
9 enacted that said that the Escrow Statute in its  
10 original form did not do what the MSA said it  
11 needed to do, and that's fully neutralize the cost  
12 of NPMS?

13 A. No, I haven't seen a report like that,  
14 sir, no.

15 MR. VIOLI: No further questions.

16 PRESIDENT NARIMAN: Mr. Thomson, I have  
17 one question. Mr. Luddy asked you showed you the  
18 complaint Document 37 in the core bundle.

19 THE WITNESS: Okay.

20 PRESIDENT NARIMAN: But he didn't  
21 pursue it, so I would like to know, is a complaint  
22 filed by the State of New Mexico through the

1 Attorney General against Native Wholesale Supply  
2 Company? Can you tell us what happened to this  
3 complaint? Is it dismissed, allowed or what  
4 happened?

5 THE WITNESS: Can I get those guys on  
6 the stand and ask them.

7 PRESIDENT NARIMAN: No, do you know?

8 THE WITNESS: Right now I think we are  
9 -- they are challenging the jurisdiction of the  
10 State of New Mexico. We've responded, and I think  
11 we are considering and they can correct me if I'm  
12 wrong, are considering a stay in the matter  
13 pending collateral issues.

14 PRESIDENT NARIMAN: So it's pending,  
15 nothing has happened to it?

16 THE WITNESS: That's correct.

17 PRESIDENT NARIMAN: Okay. That's all I  
18 wanted. Yes, there's a question here.

19 ARBITRATOR ANAYA: Good morning. If  
20 you can just explain how New Mexico regards  
21 on-reservation sales of cigarettes for taxation  
22 purposes, does it seek to tax all of those, some

1 exact language. It's supposed to be to a properly  
2 chartered tribal entity. So they literally, the  
3 distributor goes to taxation revenue and says, "I  
4 want X amount of tax exempt stamps," and they're  
5 given them.

6 ARBITRATOR ANAYA: The distributor in  
7 this example being smoke shop on the reservation  
8 or distributor to a smoke shop on the reservation.

9 THE WITNESS: Distributor to a smoke  
10 shop, yes, sir.

11 ARBITRATOR ANAYA: And the case that  
12 we're talking about that would be the Isleta  
13 Wholesale?

14 THE WITNESS: Yes, sir.

15 ARBITRATOR ANAYA: And that's a  
16 distributor on Isleta Pueblo?

17 THE WITNESS: I'm not sure what Isleta  
18 Wholesale is. I think they've represented that  
19 they're a distributor. They're not a licensed  
20 distributor in the state of New Mexico. They may  
21 be one on Isleta, but they're not a licensed --  
22 they don't have a license through the state to

1 of them and how it goes about doing it, if it  
2 does?

3 THE WITNESS: My understanding,  
4 Mr. Anaya, and again, I'm not the stamping  
5 authority, but I'll give you my best understanding  
6 is that a licensed distributor, the product comes  
7 in, it's transferred to a licensed distributor,  
8 that distributor has what's called stamping  
9 authority. Then they go to taxation and revenue  
10 and they either acquire a state excise stamp or  
11 non SET stamp.

12 In your analysis, it would be the  
13 tribal stamp and there's no restriction on the  
14 number you could get. So if they go to taxation  
15 revenue, and say, "I need X amount of tax exempt  
16 stamps," then they're given them. They're placed  
17 on the product --

18 ARBITRATOR ANAYA: How do you get a tax  
19 exempt stamp, for what purposes?

20 THE WITNESS: Well, legitimately the  
21 purpose would be for sales on-Reservation -- on  
22 tribal land for tribal members. I don't know the

1 obtain those stamps we were just talking about.

2 ARBITRATOR ANAYA: Right.

3 THE WITNESS: Am I being clear? It's a  
4 little confusing. If you're licensed with the  
5 state, then you get the two stamps and you put the  
6 stamps on the product.

7 ARBITRATOR ANAYA: Who would that be in  
8 New Mexico concretely with regard to sales on  
9 Indian Country lands, whether it be Pueblo fee  
10 lands.

11 THE WITNESS: We have a whole number of  
12 -- we have a list of distributors, licensed  
13 distributors on our website.

14 ARBITRATOR ANAYA: Would those  
15 typically be off-Reservation distributors?

16 THE WITNESS: Often they are.

17 ARBITRATOR ANAYA: Non Indian  
18 distributors?

19 THE WITNESS: Generally yes, but it  
20 doesn't prohibit a tribal entity from being a  
21 licensed distributor.

22 ARBITRATOR ANAYA: They're the ones

1 that get the tax stamp?  
 2 THE WITNESS: Yes, sir.  
 3 ARBITRATOR ANAYA: If they're going to  
 4 distribute to a smoke shop on Indian country land,  
 5 then they can get a tax exempt stamp?  
 6 THE WITNESS: Right.  
 7 ARBITRATOR ANAYA: That would be for  
 8 sale to tribal members only or for sales to non  
 9 members, as well?  
 10 THE WITNESS: As I understand it,  
 11 tribal members only.  
 12 ARBITRATOR ANAYA: Okay. So if there's  
 13 a smoke shop on Isleta Pueblo or Navaho  
 14 reservation or one of the apache reservations in  
 15 New Mexico and they're selling to non Indians,  
 16 they have to have the regular tax stamp on those  
 17 cigarettes for those sales to non Indians.  
 18 THE WITNESS: They probably should.  
 19 Generally, they have tax exempt stamps on them.  
 20 ARBITRATOR ANAYA: Even for the sales  
 21 to non Indians?  
 22 THE WITNESS: Generally, that's what

1 that's my belief but important to note they have a  
 2 stamp on them. How do they have a stamp on them,  
 3 they're on our directory. That's an important,  
 4 significant point.  
 5 ARBITRATOR ANAYA: Okay. And the  
 6 cigarettes that are coming through wholesale,  
 7 Native Wholesale Suppliers do not have a stamp?  
 8 THE WITNESS: Those are our allegations  
 9 in the complaint.  
 10 ARBITRATOR ANAYA: Thank you.  
 11 MR. VIOLI: May I ask one more  
 12 question.  
 13 Q. The state licensing requirement, does  
 14 that require a bond, a monetary bond to be posed  
 15 by the state license distributor?  
 16 A. I don't know the -- that's a taxation  
 17 revenue handles the licensing. It may, I'm not  
 18 sure.  
 19 Q. Okay. Now with respect to  
 20 on-Reservation distribution, does an  
 21 on-Reservation distributor, is it required to get  
 22 a license from the State before it can distribute

1 has happened but --  
 2 ARBITRATOR ANAYA: What position does  
 3 the State of New Mexico take as to those?  
 4 THE WITNESS: I don't know what  
 5 position Taxation and Revenue has taken in that  
 6 circumstance. I can tell you we're very leery,  
 7 very leery of going on-Reservation to enforce that  
 8 type of issue. That's why in this case it's  
 9 actually a step back. We're dealing with purely  
 10 directory.  
 11 ARBITRATOR ANAYA: So as a practical  
 12 matter, the smoke shops that are on I-25 between  
 13 Albuquerque and Santa Fe, right off the highway,  
 14 as a practical matter those smoke shops sell tax  
 15 exempt cigarettes?  
 16 THE WITNESS: Yes.  
 17 ARBITRATOR ANAYA: Including to non  
 18 Indians?  
 19 THE WITNESS: I believe so.  
 20 ARBITRATOR ANAYA: In practice, I'm  
 21 saying?  
 22 THE WITNESS: In practice, yes, sir,

1 on its own land?  
 2 A. If it's distributing on its own land, I  
 3 suppose it doesn't.  
 4 Q. You haven't -- your office hasn't  
 5 prosecuted reservation distributors who are not  
 6 licensed and are distributing on their own land,  
 7 has it?  
 8 A. I don't think we have.  
 9 Q. And when I meant prosecutor, I meant  
 10 civil?  
 11 A. Right.  
 12 MR. VIOLI: No further questions.  
 13 ARBITRATOR ANAYA: Just so I'm clear,  
 14 maybe I'm muddled, I'm a little unclear on the  
 15 facts, perhaps, but how does that line of  
 16 questioning, I'm not saying it doesn't, how does  
 17 that line of questioning have to do with the facts  
 18 here?  
 19 MR. VIOLI: Because when you're an  
 20 on-Reservation --  
 21 ARBITRATOR ANAYA: No, not in the  
 22 abstract, specifically?



1 MR. VIOLI: Because the Jemez  
2 distributors --  
3 THE WITNESS: No, that's New Mexico  
4 case, your case.  
5 MR. VIOLI: Mr. Weiler's going to  
6 present it but we believe that violates  
7 international law, there's an encroachment on both  
8 treaty rights and customary international law when  
9 a sovereign exercises jurisdiction when it doesn't  
10 have jurisdiction to excise.  
11 ARBITRATOR ANAYA: You were talking  
12 about distributor on-Reservation, I understood.  
13 MR. VIOLI: Right.  
14 ARBITRATOR ANAYA: Where is the  
15 distributor on-Reservation here in this case?  
16 MR. VIOLI: The Jemez and Pueblo, yeah,  
17 the Isleta Wholesale Supply and the distributor in  
18 the Jemez Pueblo, are native operating on the own  
19 reservation. We sell, NWS when I say we. We sale  
20 interstate commerce directly to, those licensed  
21 distributors, licensed by their own people, by  
22 their own sovereign nations.

1 through the state of New Mexico, and with regard  
2 to the directory, the products not on the  
3 directory.  
4 Q. And with respect to NPMs have New  
5 Mexico brought enforcement actions against NPMs?  
6 A. Yes. I was trying to come up with --  
7 yes, NPMs both foreign and domestic.  
8 Q. And on cross-examination you were --  
9 A. And let me add also distributors. And  
10 let me add it's not all about suits, so it's not a  
11 number of lawsuits we brought part of my job is  
12 working with NPMs and distributors to make sure,  
13 that's why if you look at our website, we try to  
14 be up front about here's all the brands, so they  
15 can look at that and educate themselves about the  
16 brands on our directory, sorry.  
17 Q. Have you worked with NPMs to get them  
18 on the directory?  
19 A. Yes.  
20 Q. On cross-examination you were asked  
21 questions about the August 1, 2008, letter to the  
22 Nevada FTZ and I'm just going to read two short

1 And the State of New Mexico is now  
2 saying in so many respects is saying we know  
3 you're licensed by your own people and you can be  
4 for tax purposes, but all of a sudden when it  
5 comes to the MSA, we're going to say the  
6 complementary legislation goes where not even the  
7 taxes go. We're going to stop you, we're going to  
8 stop nation-to-nation commerce.  
9 ARBITRATOR ANAYA: Okay. I understand.  
10 PRESIDENT NARIMAN: Okay. Do you have  
11 any questions?  
12 MR. FELDMAN: Yes. Two questions.  
13 Thank you, Mr. President.  
14 REDIRECT EXAMINATION  
15 BY MR. FELDMAN:  
16 Q. Mr. Thomson, what is the Native  
17 Wholesale activity that is being regulated under  
18 New Mexico's directory statute?  
19 A. Under our complaint?  
20 Q. Yes.  
21 A. It would be the importing or causing to  
22 be imported of non directory product into and

1 paragraphs from that letter. The first says, "To  
2 assist you in determining whether cigarettes are  
3 contraband in New Mexico, I refer you to the  
4 website where our directory of compliant products  
5 is listed. It can be found at WWW dot NMAG dot  
6 gov. And then select tobacco manufacturer's info  
7 section. To assist in resolution of issues  
8 arising from past shipments from FTZ number 89, I  
9 would like to begin discussions to form a binding  
10 memoranda of understanding or other agreement that  
11 will ensure that non compliant products are not  
12 released by FTZ number 89 when the shipping  
13 destination on the shipping documents is any  
14 location in New Mexico.  
15 Mr. Thomson, when your office sent the  
16 letter to the FTZ, were you threatening the FTZ?  
17 A. No. That's why I apologized, I got a  
18 little excited about that. That's not my mode of  
19 operation. That's not unusual with other -- it's  
20 not unusual with other distributors, NPMs or  
21 retailers. I take the job of the State very  
22 seriously. We're not hammering people.

1 It was a way to resolve it and that was  
2 my approach, so . . .

3 MR. FELDMAN: Thank you, Mr. Thomson.

4 PRESIDENT NARIMAN: Just one question  
5 Mr. Thomson. The letter says, "Please contact me  
6 at your convenience, please contact me at your  
7 convenience to discuss this matter."

8 Did anybody contact you in connection  
9 with this letter of yours on compliance or non  
10 compliance? Did anybody from Nevada speak to you?

11 THE WITNESS: I may have talked to  
12 Nevada general counsel. I will go back through my  
13 records to see if we have a written response from  
14 them.

15 PRESIDENT NARIMAN: You have no  
16 recollection.

17 THE WITNESS: I don't but I speak to so  
18 many -- I'm not sure whether we -- I spoke to the  
19 general counsel or someone at the FTZ or what also  
20 may have happened because as we're talking about  
21 before, we were working with Nevada and other  
22 states where another state AG spoke --

1 Mr. President, before Mr. Weiler -- sorry --  
2 before Mr. Weiler begins, we've been notified by  
3 the Claimants that they do not intend to call  
4 Brent Kaczmarek, our valuation expert, for  
5 cross-examination.

6 We just wanted to notify the Tribunal  
7 that Mr. Kaczmarek is available at this time, in  
8 the event the Tribunal had any questions for him.

9 PRESIDENT NARIMAN: That's gone on  
10 record, I take it. What you have said has gone on  
11 record.

12 MR. WEILER: Good afternoon -- is it  
13 afternoon yet? Good morning. So what I tried to  
14 do over the evening was take a look at the  
15 transcript over the past two days and see the  
16 occasions when the Tribunal had questions. And,  
17 well, of course, we still understand we have a  
18 closing to do, we thought that we could take some  
19 of your time now to go through some of the  
20 materials and see if we can answer some of your  
21 questions.

22 So it seemed to me that these were four

1 PRESIDENT NARIMAN: My question is what  
2 happened after this letter with regards to its  
3 content August 1, 2008, do you know anything about  
4 it or you don't know anything about it?

5 THE WITNESS: I don't know.

6 PRESIDENT NARIMAN: Because you spoke  
7 to counsel you said about this.

8 THE WITNESS: Right. And I don't -- we  
9 never entered into a formal memoranda, as I  
10 suggested.

11 PRESIDENT NARIMAN: Okay. Thanks.  
12 Thank you.

13 THE WITNESS: Thank you, sir.

14 PRESIDENT NARIMAN: Okay. What next?

15 MR. LUDDY: Mr. Weiler has it setup.

16 PRESIDENT NARIMAN: No. Let him set it  
17 up. We'll take the coffee break when it comes.  
18 (Pause in the Proceedings.)

19 Q. Is it there?

20 PRESIDENT NARIMAN: Mr. Weiler, it's  
21 all yours.

22 MR. FELDMAN: Mr. President, before --

1 of the key areas that we could focus on. The  
2 first one, I heard a couple of times and it seems  
3 like a fairly important issue, why is this a NAFTA  
4 claim. So I thought that we can start with why  
5 this is a NAFTA claim.

6 And, again, so there isn't any  
7 confusion, I use that fancy literary word "redux."  
8 We're not abandoning any part of the case. We're  
9 trying to make it as brief and as tight as we can.

10 So there are two standards here,  
11 minimum standard and the, what we could call the  
12 cumulative less favorable standard. I'll start  
13 briefly with the no less favorable standard since  
14 we did talk about that a little bit yesterday, and  
15 I have a few notes I just wanted to go over with  
16 you.

17 So with respect to the comparison, the  
18 point of the obligation is to ensure that there's  
19 an equality of effective opportunity for the  
20 parties, and it's an individualized test because  
21 there's only one Claimant. They don't represent  
22 their country. They represent themselves.

1 And as the Pope & Talbot Tribunal and  
2 the Feldman Tribunal found the comparison should  
3 be with the best treatment being received by some  
4 other foreign national. If it's most favored  
5 nation treatment or national, if it's national  
6 treatment.

7 The best treatment here, we think,  
8 would be the opportunity to join the MSA with  
9 grandfathering. So as a result of the Allocable  
10 Share Amendment, we are placed in a position where  
11 the status quo ante has changed, and the ideal  
12 circumstance for the Claimant would have been to  
13 have been able to join the MSA, much like the SPMs  
14 had joined the ones that had exemptions, to join  
15 on similar terms. I'm trying to read my own  
16 writing. That's a dangerous thing.

17 The other choice would have been to pay  
18 higher escrow. Those were essentially the choices  
19 presented. It was either seek to join the MSA,  
20 hope to get the same treatment the exempt SPMs  
21 received or pay the escrow and take your chances  
22 and see how long you last.

1 and MPM such as Grand River, slash, NWS and you  
2 asked about whether or not it was fair given that  
3 the exempt SPM had, quote, unquote, all of these  
4 health considerations. And I just wanted to make  
5 it clear that the types of health considerations  
6 that, the things that one would have to give up  
7 were really the kind of things that a company like  
8 Grand River wasn't doing. It would not be hard to  
9 give up.

10 They weren't advertising on NASCAR.  
11 They weren't advertising on television. So the  
12 kinds of things that they would have had to give  
13 up to join the MSA, they were obviously quite  
14 willing to, and how do we know that? Because they  
15 tried to join the MSA. If they had any problem  
16 with it, well, they would have said say we'll  
17 joint subject to this or that exemption.

18 The only thing they wanted was the same  
19 kind of deal that the exempt SPMs received. And  
20 in that regard, it's important to note while the  
21 status quo ante is better than it is now, it still  
22 wasn't fair to be able to compete against the

1 And we know that in three states they  
2 didn't last and they're hanging on in two states  
3 and the numbers show that. So . . . to be clear  
4 though the opportunity was not passed up. The  
5 Claimants's did try to join the MSA.

6 PRESIDENT NARIMAN: Excuse me for  
7 interrupting. What period of time are you talking  
8 about? What period and so on, what year?

9 MR. WEILER: Post Allocable Share  
10 Amendment, so with the Allocable Share Amendment  
11 about to come into place, if I recall the time  
12 frame correctly, the Claimants saw this, knew what  
13 was coming because the Allocable Share Amendment  
14 was coming in in five different states with five  
15 different legislature so it didn't happen the same  
16 day. But it was clear what was happening and they  
17 did make their efforts, which is in the record to  
18 try to join the MSA.

19 And that's one point I wanted to make  
20 because there's one thing that concerned me  
21 because the president said yesterday, he was  
22 asking about the comparison between an exempt SPM

1 exempt SPMs, Grand River had to stay in five  
2 markets.

3 What they wanted to do and what Jerry  
4 Montour's affidavit states he wanted to do was to  
5 compete in all of the markets in the U.S.  
6 off-reserve if he was going to join the MSA. He  
7 was more than willing to compete if given the  
8 opportunity to compete on a fair basis.

9 So there should be no confusion about  
10 the level of treatment. Grand River was more than  
11 willing to take on the negligible extra  
12 commitments in terms of healthcare. I mean, no  
13 one even asked the Claimant ever, do you -- we  
14 heard yesterday about the fire retardant cigarette  
15 paper. My clients use that. Nobody bothers to  
16 ask that. It's just assumed that they don't. The  
17 best thing we have is a Buffalo newspaper, that's  
18 not a reliable source. So if someone would just  
19 ask the Claimants rather than assuming that  
20 they're, quote, unquote, scofflaws, they might  
21 have been able to probably, I would have assumed,  
22 maybe come to some sort of arrangement but instead

1 it didn't happen.

2 PRESIDENT NARIMAN: For my edification,  
3 Mr. Weiler, at some point of time not just now  
4 will you just enumerate the documents, just give  
5 us a list of the documents on each side showing  
6 that you attempted to join the MSA genuinely, bona  
7 fide and that they rejected your efforts. I would  
8 just like to have that in picture form, just give  
9 us.

10 MR. WEILER: The tabs.

11 PRESIDENT NARIMAN: Yes, just the tabs.

12 MR. WEILER: Will do.

13 PRESIDENT NARIMAN: Stay there.

14 MR. WEILER: Yes, I'm not going to run  
15 off now. And let's see, the other point I wanted  
16 to make was I wanted to turn back to something  
17 that Professor Anaya said. I don't think this  
18 changes anything, but I just thought that I would  
19 make sure I was on the right page, so to speak.

20 So we were talking about intent and the  
21 question was assuming that we have a prima facie  
22 breach in the sense that we have less favorable

1 manifest on the facts. And, indeed, that's the  
2 way the WTO Tribunals have gone. Manifest on the  
3 facts, whether or not it appears that there was or  
4 was not a good reason. And it is a balancing  
5 test.

6 Just last night I was reading -- I  
7 didn't bring it because it's too late, but it's a  
8 2009 law article by two very well known young men  
9 who are in this field, and it's a whole article  
10 about proportionality analysis. And so while they  
11 didn't talk about national treatment, they talked  
12 about minimum standard and they talked about  
13 expropriation.

14 Nonetheless, it was certainly clear to  
15 me that we're at least on the same page. We're  
16 talking about this notion of how well the measure  
17 appears to meet that goal, and I think it's fair  
18 to say that protecting healthcare is a legitimate  
19 goal. And so the question is going to be manifest  
20 on the facts to what extent does it appear to be  
21 meeting that goal, balanced against what harm it's  
22 doing to the Claimants.

1 treatment according to the Claimant, as compared  
2 to someone else and that the comparison sticks  
3 because they're relatively in competition.

4 Yes, it is relevant why they did that,  
5 but we agree with the statement you made and it is  
6 indeed the statement that many WT panels and  
7 tribunals have made that had more the natural  
8 treatment cases, it's impossible to discern  
9 intent, whose intent are we talking about.

10 In S.D. Myers, we were quite lucky  
11 because it was clear that there were some angry  
12 bureaucrats who gave up the Claimants an access  
13 information request that you could only dream  
14 about. We had smoking guns that said someone's  
15 got to tell the minister we can't do this under  
16 NAFTA. But we're not -- you're generally not  
17 going to get that, that's not going to happen very  
18 often. And besides, whose intent, which  
19 legislature do we want to pick.

20 So, it's funny because Mr. Eckhart  
21 yesterday actually pronounced the test, but with  
22 respect to local law, municipal law, he said it's

1 And that is something that the Tribunal  
2 will have to weigh based on all the evidence they  
3 have. So the one thing that's pretty -- that is  
4 clear though from the case law, to the extent that  
5 you feel they want to be guided by it, is that  
6 intent to discriminate on the basis of nationality  
7 is not in the text and it's not in the case law.

8 It's probably because it's not in the  
9 text. Though my friends, and my friends from the  
10 other NAFTA parties in the cases that I've been  
11 involved in, will continue to say that it is  
12 discrimination on the basis of nationality. Thus  
13 far, it appears that the vast majority of  
14 Tribunals don't agree with them. And I would  
15 submit you shouldn't agree with them either  
16 because it's not on the face of the text. The  
17 text doesn't require it.

18 Nationality is only a concern to the  
19 extent that you need to be the right kind of  
20 national to even be in the door to make this  
21 claim. So with that, I'll turn to the  
22 Article 1105. Of course, we can certainly come

1 back to this if you want, but with respect to the  
2 Article 1105 case, again, I tried to figure out  
3 how I can hopefully describe to you why this is a  
4 NAFTA claim.

5 The important point I want to make on  
6 this slide though is the word "collectively."  
7 I'll get you the reference because I think I wrote  
8 it down on another piece of paper.

9 ARBITRATOR ANAYA: Mr. Weiler, excuse  
10 me. This is useful but what will be particularly  
11 useful and I imagine if you're going to do this in  
12 your closing, would be if you link some of what  
13 we've heard, the cross-examination, you know, the  
14 points that were being made to what you're saying.

15 MR. WEILER: I'm doing a little bit of  
16 it here and we'll certainly be doing more in our  
17 close.

18 ARBITRATOR CROOK: In a similar vein, I  
19 would be very interested if we could focus on what  
20 specifically are the measures that are being  
21 contested here.

22 MR. WEILER: The answer to that

1 would be the regulation of the sovereign entities  
2 within whose jurisdiction they were operating.

3 So I've heard many times my friends say  
4 they thought they could be free and clear, but  
5 that's not true. They just expected to be  
6 regulated by the sovereign jurisdictions in which  
7 they were trading.

8 ARBITRATOR ANAYA: And thereby not --  
9 and thus, not subject to regulation by the states.

10 MR. WEILER: Yes, that's correct.

11 ARBITRATOR ANAYA: At all.

12 MR. WEILER: And, of course, subject to  
13 the federal --

14 ARBITRATOR ANAYA: Not subject to  
15 regulation by the states, including as to sales to  
16 non Indians?

17 MR. WEILER: Well, the Claimants never  
18 sold to -- they're wholesalers.

19 ARBITRATOR ANAYA: No, no, I mean --  
20 you know what I'm saying. I mean, including as to  
21 those cigarettes ending up being sold to non  
22 Indian consumers.

1 question is with respect to off-reserve Allocable  
2 Share Amendment with respect to on-reserve, it is  
3 the enforcement of the escrow statutes regardless  
4 of whether it was or was not before or after the  
5 amendment as per the Tribunal's decision, and it  
6 is most definitely the Contraband Laws, which I  
7 will discuss briefly at a certain point during my  
8 presentation and we will certainly also be  
9 addressing further on, but it is the enforcement  
10 of those two pieces of legislation in these  
11 various states that we've been talking about.  
12 Those are the measures.

13 ARBITRATOR ANAYA: And you're  
14 distinguishing between on-reserve and off-reserve?

15 MR. WEILER: Yes, because the  
16 expectation of the Claimants with respect to their  
17 on-reserve sales, their sales that were from  
18 nation to nation, from Indian wholesaler to Indian  
19 distributor, or I think to a certain extent  
20 sometimes retailer, that the expectation was that  
21 they would not be, that the regulation that they  
22 would be subject to in conducting those sales

1 MR. WEILER: The Claimant's position is  
2 that they are entitled to sell nation to nation,  
3 and if what happens to them after that --

4 ARBITRATOR ANAYA: As far as I know,  
5 we're not talking about sales nation to nation,  
6 we're talking about sales from --

7 MR. WEILER: Indian to Indian.

8 ARBITRATOR ANAYA: Yes, it's very  
9 different. So just to clarify things, but I want  
10 to be clear, so they're not distinguishing between  
11 those sales that ultimately are made to consumers.  
12 The chain of sales that ultimately end up --

13 MR. WEILER: That's correct.

14 ARBITRATOR ANAYA: -- end up with  
15 getting the cigarettes in the hands of non Indian  
16 people. I want to be clear, there's no  
17 distinction being made there.

18 MR. VIOLI: With respect to that,  
19 Professor Anaya, the measures are any application  
20 of the MSA regulatory regime, so as the  
21 jurisdictional award --

22 ARBITRATOR ANAYA: I understand. It's

1 just that when we talk about expectations, these  
2 are in my mind relevant considerations.

3 MR. VIOLI: Yes. So I'm trying to  
4 blueprint the measures. The measures are the MSA,  
5 the original Escrow Statute, everything they were  
6 talking about on-reserve because the view is the  
7 expectation is that they never had the right to  
8 enforce any of them, and the jurisdictional award  
9 said that, but with respect to off-reserve, I  
10 believe the jurisdictional award said --

11 ARBITRATOR CROOK: Is that what we  
12 said?

13 MR. VIOLI: -- on-reserve doesn't have  
14 a time --

15 MR. FELDMAN: Counsel, did you just say  
16 the MSA is a challenged measure in this  
17 arbitration?

18 MR. VIOLI: With respect to the  
19 on-reserve, the MSA regulatory regime, includes  
20 the Allocable Share and includes the original  
21 Escrow Statute.

22 MR. FELDMAN: And does not include the

1 It gets amended in or about 2004, and  
2 it's still supposedly the choice that these  
3 Claimants face under the Escrow Statute.  
4 Unfortunately, the Escrow Statute says join the  
5 MSA or pay under into escrow.

6 So with respect to you're saying the  
7 MSA, it's a little truncated and it's not entirely  
8 correct to say we're not complaining with the MSA,  
9 per se, we're talking about the regulatory  
10 measures in connection with the MSA.

11 MR. FELDMAN: Counsel, I am referring  
12 to the affirmative representation of Claimants in  
13 this arbitration that the MSA is not a challenged  
14 measure.

15 MR. WEILER: Like me try to square this  
16 circle. The MSA, an agreement between private  
17 parties and the attorneys general is not a  
18 measure, it is not capable of being a measure  
19 because it's not promulgated by states. It is, of  
20 course, relevant as an evidentiary document.  
21 Okay. Good.

22 PRESIDENT NARIMAN: The MSA according

1 1998 agreement, correct --

2 MR. VIOLI: The 1998 agreement is part  
3 of the statute but we're talking about on-reserve.  
4 There's a distinction between on-reserve and  
5 off-reserve. And the -- any measure, any MSA  
6 related regulatory measure on-reserve did not have  
7 a time bar, is my understanding. It was the --

8 MR. FELDMAN: This isn't a time bar  
9 issue. The Claimants have affirmatively stated  
10 that the MSA is not a challenged measure in this  
11 arbitration.

12 MR. VIOLI: If you read the second --  
13 you know, I appreciate your parsing it out but if  
14 you read the cases that have talked about this in  
15 the domestic courts and what we've presented all  
16 along is that trying to divorce the MSA from the  
17 Escrow Statutes is inappropriate.

18 It's inappropriate because as I said  
19 yesterday, you have one statute that says do one  
20 of two things, enter into an agreement or abide by  
21 the schedules in the NPM payments in the schedules  
22 in the Escrow Statute. That proceeds after 1998.

1 to you is not a measure?

2 MR. WEILER: It can't be.

3 PRESIDENT NARIMAN: By any part of  
4 NAFTA for the purposes of this case?

5 MR. WEILER: Even if you haven't made  
6 your jurisdictional decision the way you did, you  
7 still -- it wasn't a measure. It's an agreement  
8 between private parties. It just informs the  
9 measures and, therefore, that's what Mr. Violi is  
10 getting at, that one, obviously, needs to look at  
11 the evidence. We can't divorce the fact of why  
12 they did it and I don't think Mr. Feldman has a  
13 problem with that. Okay. Good.

14 So with respect to why this is a NAFTA  
15 claim to switch back -- by the way, are we --

16 ARBITRATOR ANAYA: You said something,  
17 I'm sorry, I'm a little confused with this  
18 exchange. You said something about how the MSA is  
19 a measure subject to this arbitration with regard  
20 to on-Reservation sales?

21 MR. WEILER: No, it's not.

22 MR. VIOLI: Regulatory regime.

1 PRESIDENT NARIMAN: What's the  
2 difference?  
3 ARBITRATOR ANAYA: And you mentioned  
4 jurisdiction award.  
5 MR. WEILER: My point, Professor Anaya,  
6 was that the jurisdictional award, it didn't  
7 matter how you decided, it was still a measure,  
8 the MSA was an private agreement between parties  
9 and if we misspoke, mea culpa, if we misspoke, it  
10 is not a measure. It informs the measures that  
11 implemented it, but the MSA is -- it's the  
12 definition of a measure doesn't include agreements  
13 between parties, private parties.  
14 ARBITRATOR ANAYA: We did make a  
15 distinguish -- between on-Reservation sales, true  
16 members of federally recognized tribes and the  
17 jurisdiction award.  
18 MR. WEILER: Yes.  
19 ARBITRATOR ANAYA: And how do you see  
20 that as informing this analysis, what is the  
21 measure and also what is a reasonable expectation  
22 or any of the points that you're making?

1 test and, obviously, it matters the incidence of  
2 the particular measure that's involved. This  
3 isn't a tax we're talking about here. We're  
4 talking about something that doesn't have to do  
5 with the consumer coming on, taking it off and  
6 they're supposed to be paying for it.  
7 ARBITRATOR ANAYA: I'm sorry, I didn't  
8 really want to go down, you know, the path of  
9 trying to parse the U.S. case law which is very  
10 confused. I'm not saying it's just confusing to  
11 the reader, it's confused area of case law, so  
12 there's no surprise that we have divergent views  
13 of what it says, and even here we have divergent  
14 views, but what I want to know is how these  
15 distinctions on-Reservation, off-Reservation that  
16 you are making, the distinction sales to Indians  
17 sales to non Indians that we make in the  
18 jurisdictional award, how those relate to your  
19 claim. You're making these --  
20 MR. WEILER: If you mean the NAFTA  
21 claim?  
22 ARBITRATOR ANAYA: Yes, I mean the

1 MR. WEILER: With respect to sales  
2 between -- well, perhaps as a matter of getting  
3 into the law and certainly I'm at a disadvantage  
4 compared to many people in the room.  
5 ARBITRATOR ANAYA: Who can put this all  
6 together? I keep hearing, no one is an expert on  
7 this, that and the other. Someone's got to be  
8 able to put this all together.  
9 MR. WEILER: The test, as far as I  
10 understand it, is that with respect to regulatory  
11 measures -- well, first with respect to taxation  
12 measures, with the taxation measure, if the tax,  
13 if non Indians have come on to reserve and bought  
14 cigarettes, and when they go back out, they don't  
15 pay the taxes they're supposed to pay, the case  
16 law shows it is perfectly appropriate for the  
17 state to require the seller of that product,  
18 excuse me, the seller of that product to collect  
19 information and if I'm not mistaken even collect  
20 the tax on behalf of the state. It's just the  
21 information they can collect.  
22 With respect to -- so that's the simple

1 NAFTA claim.  
2 MR. WEILER: I'm there, but if it's the  
3 evidentiary --  
4 ARBITRATOR ANAYA: No, I'm trying to  
5 relate all these things, okay, good. I'm sorry if  
6 I derailed things inappropriately.  
7 PRESIDENT NARIMAN: Can we stop here?  
8 ARBITRATOR CROOK: We can certainly  
9 stop. I have a question.  
10 PRESIDENT NARIMAN: We'll resume at 11.  
11 (Whereupon, at 10:45 a.m., the hearing  
12 was adjourned until 11:00 a.m., the same day.)  
13 PRESIDENT NARIMAN: Can we start?  
14 MR. KOVAR: You can start.  
15 PRESIDENT NARIMAN: Do you have an  
16 announcement?  
17 SECRETARY YANNACA-SMALL: Yes. The  
18 announcement with regards to the time each party  
19 has available.  
20 The Claimants have eight hours and  
21 17 minutes and the Respondent 13 hours and  
22 37 minutes. Eight hours and 17 minutes for the

1 Claimants and 13 hours and 37 minutes for the  
2 Respondent.  
3 PRESIDENT NARIMAN: That's the  
4 remaining time?  
5 SECRETARY YANNACA-SMALL: Yes.  
6 MR. VIOLI: The redirect of Mr. Eckhart  
7 last night, by Respondent, was that put towards  
8 Claimant's time?  
9 SECRETARY YANNACA-SMALL: No.  
10 MR. VIOLI: Okay. So --  
11 SECRETARY YANNACA-SMALL: Everything  
12 it -- and the questions from the Tribunal are  
13 excluded.  
14 MR. VIOLI: For both sides.  
15 SECRETARY YANNACA-SMALL: For both  
16 sides.  
17 MR. VIOLI: All right. So the  
18 Respondent has used one hour and 23 minutes in all  
19 of their questioning and their questioning of the  
20 economics -- the evaluator yesterday, it's only  
21 come out to one hour --  
22 SECRETARY YANNACA-SMALL: Yes. That's

1 that certain claims were dismissed but claims with  
2 respect to retail sales on-Reservation would be  
3 considered at the stage of the merits.  
4 And as you present your claim I think  
5 it would be helpful to the Tribunal if you could  
6 perhaps relate it to the specific findings that we  
7 made there.  
8 MR. WEILER: Thank you, Mr. Crook.  
9 I also would just like to confirm when  
10 Professor Anaya was asking me about the connection  
11 between the NAFTA and the measures, I had wrongly  
12 assumed that you were actually asking my opinion  
13 of the state of Indian law, which I now understand  
14 you weren't.  
15 And I did want to make sure on the  
16 record that I did not take a position either on  
17 behalf of the Claimants or, for that matter, on  
18 behalf of any indigenous sovereign concerning the  
19 application of state taxes. I just wanted to make  
20 sure that was quite clear that I didn't do that  
21 and that that's certainly not the Claimant's  
22 position and probably not any sovereign's

1 the time recorded.  
2 MR. VIOLI: Okay.  
3 PRESIDENT NARIMAN: Okay. We will  
4 begin.  
5 Mr. Crook has a question.  
6 ARBITRATOR CROOK: We were having a bit  
7 of a side-bar discussion about the definition of  
8 the measures. And as we proceed, I think it would  
9 be useful to the panel if you could direct your  
10 attention to Paragraph 72 of the jurisdictional  
11 award in which we said, among other things, where  
12 we addressed the question of on-Reservation sales.  
13 I will just draw your attention to one  
14 sentence but I think it's really the entire  
15 paragraph that would be important for you to  
16 consider.  
17 On-Reservation sales of tobacco  
18 products, at least such sales to members of  
19 federally recognized Indian tribes, are generally  
20 exempt from regulation by the states within the  
21 United States as a matter of federal law. And  
22 then in Paragraph 103 of our dispositive we noted

1 position. I just wanted to confirm that.  
2 If that's fine, I'll just continue on.  
3 ARBITRATOR ANAYA: It would be useful  
4 perhaps if you would address Mr. Crook's point.  
5 MR. WEILER: Yes, I'm sorry, I had the  
6 idea, Mr. Crook, that was as you go on as opposed  
7 to --  
8 ARBITRATOR CROOK: I always hate to put  
9 counsel in a difficult position. If you feel  
10 you're in a position to address the point now,  
11 please do so.  
12 MR. WEILER: I do not feel that I am so  
13 I will meditate on it and work with it and build  
14 it in as much as I can at the moment but then we  
15 will also return to it.  
16 MR. VIOLI: Mr. Crook, may I ask what  
17 the second paragraph -- well, the first one was 72  
18 103. What was the second one?  
19 ARBITRATOR CROOK: 103.  
20 MR. VIOLI: I thought that was it.  
21 ARBITRATOR ANAYA: I would just like to  
22 point out we were very deliberate in our



1 jurisdictional award as to that distinction. You  
2 know, that there were certain -- the MSA claim was  
3 barred as to the off-Reservation sales but not as  
4 to the on-Reservation sales.

5 MR. VIOLI: Right. That was my  
6 understanding. It says March 12, 2001, for  
7 off-Reservation -- retail off-Reservation.

8 And one thing I would like to engage,  
9 because it's an issue when it comes up with the  
10 incidence of the regulation.

11 With respect to on-Reservation sales,  
12 right, Claimants here, and I know you're having  
13 trouble with this, I think it's something we  
14 should, I think, clarify at this point.

15 Claimants -- and I understand you know  
16 it, and when we talk about on-Reservation sales to  
17 non-members of the community, that's fine, but  
18 there's a distinction as Professor Goldberg and  
19 Professor Fletcher I believe have pointed out.  
20 The Claimants here only deal in a non-consumer  
21 sale transaction. All right. It's only a supply  
22 situation.

1 differed as to whether or not whether a state can  
2 come in and tell a licensed entity of the Nation,  
3 a Tribe, you know, you have to charge tax to your  
4 consumer, you have to ask this person, are they  
5 white, are they African-American, are they Native  
6 American, are they Asian. And if they're any one  
7 of those you have to charge different price and  
8 impose a tax.

9 I personally think the development of  
10 the law is going to be that that perpetuates civil  
11 rights violation. And it's putting a Native  
12 American retailer in an unfortunate position. And  
13 I think there's commentary on that.

14 So that is my position I would argue  
15 all the way to the Supreme Court if I had to.

16 But now we're dealing with what does  
17 the -- what is our Claimant's position? And our  
18 Claimant's position is we only deal in the  
19 upstream supply and wholesale and that the  
20 incidence of this regulation, both the  
21 complementary legislation, because the  
22 complementary legislation doesn't just say, you

1 The incidence of this regulation,  
2 however, is not on the consumer. It is on, as  
3 Professor Gold- -- Professor Clinton, excuse me,  
4 has mentioned, the incidence is on not the  
5 consumer, but the upstream supplier and  
6 manufacturer. In a transaction that takes place  
7 with a member or company owned by members of one  
8 Tribe or Nation and sometimes another Nation or  
9 sometimes a member or a company owned by a member  
10 of another Nation.

11 Now, those transactions may result in  
12 an ultimate sale to a non-member of that remote  
13 sovereign coming onto the territory in purchasing  
14 the product. But the incidence of this regulation  
15 is not on that remote consumer. The incidence is  
16 on the supply chain and the manufacturing part of  
17 this distribution chain.

18 So we think that is important because  
19 the standards, at least in a domestic Indian law,  
20 and I'm not so sure I agree with even the  
21 imposition, and as Professor Anaya said,  
22 reasonable scholars, judges and lawyers have

1 know, residents of Arizona, residents of New  
2 Mexico, you're not native and when you go on the  
3 Native American land you have to --

4 ARBITRATOR ANAYA: Mr. Violi, you know,  
5 I don't want to really interrupt you but I think  
6 we understand your position.

7 The question is how does that relate to  
8 the claim.

9 MR. VIOLI: Indeed.

10 ARBITRATOR ANAYA: And in light of our  
11 jurisdictional award.

12 MR. VIOLI: Right. And so my point  
13 here is that, Professor Anaya, the award says it  
14 does not mention -- when you talk about  
15 on-reserve, it does not say on-reserve to  
16 non-reserve members.

17 And I viewed that rightfully  
18 interpreting the law in the application of these  
19 laws because the incidence of these laws apply not  
20 to the retailer, not to the consumer transaction.  
21 It applies -- the incidence of these laws applies  
22 to the upstream wholesale transaction. So we view

1 the on-reserve transactions to be those  
2 transactions.

3 PRESIDENT NARIMAN: Which? You viewed  
4 on-reserve to be what transaction?

5 MR. VIOLI: The transactions between  
6 the Claimants, NWS in this case or Arthur Montour  
7 and NWS and the Native American tribes that it  
8 deals, with because it deals with tribes. It  
9 deals with companies owned by with tribal members  
10 on their land and it deals with tribal members who  
11 are sole proprietorships on their land, that  
12 upstream transaction. Not the consumer.

13 The taxes under U.S. Indian law, they  
14 deal with the -- predominantly with the incidence  
15 of the regulation falling on the non-Native  
16 American consumer and they create -- a fictional  
17 albeit, they create a fiction the incidence of  
18 this regulation doesn't really fall on the  
19 retailer, the Native American. It falls on the  
20 non-Native consumer who comes on and buys. But if  
21 that's the case, then deal with it -- our view is  
22 deal with it with the consumer, not go upstream

1 March 12, 2001, any measure before March 12, 2001,  
2 with respect to cigarettes sold at retail  
3 off-Reservation.

4 We are here dealing with the questions  
5 that were presented were on-Reservation.

6 PRESIDENT NARIMAN: The last sentence  
7 of that paragraph.

8 MR. VIOLI: Oh, sorry. Any such claims  
9 with respect to retail sales on-Reservation will  
10 be considered at the stage of the merits. And  
11 with respect to retail sales --

12 PRESIDENT NARIMAN: What's your case on  
13 this?

14 MR. VIOLI: Our case on that is, we  
15 supply the distributors on-Reservation or when a  
16 Tribe is a retailer, the Tribes on-Reservation.  
17 We supply them. There are -- the Coeur d' Alene  
18 Tribe, for example, in Idaho owns a smoke shop  
19 retailer. So --

20 Go ahead.

21 ARBITRATOR ANAYA: So this doesn't  
22 apply. What we're trying to say here is that you

1 and put the imposition of the tax.

2 PRESIDENT NARIMAN: But do I understand  
3 you to say that that sentence in Paragraph 103  
4 doesn't enter into your claim at all because it  
5 speaks of retail sales? That last sentence. I  
6 just want to know your position.

7 MR. VIOLI: Sure. Okay. I would read  
8 it because it's very important.

9 Any related enforcement measures  
10 adopted or implemented by U.S. states prior to  
11 March 12, 2001, with respect to cigarettes  
12 manufactured or distributed by any of the  
13 Claimants and sold at retail, off-Reservation,  
14 that one? That's off-Reservation.

15 PRESIDENT NARIMAN: No, no, no.

16 ARBITRATOR ANAYA: No, but it  
17 implies --

18 PRESIDENT NARIMAN: This is reserved  
19 for the merits, that portion which Mr. Crook read.

20 MR. VIOLI: Yeah, well, that talks  
21 about what is dismissed.

22 What is dismissed is anything before

1 can make a claim --

2 MR. VIOLI: Right.

3 ARBITRATOR ANAYA: -- as to --

4 PRESIDENT NARIMAN: They have no claim  
5 at the moment.

6 ARBITRATOR ANAYA: But you're saying  
7 that we should just not consider this and just  
8 consider all these claims time barred.

9 I mean you have to relate it -- we're  
10 looking for you to relate this to the door we left  
11 open for certain kinds of claims and you're  
12 seemingly saying it just doesn't apply.

13 MR. VIOLI: Yep.

14 MR. WEILER: Just to be clear, the  
15 Contraband Laws --

16 ARBITRATOR ANAYA: We understand that.  
17 Or I think we do.

18 MR. WEILER: Well, the Contraband Laws  
19 are in time and they are being applied and the  
20 incidence is falling on the wholesaler. It -- so  
21 therefore it's not directly related to that last  
22 sentence in Paragraph 103. So I wouldn't say that

1 everything is off the table because the Contraband  
2 Laws are. . .

3 ARBITRATOR ANAYA: Okay. What we did  
4 was we said that any measures before March  
5 whatever --

6 MR. VIOLI: March 12, 2001, right.  
7 ARBITRATOR ANAYA: -- 2001 are time  
8 barred.

9 MR. VIOLI: Off-Reservation.  
10 ARBITRATOR ANAYA: Yes. For retail  
11 sales. And we made that distinction.  
12 And then as to those cigarettes that  
13 make their way --

14 MR. VIOLI: Right.  
15 ARBITRATOR ANAYA: -- in the stream of  
16 commerce --

17 MR. VIOLI: Right.  
18 ARBITRATOR ANAYA: -- ultimately in  
19 retail to -- off-Reservation --

20 MR. VIOLI: Right.  
21 ARBITRATOR ANAYA: -- those are time  
22 barred.

1 zone, it's manufac- -- and it goes to the Tribe,  
2 tribal land. It is then sold at retail on tribal  
3 land. We're not talking about -- because --

4 ARBITRATOR ANAYA: No, we understand  
5 that. This goes to the question of what then are  
6 the measures that you are --

7 MR. VIOLI: There are two measures.  
8 There's the Escrow Statute, right, because there's  
9 no time bar on the Escrow Statute --

10 ARBITRATOR ANAYA: Right.  
11 MR. VIOLI: -- in that situation and  
12 the complementary legislation. Because the Escrow  
13 Statute should have never been applied at any  
14 point in time.

15 ARBITRATOR ANAYA: All right.  
16 MR. VIOLI: To charge us \$5 per carton  
17 for sales sold on-Reservation at any point in time  
18 is a violation of the NAFTA and that's what we've  
19 pointed out.

20 With respect to off-reserve, we say the  
21 allocable share is what causes the damage to us.  
22 But on-reserve there never should have been this

1 MR. VIOLI: Indeed.  
2 ARBITRATOR ANAYA: As to those  
3 transactions that make their way through the  
4 stream of commerce to --

5 MR. VIOLI: Retail.  
6 ARBITRATOR ANAYA: -- sales retail  
7 on-Reservation, you're free to still make a claim.  
8 MR. VIOLI: Okay.  
9 ARBITRATOR ANAYA: And so we're saying  
10 how does that apply. And it seems like you're  
11 saying the whole thing doesn't apply, that we  
12 shouldn't think of it that way.

13 MR. VIOLI: No. Okay. I would  
14 clarify, because that's an important point.  
15 With respect to NWS's business  
16 on-Reservation, all of NWS's business is  
17 on-Reservation, right. What I mean by that is, it  
18 sells -- as the record shows, it sells to  
19 distributors in Tribes or distributors who are  
20 owned by members of the Tribes or the Tribes  
21 themselves on-Reservation, meaning the product  
22 goes from either New York or free foreign trade

1 MSA regulatory regime which only applies by way of  
2 the original Escrow Statute --

3 ARBITRATOR ANAYA: If I'm correct,  
4 we're actually saying that you can assert the MSA  
5 as a measure prior to 2001. And I don't --

6 MR. WEILER: Technically, as Mark is  
7 about to say, not the MSA but the implementation  
8 of the MSA.

9 MR. VIOLI: The Escrow Statute.  
10 MR. FELDMAN: The Escrow Statute with  
11 respect to on-Reservation sales, the Escrow  
12 Statute, either in its original or amended form,  
13 is the challenge measure.

14 The MSA, as Mr. Weiler has confirmed,  
15 is a private agreement. It is not a challenge  
16 measure. It cannot breach the NAFTA.

17 ARBITRATOR ANAYA: All right. I  
18 misspoke. I misspoke.

19 MR. VIOLI: And the states never came  
20 to us and said the MSA applies on-Reservation.  
21 What they said was the Escrow Statute and the  
22 complementary. I'm sorry. Did we clear -- I mean

1 is it. . .

2 ARBITRATOR ANAYA: I think so.

3 MR. WEILER: Article 1105. Right up  
4 there. And hopefully on your screens as well.

5 So that's the little dandy that we're  
6 having fun with. I mean that in the colloquial  
7 manner, just to be clear.

8 Each party shall accord to investments  
9 of investors of another party treatment in  
10 accordance with international law. And then they  
11 list two possible standards that are included in  
12 that minimum standard.

13 And then we see right below a  
14 clarification which is binding upon Tribunals  
15 under Article 1131 sub two which states that --  
16 well, as we can see, that it prescribes the  
17 customary international law minimum standard. So  
18 clearly one of the things that that's saying is  
19 that when it says treatment in accordance with  
20 international law, they don't mean that you can  
21 try to bring a NAFTA claim because somebody  
22 violated the WTO trips agreement. Because the WTO

1 standard. And the most recent case, Glamis Gold  
2 versus USA, sets it out fairly well. I mean  
3 it's -- I disagree with some aspects of the case,  
4 but -- and their reasoning but it sets it up  
5 pretty well. It says there that, you know,  
6 although the circumstances of the case are, of  
7 course, relevant, the standard is not meant to  
8 vary. It's not a subjective standard that simply  
9 means whatever you think is fair is fair. It's an  
10 absolute standard. And it draws a distinction for  
11 us, which is why I highlighted this, between the  
12 minimum standard and Article 1102, the national  
13 treatment standard, which is a comparative  
14 standard.

15 So as the text of that particular  
16 decision states, correctly, when you're dealing  
17 with a national treatment claim, you are again  
18 looking for the best comparable treatment. You're  
19 not looking -- it's not a floor. It's not a  
20 minimum standard.

21 Some of the examples then in the second  
22 paragraph there, 627, show the kinds of things

1 trips agreement breach has to be heard in the WTO.

2 So it's very clear that the NAFTA  
3 parties are saying this is meant to be a customary  
4 standard. And as a matter of custom, fair and  
5 equitable treatment and full protection and  
6 security are two of the examples. Should clarify,  
7 though, of course, it does say including, so there  
8 are others. But just as municipal Indian law  
9 federally is so confused, we're talking a dog's  
10 breakfast in terms of trying to figure out whether  
11 or not you have fair and equitable or full  
12 protection and security or do you call it -- all  
13 the words end up folding into a simple concept.  
14 There's a minimum standard. There's a floor below  
15 which no one can fall, no state should be going  
16 below that. And it's clear that some deference  
17 should be shown.

18 And as we discussed I believe  
19 yesterday, Professor Anaya, there's -- it's a  
20 case-by-case basis in terms of figuring out  
21 exactly where that deference should fall.

22 But that's pretty clear about the

1 that will breach the standard. Manifest  
2 arbitrariness. A gross denial of justice.  
3 Blatant unfairness. Complete lack of due process.  
4 Evident discrimination. So we have a pretty good  
5 idea what we're talking about in terms of the  
6 minimum standard.

7 PRESIDENT NARIMAN: Pardon me. May I  
8 just interrupt?

9 MR. WEILER: Yes.

10 PRESIDENT NARIMAN: It would help me at  
11 least to the start if you could set out what is  
12 that treatment that you complain of in this case  
13 that is sufficiently egregious and shocking as the  
14 case says.

15 MR. WEILER: Luckily, Mr. Chairman,  
16 that's exactly what I'm doing.

17 PRESIDENT NARIMAN: Please, if you  
18 don't mind.

19 Sufficiently egregious and shocking in  
20 the current case. What are those elements. If  
21 you could first spell them out and then proceed,  
22 at least I would be more educated.

1 ARBITRATOR ANAYA: And also as you do  
2 that, if you could relate it to what we've heard  
3 so far, the kinds of things that have come in.

4 MR. WEILER: It's right here. We're  
5 about to talk about it so we're -- it's right here  
6 and we're gonna -- it's the next slide so we're  
7 right on track.

8 So again this second slide here, it's  
9 just another example of clarifying that unjust  
10 idiosyncratic -- we won't go into any detail  
11 there.

12 The other point I want to make with  
13 Siemens before I turn the page is that it's clear  
14 that the current standard does include the  
15 frustration of expectations. Very down at the  
16 bottom there, Professor Anaya. The current  
17 standard does include legitimate expectations.

18 Another example of that premise is this  
19 case called BG Group, the duties of the host state  
20 must be examined in light of the legal business  
21 framework as represented by the investor at the  
22 time it decides to invest. Some people believe

1 investment treaties that are not subject to the  
2 NAFTA FTZ statement relevant? Do you think those  
3 are indications of consistent practice informed by  
4 a sense of legal obligation? Where do we go to  
5 find the customary law here?

6 MR. WEILER: The Glamis Gold quote is  
7 the operative quote. It's -- I've parsed out the  
8 blue.

9 Arbitral awards can serve as  
10 illustrations of customary international law if  
11 they involve an examination of customary  
12 international law. BG Group PLC very clearly  
13 states around that very same area, it's talking  
14 about custom. It refers to the NAFTA standard and  
15 it says, we like this NAFTA standard. It's good  
16 because we don't want -- the Tribunal ultimately  
17 doesn't do an additive analysis because it's  
18 deciding on custom.

19 ARBITRATOR CROOK: So these are  
20 equivalent to the writings of the leading  
21 publicists or --

22 MR. WEILER: These are the equivalent

1 that that can only mean some sort of investment  
2 agreement.

3 Other Tribunals, and I would submit  
4 that -- we've made our arguments in writing with  
5 respect to which Tribunals say which, our position  
6 is that the minimum standard includes a minimum  
7 level of transparency and certainty which  
8 admittedly is hard to breach but does exist and so  
9 that's what we mean when we say when we got here  
10 the status quo ante was the measures as we found  
11 them and then they were dynamically changed.

12 Yes, Mr. Crook?

13 ARBITRATOR CROOK: As you know, the  
14 Glamis award took a pretty traditional view of  
15 what it takes to establish a rule of customary  
16 international law.

17 Now, you're asserting that custom has  
18 involved to include these notions of transparency  
19 and so forth. And what do you cite as the  
20 evidence for that?

21 Let me finish, please.

22 Are decisions under bilateral

1 to the writings of leading publicists.

2 ARBITRATOR CROOK: So you're not  
3 asserting these are state practice?

4 MR. WEILER: No. They're evidence of a  
5 finding that state practice exists. As actually  
6 the Glamis Gold Tribunal says itself, it does not  
7 expect very often that you are going to find any  
8 Claimant capable of demonstrating the positivist  
9 doctrinal position of proving custom. That takes  
10 decades. And that's why the Glamis Gold Tribunal,  
11 as you said, being a very conservative Tribunal's  
12 approach, nonetheless says, we want to look at  
13 other cases as long as they're also pronouncing  
14 customary international law in that other  
15 Tribunal's position.

16 Ultimately, of course, as a Tribunal  
17 you have to decide for yourself whether you're  
18 comfortable with what these other Tribunals are  
19 saying about customary international law but the  
20 Glamis Tribunal itself did that.

21 ARBITRATOR CROOK: In Claimant's view,  
22 what is customary international law?

1 MR. WEILER: Customary international  
2 law is one of the three -- taking the doctrinal  
3 position in Article 38 of the statute of the Court  
4 of International Justice, customary international  
5 law is -- one could almost call it the common law  
6 of states. States effectively through practice  
7 and through an observation of their intent to --  
8 strike that. They're -- it's tough to word it.

9 Ultimately I would just go back to the  
10 standard you quoted. Essentially it shows the  
11 state believes itself to be bound and acts like  
12 it's bound. And that's why the Glamis Tribunal  
13 did actually make a finding in that case that  
14 they're -- without going to a proof of the  
15 positivest doctrinal test, they nonetheless found,  
16 based on the case law, that there was a customary  
17 norm there. And we have many customary norms in  
18 the next pages coming up.

19 For example --

20 ARBITRATOR ANAYA: So I'm clear,  
21 relating to the earlier slide and the earlier  
22 quote from Glamis, we have to find that a breach

1 the Gamie Tribunal suggested, and I think that  
2 they were correct in suggesting it, so I'll get to  
3 the cite soon. The Gamie Tribunal was correct, we  
4 submit, in suggesting that it's a cumulative test.  
5 You don't just parse it out and say, well, did you  
6 make it on legitimate expectations? Did you make  
7 it on denial of justice. It's all of them  
8 together. It's the whole -- you don't parse it  
9 out into little compartments.

10 ARBITRATOR ANAYA: I understand. But  
11 we are to find that all of them together are  
12 shocking.

13 MR. WEILER: Are shocking to the  
14 reasonable jurist today.

15 ARBITRATOR ANAYA: Yes, of course,  
16 today.

17 MR. WEILER: As opposed to 1927.

18 ARBITRATOR ANAYA: Yes, or as opposed  
19 to 1540 or something.

20 MR. WEILER: Or, yeah, or even an  
21 earlier, yeah.

22 The concept of civilized nations is

1 of the norms is shocking and outrageous?

2 MR. WEILER: Shocking and outrageous is  
3 actually the near standard. And most writers and  
4 scholars would suggest that it might just -- it  
5 might be shocking. It might be shocking and  
6 outrageous but the other way that they go is that  
7 they say, well, what's shocking and outrageous to  
8 someone in 1927 --

9 ARBITRATOR ANAYA: I understand. I  
10 just want to make sure that these things are  
11 together.

12 We're not talking about finding out --  
13 discovering a rule of customary international law  
14 then finding that, you know, on the balance of  
15 things it was breached. We need to find that it  
16 was sufficiently egregious and shocking and gross  
17 denial of justice; is that right?

18 MR. WEILER: Yes. And so that's why I  
19 mentioned it in the first slide. Good thing you  
20 just jogged my memory.

21 One of the things I was going to say  
22 with the first side when I said collective is as

1 sort of offensive nowadays.

2 So legitimate expectation.

3 I think I've pretty much already  
4 covered this. There's a legitimate expectation of  
5 transparency, certainty, due process.

6 PRESIDENT NARIMAN: I'm sorry.  
7 Speaking for myself again, see, all this is good  
8 in theory. I just want you at some point of time  
9 as soon as you can to enumerate in some detail why  
10 you say the treatment in this particular case,  
11 what is that treatment and why it is so shocking  
12 to our conscience that we should say that it is --  
13 it falls on the relevant article.

14 You see, until I get that, I don't go  
15 back onto all the case law, et cetera. I want to  
16 first know what according to the Claimant is that  
17 conduct or that treatment which they have either  
18 done or failed to do, omitted to do, deliberately  
19 virtually, because it has to be shocking, it has  
20 to be deliberate. It has to be deliberate against  
21 you.

22 What is it -- I mean why don't you

1 please crystalize that? I don't get -- I went  
2 through this. If you could just crystalize that,  
3 at least I will find it very, very useful.

4 MR. VIOLI: Mr. Chairman, we'll do that  
5 in the closing, but I would just present just a  
6 short story here of states -- beginning of the  
7 negotiation process where they say these measures  
8 will apply to Indians on their land. And I'll  
9 just take the on-Reservation sales.

10 These measures are going to apply to  
11 Indians on their land. That's the federal  
12 proposal. We're going to give them payments in  
13 return for the payments under the \$5 per carton  
14 and we're going to confer with their Tribes in the  
15 negotiation of how it's going to get paid and  
16 everything like that. We start with that premise.

17 We then proceed with the MSA after the  
18 federal government rejects that. The states  
19 decide they're going to take it in their own  
20 hands. Forget the federal government. Forget the  
21 people, my friends across the table. They don't  
22 want it so, we'll do it ourselves, the states say.

1 take money back under this MSA payment scheme  
2 because you're not diligently enforcing it  
3 on-Reservation. And the states, like in New York,  
4 say, it was never meant to apply on-Reservation.  
5 We have memos that show it's not -- they opine it  
6 doesn't apply on-Reservation. All of a sudden  
7 because big tobacco says, we want it to apply  
8 on-Reservation or we're going to take money away  
9 from you, the states start knocking on the door,  
10 tapping at first lightly and then they start to  
11 encroach. And then they start to seize product.  
12 Then they start to tell people that we're dealing  
13 with contraband, something that we've been  
14 dealing -- not me personally. I'm a visitor, I'm  
15 a first-generation American. So I'm a visitor as  
16 well. But I know what it means to be a visitor in  
17 someone else's land.

18 They come knocking on the door to these  
19 people and say -- or other people, don't deal with  
20 them. They're contraband. Yeah, the product is  
21 only going on their land and they're dealing in  
22 Nation-to-Nation trading or

1 They enter into an agreement that  
2 specifically says, this excludes Native Americans  
3 or Indian Tribes. We proceed with -- a few months  
4 after that agreement is reached. What do we do in  
5 the case where we have non-taxable sales on Indian  
6 reservations? Not a unit sold that doesn't apply.  
7 These measures don't apply. We proceed for five,  
8 six, seven years. Five, six, seven years. No  
9 enforcement on-Reservation. We go on. We invest.  
10 Build a market. Cultivate the market. These are  
11 the first people in this hemisphere to grow,  
12 cultivate and trade in tobacco. Long before the  
13 English settlers came. Right? They had tobacco  
14 trading commerce long before the companies entered  
15 into this deal.

16 So we have a five-, six-year history  
17 after the measures are adopted. They don't apply  
18 on-Reservation. No one comes knocking on the door  
19 and says, we now want this to apply on your Indian  
20 land, your trading commerce.

21 All of a sudden the big tobacco  
22 companies start to complain and say, we want to

1 Indian-member-to-Indian-member trading, things  
2 that have been done for probably a thousand years  
3 in this hemisphere. But now we have a problem  
4 with it under this rubric that we developed seven  
5 years ago, because tobacco companies are  
6 complaining about it and we're going to get less  
7 money.

8 How egregious can that be? They've  
9 admitted that it doesn't apply on-Reservation.  
10 They never enforced it for six, seven years. And  
11 then all of a sudden because competitors, because  
12 Phillip Morris, because these big companies that  
13 have 90-something percent of the market see a  
14 Native American company that employs two, three  
15 hundred people, provides more jobs on these  
16 Reservations both in Canada and across the  
17 artificial border in the U.S. on their  
18 territories, three hundred jobs, brought more  
19 industry and economy and commerce to these nations  
20 than they ever seen since the settlement of the  
21 English colonization and subsequent revolution and  
22 independence. Right. They're growing.

1 Healthcare. Donations to charities. 12 million  
2 dollars -- they're doing the best they can to  
3 develop this business and to put it back into  
4 their people.

5 And now we have the states who admitted  
6 that it doesn't apply coming on their land saying  
7 it now applies. Stop it. And you, you're  
8 shipping this product to there? Contraband.

9 Do I know that that is a violation of  
10 law? No. Did you do diligence to research  
11 whether you had authority to tell a foreign trade  
12 zone regulated only by the United States  
13 Government that they have to stop shipments to a  
14 Native American land? Did you do due diligence?  
15 No. I thought I said you may or you'd think about  
16 it.

17 Well, a couple of those letters from  
18 the foreign trade didn't say that. They said,  
19 cease and desist without due diligence.

20 So now they're shutting these people  
21 out of their Native American markets. To this day  
22 they're getting letters, and we'll see one,

1 it. NPMs, you get this treatment here with  
2 refunds. Right? You get refunds.

3 What happens after that's passed?  
4 Again, the tobacco companies say, you know what,  
5 these NPMs gained about four, five, six percent of  
6 the market, maybe eight percent which is beyond  
7 the two percent limit that we allowed, so we want  
8 you to go after them.

9 Well, how are we going to go after  
10 them? We're going to change the law. We're going  
11 to see e-mails from Phillip Morris's attorneys.  
12 You said it yesterday, why weren't the NPMs  
13 invited to consult on the change in the law, on  
14 the change in these measures? Why are the tobacco  
15 companies caucusing with the state AG's? Right?  
16 And the lobbyists for the tobacco companies in  
17 book room deal? We need to make this law. We  
18 need to protect this. We need to protect that.  
19 And none of it mentioned healthcare. Right? Not  
20 one word of healthcare when they were in private.  
21 We need to stop the NPM sales.

22 The tobacco companies, big guys, of

1 letters back -- as recent as December 31st of this  
2 past year. Stop the business on the Reservation.  
3 That's egregious, disrespectful. It's in plain  
4 violation of even what they agreed and what they  
5 said and how it was supposed to be a supplied.  
6 And they brought a lawsuit against the tobacco  
7 companies, the big guys, to say this does not  
8 apply on-Reservation, the State of New York did.  
9 Does not apply on-Reservation. They admitted it  
10 and now they want to change the terms. Now they  
11 want to come after something -- us under  
12 something, an agreement that they've admitted all  
13 along never applied, has no basis of applying  
14 under international law, domestic Indian law or  
15 plain fairness and justice. That's  
16 on-Reservation.

17 Off-Reservation, they have an Allocable  
18 Share Amendment that's changed the whole deal,  
19 terms of the deal. They agreed to that, that  
20 legislation. That was what the tobacco companies  
21 in the states agreed to, the original law. The  
22 original said grandfathered exempt SPMs, they get

1 course, saying, we're losing market share. That  
2 precipitated this.

3 We'll see e-mails where these tobacco  
4 companies, where we have the Attorney General of  
5 Oklahoma saying, Phillip Morris attorney, please  
6 tell me you approve of this language in the  
7 Allocable Share Amendment, because they were  
8 drafting it, because I need your blessing before I  
9 can go to the legislature of Oklahoma and tell  
10 them that it's safe to run with this legislation.  
11 My God, you have these people in bed with each  
12 other. You have the infiltration of the core of  
13 American democracy by a private interest that is  
14 being protected, shielding and furthered in an  
15 alliance what is called by some company an unholy  
16 alliance.

17 Imagine the Attorney General of  
18 Oklahoma telling a Phillip Morris attorney, I need  
19 your blessing to go to the legislature. It  
20 doesn't have a comma here or I used the word that  
21 instead of which. Is it okay, Mr. Attorney for  
22 Phillip Morris. Right?



1 This is what we see when we get a  
2 snippet of what is really behind the door. The  
3 documents that exist out there. And that's why  
4 I've asked the documents and they have yet to  
5 produce them, because they will show to the  
6 Tribunal how egregious and how gross the  
7 misconduct is, how shocking it is and outrageous.  
8 We've seen it.

9 So now, in addition to these memos,  
10 right, we have them caucusing. We have the State  
11 of California passing a law. It's never given  
12 allocable share release. The State of New Mexico,  
13 the gentleman today, I don't know if I've ever  
14 given that. Why change the law if you've never  
15 given a release? Why change it? Did you do an  
16 economic study? We have the agreement. It says,  
17 if you're going to change the law or cast this  
18 thing it's going to affect the qualifying statute,  
19 get an economics firm to determine whether there's  
20 really a cost disadvantage. Whether these SPMs  
21 are really -- really have some kind of advantage.  
22

Did they do that? Did they get an

1 passed by the state. They did no due diligence to  
2 determine whether they really needed -- whether  
3 they really needed this change in the law to  
4 remove some disadvantage, some loophole. I mean  
5 we're talking about a fundamental change in this  
6 economy, this market in this industry. Not one  
7 economic study.

8 Why did you pass it? Well, NAAAG told  
9 me a memo that's a loophole. Any analysis that  
10 there was a market share loss? Because we have a  
11 letter from the Attorney General himself saying  
12 that NPMs grew because Phillip Morris raised its  
13 price fivefold multiples of what it had to pay  
14 under the MSA. The MSA \$3 a carton, Phillip  
15 Morris raises its price \$17 a carton. And the  
16 Attorney General says that's why SPMs have market  
17 share. You have these guys gouging consumers in  
18 the American market. Granted, it's pariah  
19 product. It's dangerous product. Now they're  
20 adding insult to injury. Now they're charging the  
21 consumer -- it's ridiculous, \$17 a carton, these  
22 Phillip Morris companies, big companies, right,

1 economist? Did they go to the economist? No.  
2 Did one state do an economics analysis of this  
3 change in the law? Such a big change in the law  
4 now. We have investments. We have building up of  
5 market share, tremendous dedication, trademarks.  
6 We're building it, we're putting all the money in  
7 the market, we're developing it, cultivating the  
8 brand. Did they come to us? Did they confer with  
9 us? No.

10 Did they go to an economics firm and  
11 say, we need to stop the Seneca brand because  
12 there's a disadvantage? No. The agreement says,  
13 go to an economics firm. Did they do an  
14 independent study? Did they do an independent  
15 study? One economic study to be produced in this  
16 record of why they need it. No, it's all ex post  
17 facto. It's all after the fact by expert who said  
18 in federal court when the federal government  
19 brought its case, this MSA doesn't work.

20 He comes in and he says, well, you  
21 know, I think this economics -- nothing done  
22 nothing done at the time the allocable share was

1 when they only have to pay the states three.

2 So candidly, outside the scope of  
3 litigation, no economic studies, nothing. We have  
4 the AG saying to themselves the reason why is  
5 because the tobacco companies are grossly abusing  
6 these MSAs to these big companies. They're  
7 abusing the MSA.

8 So what do we have now? We have a  
9 situation where the explanation is the big tobacco  
10 companies -- not any problem with the statute or  
11 the original law that everybody agreed on.  
12 Nothing. Zero. Fast forwarding here. And the  
13 tobacco companies start knocking on the door and  
14 saying, we're going to start taking money back.  
15 We're going to sue you for an NPM adjustment and  
16 we're going to go get a determination. Their own  
17 expert says, the original Escrow Statute didn't  
18 affect -- didn't cause a loss in market share.  
19 That's what he says, their expert, which we'll  
20 hear and see.

21 It did not cause -- why change the  
22 statute then if it didn't cause a change in market

1 share? Right. Because it's about the money. The  
2 tobacco companies came knocking on the door.

3 And so the states, they heeded the  
4 call. They followed what the tobacco companies  
5 asked them to do. They went in and changed the  
6 law. They changed it grossly to disadvantage us.  
7 So we had that sort of dynamic, that egregious and  
8 shocking conduct, what has brought us here and  
9 we've been fighting all these years to be here.  
10 Because this is something that is unprecedented.

11 As I told my brother across the table,  
12 if we were dealing with them, we wouldn't be here  
13 today. We're not dealing with them. We're  
14 dealing with the states. We have no quarter with  
15 the federal government. Our quarter was with the  
16 states. They're vicariously responsible.

17 Did they take these measures? No. Not  
18 at all. Did they pass a new law under the FDA?  
19 And exceptions in there, Mr. President? No. Not  
20 one exemption. Any different treatment, you pay  
21 \$5, you pay \$2? No, no, no, across the board.  
22 Across the board. But that's the level.

1 with all this and we do think it reaches that  
2 level.

3 PRESIDENT NARIMAN: Thank you. I'm  
4 glad I provoked you.

5 MR. VIOLI: I apologize.

6 MR. WEILER: I should mention,  
7 Mr. Chairman, we need to get you the tabs. But we  
8 actually -- personal aside, actually my spouse has  
9 been in tobacco reduction. When I explained this  
10 to her, she was shocked. I remember my client  
11 thought it was funny when he first found -- he  
12 said basically you're trying to help me and she's  
13 trying to put me out of business because she does  
14 tobacco reduction. She doesn't now. She's gone  
15 on to do a Ph.D. but she's -- it convinced her.

16 You go on this reserve, you see this  
17 plant, and actually I'm hoping we will have time  
18 to show you that video because the video is meant  
19 as sort of a consumer -- you know, it shows the  
20 retailer what they're doing, but you see those  
21 faces and it really does bring it home a lot  
22 better than I think that I can possibly do talking

1 We have something unprecedented in the  
2 U.S. economy. We have infiltration into the poor.  
3 These are the highest law enforcement officers of  
4 the states, the attorneys general. Right? It's  
5 the fox guarding the hen house. We've allowed  
6 infiltration of private interest into that core  
7 Democratic process, because the AG's then go to  
8 the legislatures and say, we need this change in  
9 the law. Behind the curtain we're told what they  
10 need to change in the law for. On the front they  
11 say health and they say whatever. This is  
12 egregious.

13 I've never seen a case -- I've never  
14 seen such infiltration on a -- and some of the  
15 words are terrible, what they would call this kind  
16 of -- where a private interest has -- the highest  
17 law enforcement officer literally has them in  
18 their hands, tells them that they need our  
19 blessing before changing the law.

20 And that is egregious, I think the  
21 Tribunal will find during our closing, and when we  
22 get to the more slides, that's where we're going

1 about law. But this -- it truly is egregious and  
2 the people in the health community, they're not  
3 very thrilled about this either, because big  
4 tobacco has cut a deal with AG's.

5 But anyway, I'll get on with the law  
6 here.

7 My clients, they're not putting on a  
8 show. They really do believe in their sovereignty  
9 and they really do believe that the Jay Treaty and  
10 the Treaty of Gent, three or four other treaties,  
11 that these treaties really meant something.  
12 They're very clear they were never conquered.

13 Those treaties, as Professor Clinton explained --

14 ARBITRATOR ANAYA: Mr. Weiler, you say  
15 your clients believe in their sovereignty. I  
16 understand what you're saying but is the Mohawk  
17 Nation or any of the tribal -- or governments of  
18 the Indian Nations intervening in any way, or have  
19 they taken a formal position?

20 MR. WEILER: Yes, Chief William Montour  
21 has written I believe two letters and --

22 ARBITRATOR ANAYA: I know about the

1 letters, but is the Nation itself?

2 MR. WEILER: Well, I think perhaps  
3 Mr. Montour tomorrow, you could probably ask him  
4 that question. That might be more appropriate  
5 than my trying to answer that.

6 MR. VIOLI: I can answer it.

7 With respect to the Muscogee (Creek)  
8 Nation in Oklahoma, I know that they've recently  
9 brought a lawsuit -- recently brought a lawsuit  
10 seeking an injunction against the application of  
11 these measures to trading commerce on their land,  
12 but they haven't intervened in this action. They  
13 have a separate federal lawsuit that's pending.

14 MR. WEILER: And the AFN chief.

15 PRESIDENT NARIMAN: Yes, Mr. Violi, it  
16 would help me, at least, if you can go through the  
17 transcript what you just told us just now and just  
18 pinpoint the various documents in this case that  
19 would support what you say. And later, when you  
20 close your argument or whatever it is, go through  
21 this transcript and just give it to us.

22 MR. VIOLI: Thank you.

1 traditional chiefs already, but I have no problem  
2 before the end of this Tribunal hearing getting  
3 you that information. And I'm sure that on an  
4 expedited basis they can check that out.

5 MR. FELDMAN: Mr. President, the  
6 Claimants clearly are free to rely on what's in  
7 the record but supplementing the record is a very  
8 different issue.

9 ARBITRATOR ANAYA: Yeah, and I'm not  
10 asking them to supplement the record. I'm just  
11 asking them to direct me where we can find that  
12 information for their position reflected in the  
13 record or whether it is.

14 MR. WEILER: We definitely can do that.

15 I do recall in Mr. Jerry Montour's  
16 statements there was material up to that regard.  
17 I know that Mr. Montour -- Chief Montour filed a  
18 statement. It wasn't just a letter. He actually  
19 filed a statement in the first with the Memorial,  
20 so we definitely -- but, anyway, we'll get it. We  
21 do have that.

22 PRESIDENT NARIMAN: Does it make any

1 ARBITRATOR ANAYA: I mean, you're  
2 relying very much on the sovereignty of the  
3 indigenous people, a Nation that is involved here.

4 MR. WEILER: Yes.

5 ARBITRATOR ANAYA: -- yet your client  
6 is in fact not the Nation.

7 MR. WEILER: No, they're not the  
8 Nation, but --

9 ARBITRATOR ANAYA: I understand that.  
10 But it seems like, given your analysis, it would  
11 be relevant to have -- to know, you know, what the  
12 position of the Nation is as the Nation. And I  
13 understand that the chief has made a statement.  
14 And if you're saying that that's the position then  
15 I'm --

16 MR. WEILER: I'm happy to get the  
17 answer on the Nation. I mean there's really --  
18 there's the Seneca Nation and there's the -- and  
19 in Oswekan it's six Nations as opposed to -- and  
20 there's two councils. There's politically elected  
21 council and then there's a traditional one. I  
22 thought we had something in the record from the

1 difference that a sovereign Nation hasn't made a  
2 claim in this case but that --

3 MR. WEILER: No.

4 PRESIDENT NARIMAN: -- examination of a  
5 company which many Indian Tribes has, does it make  
6 any difference, according to you?

7 MR. WEILER: Well, to qualify as an  
8 investor, I mean a sovereign Nation can be in  
9 theory --

10 PRESIDENT NARIMAN: No, no, no, no, no.  
11 No, I'm not talking of investing.

12 Bu whether a sovereign Nation, not  
13 being the Claimant in the present case, does that  
14 make any difference to the argument that we are a  
15 sovereign Nation that it -- that it is because we  
16 are a sovereign Nation that this entire scheme  
17 never applied to on-Reservation?

18 MR. WEILER: The short answer is no.

19 And the reason why is that different nations  
20 organize themselves in different ways. In a  
21 way -- I mean some say loosely you'd say some of  
22 them are more laissez faire in terms of ownership

1 and rights of participation. Some of them are  
2 more social democratic and outright state  
3 controlled. So there's a wide variation in Indian  
4 Nations as to how they organize their affairs.

5 With respect to this particular, the  
6 Mohawk Nation and the Seneca Nation, they are  
7 actually big fans of free enterprise. So -- and  
8 I -- they support that and that's why the  
9 Claimants do believe -- when they're speaking for  
10 the -- I mean they speak for the Nation in more  
11 than one way, one because they are part of the  
12 Nation.

13 PRESIDENT NARIMAN: Montour belongs to  
14 the Seneca Nation?

15 MR. WEILER: That's correct.

16 PRESIDENT NARIMAN: I mean his company  
17 operates from the Seneca Nation?

18 MR. WEILER: Correct.

19 PRESIDENT NARIMAN: Within the Seneca  
20 Nation?

21 MR. WEILER: Yes. And he is and it  
22 does.

1 yes. This is about the Dream Catcher Fund. And  
2 yes, it's in the record.

3 I mean this is -- they are integrated.  
4 They are part of it. So yes, they do speak for  
5 the Nation.

6 But I mean, again, I think Mr. Montour  
7 is going to be available to ask him some direct  
8 questions about this. Mr. Montour is certainly  
9 involved in the politics, if you will, and the  
10 structure of his Nation, so I think he'd be more  
11 than happy to tell you how he feels, he can speak  
12 for his Nation.

13 MR. MONTOUR: Just to help, I will  
14 speak -- I will speak as an individual.

15 My name is Jerry Montour. And I try  
16 very, very --

17 MR. FELDMAN: Mr. President, this is  
18 testimony.

19 PRESIDENT NARIMAN: That's correct.  
20 This is testimony.

21 MR. MONTOUR: Okay. Sorry.

22 MR. WEILER: So the point being that

1 And Mr. Hill and Mr. Jerry Montour are  
2 both Mohawk Nation and they both participate on --  
3 that's where their plant is.

4 PRESIDENT NARIMAN: Hill and who?  
5 Mr. Hill and?

6 MR. WEILER: Mr. Hill and Mr. Jerry  
7 Montour.

8 PRESIDENT NARIMAN: Yes.

9 MR. WEILER: And I think they also  
10 speak for the Nation in another way. They are by  
11 far the largest employer. I mean this is a small  
12 community so it's not like they're off on their  
13 own sort of doing their own thing. These people  
14 have the largest charity in Canada devoted to  
15 benefiting indigenous people and it's across  
16 Canada. They're actually federally registered.  
17 So anyone from any indigenous Nation across Canada  
18 can go get a grant for teach- -- there's all sorts  
19 of things.

20 PRESIDENT NARIMAN: You are speaking  
21 from the record?

22 MR. WEILER: Well, it's in the record,

1 they -- it's not enough to just have a heart-felt  
2 expectation. I think that's true. It's got to be  
3 based on some expectation of legal certainty. But  
4 I think that those treaties do definitely provide  
5 that to these Claimants.

6 And overall, there is also just the  
7 general standard that applies to anybody  
8 regardless of whether they are or not indigenous.

9 One, this off-reserve claim didn't need  
10 to be brought by an indigenous person. It's  
11 ridiculous that one would come and see the lay of  
12 the land and then, all of a sudden, it changes. I  
13 mean it -- actually we have them -- I'll  
14 definitely refer to it in the record again, but I  
15 was reading this last night. There's the up in  
16 smoke article which was provided with, I believe,  
17 our Claimant's first Memorial and describes a  
18 gentleman named Baillie. And Mr. Baillie, he's  
19 basically told, get yourself up here to New York  
20 to talk to these lawyers.

21 And he goes up and he says, I can't  
22 sign on to this. I need some time to think about

1 it. They actually grant him some extension. The  
2 article doesn't say how much longer. And he goes  
3 back home and apparently within, I guess, it's  
4 either 30 days or 60 days he and his lawyer figure  
5 out, no, I'm pretty much a local seller in this  
6 particular state, maybe the one next door. I'm  
7 better to stay out of this thing because there's a  
8 provision for me. If I'm going to stay local, I'm  
9 going to stay there.

10 So when I hear this stuff about  
11 loophole, you know, no one thought of it. I mean,  
12 well, Mr. Baillie, some -- you know, just some  
13 fellow, you know, who's got this small tobacco  
14 plant somewhere, he and his lawyer figured it out  
15 pretty quickly. So, I mean, gee, what a shocking  
16 loophole.

17 I mean I think what's more likely is  
18 Mr. Baillie had every reason to rely on that. And  
19 if Mr. Baillie was a Canadian or a Mexican he  
20 could be here, but because he's an American he  
21 doesn't qualify under the NAFTA to bring a claim  
22 so Mr. Baillie is out of luck. But it's just as

1 for healthcare costs from a tobacco company for  
2 apparently the cost that they have to, you know,  
3 fund as part of that part of the socialized  
4 medicine that they have. It's not one case. And  
5 yet -- so there's no legal authority whatsoever  
6 and yet they want to take their money for 25 years  
7 just in case someone gets sick. And I guess in  
8 the 25 years they're hoping the law is going to  
9 change too.

10 Because --

11 PRESIDENT NARIMAN: I'm sorry. I  
12 didn't follow this part of your argument.

13 MR. WEILER: Well, there is no --

14 PRESIDENT NARIMAN: What is the  
15 relevance of it?

16 MR. WEILER: There's just no tort law  
17 supporting the right of the states to take the  
18 money. Not for five years, not for one year, not  
19 for ten, not for 25. They don't have a legal  
20 claim in tort law to it. And so it is a denial of  
21 justice to say to somebody, okay, I have no  
22 right --

1 egregious to Mr. Baillie. All he can do is  
2 complain to the Forbes Magazine.

3 Denial of justice. This is another one  
4 where there's no debate that there is a denial of  
5 justice standard. And it's pretty clear from the  
6 writings that we've submitted to you that this is  
7 not just a question of having a good judicial  
8 system. This is about administration. This is  
9 about executive rule making. Denial of justice is  
10 a -- basically a proxy for the notion of due  
11 process.

12 And I don't mean the American style of  
13 due process that is also substantive. I mean the  
14 procedural type of fundamental justice that's more  
15 common in the Canadian-British kind of system.

16 So there is this degree of fairness  
17 that one expects. And in this case, I've got it  
18 up there and I think you have it in front of your  
19 screen too. They're told, okay, you've never --  
20 there's not one case that we're going to see and  
21 we haven't seen and we're not going to see, not  
22 one case of a state being able to actually collect

1 PRESIDENT NARIMAN: I don't follow --  
2 what is the tort here?

3 MR. VIOLI: Let me explain.

4 Mr. President, the Escrow Statute  
5 requires an NPM to put money -- every year has to  
6 put certain amount of money in and that money has  
7 to be held in the account for the benefit of the  
8 state for 25 years. And that's held there in case  
9 the state in the future tries to bring a lawsuit  
10 against the manufacturer, all right? And -- like  
11 a bond. And they have to hold it for 25 years and  
12 at the end of 25 years if the state does not bring  
13 a lawsuit against the tobacco, and win, right, the  
14 money is supposed to go back to the tobacco  
15 product manufacturer.

16 Now, this money that's held for  
17 25 years can only be used in a lawsuit that's  
18 defined in the MSA, a certain kind of claim. And  
19 those claims are the ones that the states brought  
20 between 1996 and 1998. And they were settled  
21 under the MSA. They're Medicaid recoupment cost.

22 What happened is the states -- various

1 states sued the tobacco companies, the big guys,  
2 and said, you lied, spiked nicotine and you  
3 conspired not to come out with a safer product.  
4 We're suing you, big companies, because we want  
5 you to pay the money for people who get sick. We  
6 have to treat them. So the state says, we have to  
7 pay for the hospital bills. We want reimbursement  
8 for that. So the states brought the lawsuits for  
9 four years and they settled them.

10 Now, those are the types of lawsuits  
11 for which we have to put money away for 25 years  
12 but none of those lawsuits ever went to the  
13 merits. None of the states -- the states said,  
14 let's settle with the tobacco companies. Let's  
15 enter into an agreement and let's pass this Escrow  
16 Statute. We don't want the courts to determine  
17 our fate. We don't want the courts to tell us  
18 whether we're entitled to the money or not under  
19 these types of cases.

20 So the Escrow Statute says, you, Grand  
21 River, must put the money away for 25 years in  
22 case the state wants to bring a similar lawsuit

1 PRESIDENT NARIMAN: What was that case?  
2 Cipollone?

3 MR. VIOLI: Cipollone versus Liggett.  
4 Liggett.

5 That was a case brought by the widow --  
6 the widower of -- I think it was Francis Cipollone  
7 sued the Liggett Company and got sick from  
8 smoking. Cipollone got sick from smoking and then  
9 it went all the way up to the Supreme Court of the  
10 United States.

11 The Supreme Court of the United States  
12 said, no, no, no. There's no strict liability.  
13 There's no fraud. There's none of these kinds of  
14 claims. They don't exist. You can't sue a  
15 tobacco company. You assumed the risk and in 1964  
16 and '69 the federal government put out a  
17 disclaimer that said, surgeon general warning  
18 label. So you know what you're -- there's a  
19 potential you're going to get sick if you consume  
20 the product. So the Supreme Court said, there's  
21 no such cause of action.

22 Well, the states came in under the MSA

1 against you.

2 Now, after the MSA -- after the MSA  
3 these cases were tested. They were brought by  
4 different sovereigns. They were brought by our  
5 brothers, the federal government of the United  
6 States brought a case, same kind of case, but the  
7 federal government didn't settle. They would not  
8 agree to settle. They wanted it determined by a  
9 judge. The judge threw the case out except for  
10 one claim, RICO, racketeering, because they  
11 conspired, right, conspiracy claims.

12 And the court also threw away the  
13 damages. The court said, these claims that you  
14 settled back under the MSA where you try to recoup  
15 the money for healthcare costs, no such claim.  
16 Because there was a previous Supreme Court  
17 decision called Cipollone which said that there's  
18 no private right of action or even a -- there's no  
19 right of action to sue a tobacco company if  
20 someone gets sick from smoking because of the  
21 warnings, because of assumption of risk, whatever  
22 the cause may be. So that court held that --

1 and said, you know what, we're trying to get  
2 around Cipollone and we're going to say we have to  
3 pay when the indigent person can't pay for cancer  
4 treatment and the state has to pay, because they  
5 do. They get reimbursed by the federal  
6 government. But when the state has to pay, they  
7 come in and they say, well, you know what, Phillip  
8 Morris, you didn't lie -- I mean you lied to the  
9 consumer but we had to pay for your lie. We had  
10 to pay. So the states tried to bring this type of  
11 lawsuit, but they didn't let to go to a judge.  
12 They would not let it go to a judge. They settled  
13 them on the eve of trial.

14 The federal government here said, we're  
15 not going to settle. We're going to go to the  
16 judge and get this decided by a judge.

17 PRESIDENT NARIMAN: And what happened,  
18 what was decided?

19 MR. VIOLI: Whether or not there is  
20 such a claim against the tobacco company, whether  
21 a government can sue a tobacco company for  
22 healthcare costs related -- you know, expenses and

1 the case against the federal government here, our  
2 brother across the table, the judge said, no such  
3 case exists. You cannot get damages for fraud and  
4 healthcare recoupment. Threw all those claims  
5 out. But the court did say, we will give you  
6 injunctive relief, like a monetary type of thing,  
7 you know, equity. We'll give you an equity kind  
8 of remedy for a RICO violation. That's the only  
9 thing that was sustained.

10 MR. WEILER: Exactly. Against the  
11 health insurance companies.

12 MR. VIOLI: Now, the health insurance  
13 companies, Blue Cross/Blue Shield, they sued.  
14 They're numerous. We have them in the record.

15 The health insurance companies did the  
16 same thing that the states did. They went and  
17 sued the tobacco companies and said, hey, we had  
18 to pay. Our customers have health insurance. We  
19 had to pay for cancer treatment. We're suing you,  
20 Phillip Morris and the tobacco companies. The  
21 court said, no such claim exists.

22 Pension funds. They did the same

1 of suing a company 25 years later after consuming  
2 a product? The statute of limitations -- I mean,  
3 there's fraudulent concealment, right? Which law  
4 extends to the one you knew or should have known  
5 that the product was dangerous, right?

6 That will carry you maybe a few years,  
7 but product liability is usually three years, six  
8 years max. Twenty-five years.

9 Could you imagine being tobacco company  
10 25 years from now, you put money away and -- put  
11 money away. 25 years they come knocking, God  
12 bless I hope you're still here. But they come and  
13 they knock on Mr. Jerry Montour's door and say,  
14 24 years ago you sold a product and we want you to  
15 pay for it. So what these cases held that have  
16 determined the merits --

17 PRESIDENT NARIMAN: But you paid up  
18 this?

19 MR. VIOLI: Well, you put it in a fund.

20 PRESIDENT NARIMAN: No, you did. Did  
21 you do it?

22 MR. VIOLI: Yes, \$50 million. To date,

1 thing.

2 So the point here, because now we're  
3 required to put money away for 25 years for those  
4 types of claims because when they formulated this  
5 statute in 1999, right, the Escrow Statute, they  
6 formulated it to require money to be paid by our  
7 clients to be put away for 25 years for those  
8 types of claims. But now all the cases have held  
9 there is no such claim.

10 What was it Mr. Hering said yesterday?  
11 We have no claim today. It's 11 years, 10 years  
12 after that statute. Have any evidence of a  
13 violation that would give such claim? No. Do you  
14 have a claim? Well, we might be able to have  
15 one --

16 PRESIDENT NARIMAN: And this doesn't  
17 depend upon whether you belong to an Indian Tribe  
18 or not.

19 MR. WEILER: No.

20 MR. VIOLI: No, this is generally.

21 So now, forget about the statute of  
22 limitations, Mr. President. Have you ever heard

1 \$50 million.

2 So what happens is now the state 25  
3 years -- so we have to put this money away. And  
4 the reason why we have to put this money away,  
5 because the agreement says, Phillip Morris has to  
6 pay \$5 a carton, exempt SPMs have to pay 70 cents  
7 or whatever it is a carton. We need you to pay  
8 money because of competition. We need you to  
9 neutralize the competition. That was the original  
10 plan for the Escrow Statute. Right?

11 So as part of that plan they said,  
12 well, we'll make you put your money away for  
13 25 years in case we sue you at some point. But  
14 all of the contemporaneous writings talk about  
15 it's to reduce competition, to limit our ability  
16 to compete. That's why when they changed the law,  
17 it took off from 50 cents a carton we were paying  
18 to roughly \$4 a carton. It hurt us tremendously  
19 in our ability to compete.

20 So now the cases have all held there's  
21 no such claim. Why, then, are we being asked to  
22 put \$5 per carton, 5.60 I think it is now. \$5 per

1 carton into an escrow fund for 25 years when all  
2 the experts agree you could be using that money  
3 for other purposes. You can compete more  
4 effectively against the exempt SPMs. You could  
5 use it as a better capitalization for purposes of  
6 growing your investment or putting it to better  
7 use in the context of your business.

8 Why put millions of dollars into a fund  
9 when the states can never get that money? There's  
10 no cause of action.

11 All of the cases that have decided have  
12 said there's no claim. The states can't get that  
13 money. There's no such thing as a released claim.

14 So that is what we submit, right? That  
15 is what -- is it denial of due process of taking  
16 of a property without just cause or reason? And  
17 we ask for the evidence from the other side, where  
18 did we do something wrong at that would allow you  
19 to take this money that you're requiring us to put  
20 \$5 away for the future.

21 PRESIDENT NARIMAN: Is this the  
22 Allocable Share Amendment?

1 this Premier brand, which is -- what's called  
2 Ultra Buyer Shield which is made by Premier. The  
3 exempt SPM, they have a five dollar advantage over  
4 you. I'm sorry I can't buy your product anymore.  
5 And so we were shut out of the market by that  
6 increase caused by the Allocable Share.

7 And we've been putting the money in,  
8 we've borrowing the money to try to comply with  
9 these measures until we get some form of relief  
10 because we've been putting the money into the  
11 escrow account, so there's now \$50 million but  
12 it's been sitting there at a rate of interest of  
13 like .5 percent. It doesn't even return money on  
14 it. But the states have no right to that money.  
15 There is no claim.

16 So imagine, if you will, Mr. President,  
17 that you have a bonding requirement by a state.  
18 You want to engage in some kind of activity and  
19 the state says, you need to pay -- forget about  
20 that you need to pay \$5 for the bond and somebody  
21 else needs to pay \$2. You have to pay \$5 per unit  
22 or per hour, whatever, for this bonding

1 MR. VIOLI: Yes. The Allocable Share  
2 made it go from 50 cents per carton to \$5 per  
3 carton, the effect of which was we had to put a  
4 lot of money in this fund. But the effect is also  
5 as they candidly admitted in other papers, that it  
6 has to raise our prices.

7 That is why, vis-à-vis, the exempt  
8 SPMs, we were shut out of the Oklahoma market, the  
9 Arkansas market. All of these markets, which we  
10 just couldn't hold onto because our price, as the  
11 record shows, we were at about \$10 per carton  
12 before the Allocable Share, we had to go up by two  
13 at that time, right? To about \$12. But Liggett  
14 targeted that Arkansas and Oklahoma market at 8.50  
15 a carton, almost three, four dollar difference.  
16 And as the affidavit in the record showed, one of  
17 the biggest distributors of discount cigarettes in  
18 the Arkansas market, I'm sorry, I can't buy your  
19 product anymore.

20 Another one in South Carolina said,  
21 your prices going up by, it's \$5 per more carton  
22 now after the Allocable Share. We have to go to

1 requirement. And imagine, if you will, that the  
2 state has no claim, can never get that five --  
3 there's no cause of action, no theory of liability  
4 upon which that state can ever get that \$5. It's  
5 a denial of justice. That's a violation of due  
6 process.

7 PRESIDENT NARIMAN: The federal case,  
8 the two of you, that judgment is reported?

9 MR. VIOLI: It is indeed. It's in the  
10 record. I think most of it is in the record.

11 PRESIDENT NARIMAN: Again will you  
12 just -- after you go through this transcript, will  
13 you just write it there at that point and give us  
14 that, put a tab on it.

15 MR. VIOLI: Yes.

16 PRESIDENT NARIMAN: Okay. Sorry to  
17 interrupt you.

18 ARBITRATOR CROOK: I wonder if we could  
19 go to the international law for a minute here.

20 Professor Weiler, as you and I very  
21 well know, all of the classic cases on denial of  
22 justice involved denial in the judicial system.



1 Now, Claimants's last paper fervently  
2 disavowed any intent to bring a denial of justice  
3 claim in the classic context of denial of justice  
4 in a judicial system.

5 What would you point us to in the way  
6 of authority for the proposition that what  
7 Mr. Violi has so eloquently described as a  
8 perversion of the legislative process constitutes  
9 a denial of justice?

10 MR. WEILER: The two that come to mind  
11 right offhand is the Freeman book from the 1920s  
12 and the Paulson book from the few years ago.

13 ARBITRATOR CROOK: I'm quite familiar  
14 with the Paulson book. I reviewed it, but you  
15 think if we look there we'll find support for your  
16 proposition?

17 MR. WEILER: I think you'll find  
18 support for the proposition that denials of  
19 justice are in no way limited to judicial systems.

20 ARBITRATOR CROOK: And includes  
21 perversion of the legislative process?

22 MR. WEILER: Well, in this case it's

1 respect me. Just answer the question, please.

2 MR. WEILER: Well, the answer to your  
3 question is, we are entitled under the NAFTA to  
4 seek injunctive relief and at the same time seek  
5 damages for denial of justice. And I submit and  
6 ultimately, sir, you don't have to take my  
7 submission, obviously, but I submit taking  
8 someone's money for 25 years and not even  
9 letting -- not even -- and you know you can't win  
10 in court but you don't give me a chance to go to  
11 court, that that's a denial of justice.

12 ARBITRATOR ANAYA: What do you mean by  
13 you don't get to go to court?

14 MR. VIOLI: We cannot sue, Professor --  
15 I would love to, especially after I've heard all  
16 the attorneys general say this, we cannot go to  
17 court to get declaration of our right to that  
18 money back until 25 years. And after 25 years it  
19 automatically comes back.

20 We can't go in, let's say, after the  
21 standard of limitations --

22 ARBITRATOR ANAYA: But can you go to

1 not about perversion of the legislative --

2 ARBITRATOR CROOK: Well, that's what  
3 Mr. Violi told us with great energy.

4 MR. WEILER: Well, with respect, sir,  
5 what he said was, he said that it was perversion  
6 of justice. He wasn't submitting that that was a  
7 denial of justice. A denial of justice is  
8 straightforward. They took the money for 25 years  
9 and we didn't get to go to court. At least the  
10 big companies, they got to go to court and on the  
11 eve of that case they settled. But we don't get  
12 to go to court.

13 ARBITRATOR CROOK: Professor Weiler,  
14 haven't you been litigating rather  
15 energetically --

16 MR. WEILER: Not on this issue.

17 ARBITRATOR CROOK: -- on whether the  
18 Allocable Share Amendments were proper? You  
19 haven't litigated that question anyplace?

20 MR. WEILER: There's a -- that's --  
21 with respect, sir, there's a different --

22 ARBITRATOR CROOK: You don't have to

1 court to challenge the escrow --

2 MR. WEILER: We can challenge the  
3 constitutionality of it.

4 MR. VIOLI: Not under international  
5 law, and not for damages.

6 Under the 11th amendment the states are  
7 immune from damages. We can only seek equitable  
8 relief to the extent we can. And we have. You  
9 can't get recompense. All the damage suffered to  
10 date and that will happen in the future, we will  
11 never be able to get -- monetarily recompensed for  
12 that.

13 MR. WEILER: And the NAFTA released  
14 very clear it says that one cannot seek damages in  
15 two fora, but one can seek special relief and this  
16 would be the type of special relief that  
17 constitutes no challenge. So, it is clear that  
18 we're not barred from doing it. The NAFTA  
19 language wage is clear we can seek injunctive  
20 relief, some sort of special relief, while we seek  
21 damages but frankly we want damages. We don't  
22 think it's fair.

1 ARBITRATOR ANAYA: Okay. So, what you  
2 mean when you say you can't go to court is that  
3 you can't go to court to seek damages.

4 MR. WEILER: We can't go to court to  
5 dispute the issue of whether or not healthcare  
6 costs can be recouped because their statute says  
7 they're keeping that money for 25 years in case we  
8 do something culpable and the definition in the  
9 statute says they can recover for healthcare costs  
10 if they can -- but we don't get to go to court and  
11 have them bring it on and have that fight and see  
12 if they can prove that there's healthcare costs  
13 and that we should be putting money away. No,  
14 instead they're just going to keep it for  
15 25 years; they may decide to sue us on the 25th  
16 year they may not. That's -- the big tobacco  
17 companies didn't have to do that. They got to go  
18 to court right away and they got a really good  
19 settlement.

20 MR. VIOLI: You're right that we cannot  
21 sue for damages, though, for the harm here, but  
22 can only get injunctive relief which would not

1 Constitution.

2 PRESIDENT NARIMAN: You can continue.

3 MR. WEILER: Funny we should mention  
4 abuse of right, because that's also a customary  
5 international law doctrine and that's one of the  
6 other bases for explaining what fair and equitable  
7 treatment means and what the minimum standard  
8 means. Arbit du droit is widely accepted. The  
9 last time I saw a really strong doctrinal  
10 challenge to it was Schwartzberger in the 1960s,  
11 and his student, Bin Chang, is actually the best  
12 source for -- and actually, I forgot, his quote  
13 is right there, for explaining what an abuse of  
14 right is. A reasonable and bona fide exercise of  
15 a right in such a case is one which is appropriate  
16 and necessary for the purpose of the right, in  
17 furtherance of the interest that the right was  
18 intended to protect. It should at the same time  
19 be fair and equitable as between the parties and  
20 not one that's calculated to procure for one of  
21 them an unfair advantage in light of the  
22 obligation assumed.

1 remedy the damages caused which is--

2 ARBITRATOR ANAYA: I understand your  
3 argument, Mr. Weiler that you keep going to but at  
4 this point I'm really trying to get clarity on it.

5 MR. VIOLI: Yeah, we cannot, under the  
6 11th Amendment. And so, therefore, all of our  
7 litigation -- actually we have one litigated--a  
8 couple litigated -- we only seek -- we could sue,  
9 we haven't yet. You can get damages from an  
10 Attorney General if you sue him in an individual  
11 capacity meaning that he abused state law under  
12 the authority of state law and took some action  
13 that violated your civil rights. We haven't done  
14 that yet and quite frankly that's not a fight that  
15 we brought on. That's the only way you could --  
16 but that wouldn't be the actions of the state at  
17 that point; that would be a rogue Attorney General  
18 or attorneys general that did certain egregious  
19 conduct which would not even be brought under  
20 state law, but the 11th Amendment precludes us  
21 getting any kind of monetary relief under the  
22 Constitution, the 11th Amendment of the

1 That kind of sounds like our case here.

2 And I've just switched the slide there. We have  
3 Mr. Eckhart actually saying on the record -- and  
4 again yes we're going to document exactly where  
5 actually -- I wrote it down at the time, he admits  
6 he didn't know whether he had the authority to  
7 send that letter, that very strong letter, to the  
8 FTZ. He didn't know whether he actually had the  
9 authority to do that. He didn't investigate  
10 whether he had the authority to do it; he just  
11 went ahead and did it. We have a special task  
12 force for deputy attorneys general called the  
13 Grand River project or -- Working Group. The  
14 Grand River Working Group.

15 We have deputy attorneys general  
16 getting together and having meetings so that they  
17 can plot out how to sue the Claimants.

18 PRESIDENT NARIMAN: You must have done  
19 something egregious and shocking.

20 MR. WEILER: I think so. I think --  
21 no, actually, I think I disagree. I think this is  
22 shocking and outrageous and egregious.

1 Yes, Mr. Crook?  
 2 ARBITRATOR CROOK: I don't remember  
 3 Claimants ever arguing abuse of right before  
 4 today. Is this a new argument you're making?  
 5 MR. WEILER: No, it's in there.  
 6 ARBITRATOR CROOK: Is it?  
 7 MR. WEILER: I'll give you this, but  
 8 the Bin Chang is in there. I think it was the  
 9 First Memorial but I'd have to go back.  
 10 ARBITRATOR CROOK: First Memorial back  
 11 4 or 5 years ago.  
 12 MR. WEILER: I don't think it's 4 or  
 13 5 years ago but definitely it's in there.  
 14 ARBITRATOR CROOK: Okay.  
 15 MR. WEILER: Actually -- frankly, it's  
 16 in all my pleadings because I really like the  
 17 abuse of right as a theory.  
 18 ARBITRATOR CROOK: Okay. Would you  
 19 refer us to any NAFTA cases that have adopted the  
 20 theory?  
 21 MR. WEILER: Well, as a matter of fact,  
 22 I was just going to point you to the Pope & Talbot

1 the market is the rail line south. So, if we lose  
 2 our quota because this man just basically decides  
 3 that our, that the review doesn't suit his needs,  
 4 we're out of luck.  
 5 So, he tells us we have to bring -- he  
 6 wants an audit but he wants us to bring -- it was  
 7 about 50 boxes -- basically every scrap of paper  
 8 up to Canada so he can take a look at it. That's  
 9 not a normal audit but that's what he wanted and  
 10 he claimed he didn't have authority to come down  
 11 to the U.S. to do it. That's not true under the  
 12 Customs Act, actually; there's a reciprocal  
 13 agreement for that, but he didn't bother checking  
 14 into that. He just asserted he had the authority  
 15 to do it. And so, what we had to do is we brought  
 16 a claim and -- well, not a claim. We brought a  
 17 motion for interim measure. We actually knew we  
 18 were going to lose but we wanted to put it before  
 19 the Tribunal because the interim measures  
 20 provision in NAFTA says you can't enjoin the  
 21 measure and we were going to ask them to enjoin  
 22 the measure, but we got it before the Tribunal and

1 case and it is true they never said the words  
 2 "abuse of right," but if you fact pattern of Pope  
 3 & Talbot, which I so happen to know well because I  
 4 was in it. We've got a very similar case. In  
 5 Pope & Talbot, we sued the Canadian government.  
 6 We were Americans and we sued the Canadian  
 7 government and we sued them because we felt that  
 8 we were being mistreated, brought a fair and  
 9 equitable claim, brought an expropriation claim,  
 10 brought a national treatment claim, and guess what  
 11 happened fairly soon after we sued them. Minister  
 12 of Foreign Affairs, the man in charge of the  
 13 system, he decided to do a little audit. He did  
 14 an audit on us.  
 15 And his audit -- he started asking us  
 16 to do things that we didn't really think he had  
 17 any authority to do but we didn't have much choice  
 18 because what he was holding over us was the  
 19 ability to recommend to the minister for us to  
 20 lose our quota, and if we lose our quota we can't  
 21 ship because this plant is located in between  
 22 mountains in British Columbia and the only way to

1 the Tribunal said, we'll remember this for the  
 2 merits and we don't think that this audit -- they  
 3 looked at the audit, they looked at the whole  
 4 thing and they said, we can't decide on this  
 5 because we have to put it off on the merits but we  
 6 don't think this audit is anything that anyone  
 7 should be proceeding on.  
 8 A couple years later we actually had  
 9 the hearing. Mr. -- it was Doug, I can't remember  
 10 his last name. Doug is sitting there at the table  
 11 and Doug is--I think it might have been Black --  
 12 anyway, Doug is asked some questions by the two  
 13 counsel and then the Tribunal asked a question and  
 14 he said -- out of his mouth pops, oh, yeah, I  
 15 wrote a letter to the Minister on that. It wasn't  
 16 in the record so we got the memo and the memo  
 17 basically said, we're not sure. We think there  
 18 might be some criminal activity going on and even  
 19 though the audit wasn't the best we think maybe  
 20 you should take away that quota. The Tribunal was  
 21 apoplectic about this. The Tribunal -- it was  
 22 actually the very first Tribunal to deal with that

1 new statement and it didn't like the statement and  
2 it said it didn't think it should follow it but it  
3 said it didn't matter because in this case this  
4 was shocking, egregious, and outrageous. I submit  
5 to you this is worse. We don't just have a little  
6 hint to the Minister about criminal behavior.  
7 He's got to go to court in three months and we  
8 already know from our friend, I think it was  
9 Mr. Eckhart yesterday, who said oh, yeah, I had a  
10 little chat with the federal prosecutor and, yeah  
11 /my California judge did throw that out and said  
12 they didn't believe it, but he could go to jail.

13 That's more than just a little kind of  
14 hint to the Minister. This is really serious.  
15 And you have a working group of attorneys general  
16 meeting, they won't tell us about it because  
17 apparently -- obviously it's work product  
18 privilege, but I'm sorry what kind of world do we  
19 live in when a group of attorneys general can get  
20 together and plop their strategy and so far their  
21 cases aren't that -- very successful. They seem  
22 to be not doing so well. That doesn't seem to

1 working group. What do they discuss? What do  
2 they plot? What is the purpose of it? But they  
3 have not produced any documents. We haven't seen  
4 any Grand River Working Group documents.

5 MR. FELDMAN: I'm sorry, that request  
6 was never made and discovery issues are closed in  
7 this matter.

8 MR. WEILER: Adverse inferences aren't  
9 closed.

10 Actually, Mr. Chairman, we've got some  
11 slides later on that address the questions that we  
12 specifically asked. The one final point about  
13 Mr. Eckhart I just wanted to remind the Tribunal  
14 of, as Mr. Violi was questioning him -- and again,  
15 we'll point this out exactly on the record it  
16 turns out that our friend from California admitted  
17 that there was no claim under the California  
18 Escrow Statute for going after Grand River, so  
19 they used their complementary legislation. My  
20 friend's argument is that the complementary  
21 legislation is really not even a measure at all,  
22 this's just complimentary. It just helps the

1 bother them, though, because they're still writing  
2 the letters and still bringing the cases. The  
3 fact that this --

4 PRESIDENT NARIMAN: Is this on record  
5 that this is called the Grand River project group?

6 MR. WEILER: Yes. Yes, we heard it  
7 yesterday, and the day before.

8 MR. VIOLI: We heard that there is a  
9 group, they do meet, we've asked --

10 PRESIDENT NARIMAN: Called Grand River  
11 project?

12 MR. VIOLI: Yes, it's the Grand River  
13 Working Group.

14 PRESIDENT NARIMAN: Working group.

15 MR. VIOLI: Yes, we are one of the few,  
16 perhaps the only entity that I'm aware of that has  
17 its own working group and an Attorney General's  
18 office for the enforcement of certain laws.

19 PRESIDENT NARIMAN: There's no Phillip  
20 Morris working group?

21 MR. VIOLI: Not that I'm aware of, Mr.  
22 President, but we've asked for documents of this

1 Escrow Statute along. Well, if that's true --  
2 and you will have your chance if you want to  
3 disagree -- the Escrow Statute wasn't supposed to  
4 be enforced here. So, if my friend and he'll  
5 correct me if I'm wrong, but I'm pretty sure I saw  
6 this in his arguments -- if my friend is right  
7 that the Escrow Statute really -- I'm sorry, that  
8 the Contraband Law isn't unique, that it's kind of  
9 part and parcel of the same thing then we've got  
10 another really good manifest excess of authority,  
11 because if it's supposed to only be use today go  
12 after escrow claims and he doesn't have one but he  
13 uses it anyway that's problematic; that's  
14 egregious. That's shocking to me that he would do  
15 that.

16 So, this is why when I saw yesterday --  
17 when I saw him say, oh, yeah, I didn't have  
18 authority to do that, I instantly thought of four  
19 years ago -- actually, I guess it's about seven or  
20 eight now. I thought of Pope & Talbot instantly  
21 because the facts are so similar. And I will make  
22 sure -- I know we have a couple Pope & Talbots in

1 there, there were three awards, we have to make  
2 sure you have the damages award because they made  
3 two findings on 1105, once before the NAFTA  
4 parties got together and issued their statement  
5 and once after, and I'm talking about the "after"  
6 one.

7 By the way in the Pope & Talbot case,  
8 we actually lost our arguments. What we won on  
9 was this egregious abuse of authority for the  
10 audit afterwards.

11 Do you want to take a break,  
12 Mr. President? I see you were looking at the  
13 clock there.

14 PRESIDENT NARIMAN: No.

15 ARBITRATOR ANAYA: The abuse of  
16 authority, the abuse of right that you're talking  
17 about, are you using their terms interchangeably?

18 MR. WEILER: Yes, I use them  
19 interchangeably because in common law, especially  
20 in Canada, it's become a tort called the abuse of  
21 authority tort.

22 It is kind of a funny story because it

1 I think I.

2 ARBITRATOR ANAYA: I understand. You  
3 don't have to go back to that. So, when they are  
4 cumulative they can still be distinct.

5 MR. WEILER: Yes.

6 ARBITRATOR ANAYA: Right? Now, are  
7 they distinct or does it just go to a different  
8 characterization of the same facts?

9 MR. WEILER: No, this abuse -- I mean,  
10 Mr. Crook is certainly right to wonder, well,  
11 where was this abuse of authority before because  
12 it was frankly really being used for the notion of  
13 arbitrariness, to explain how arbitrariness works.

14 ARBITRATOR ANAYA: Okay. So, you  
15 didn't have a distinct section in your Memorial  
16 about abuse of right.

17 MR. WEILER: We did. We had an abuse  
18 of right section.

19 ARBITRATOR ANAYA: I'm looking for it  
20 and I actually typed in "abuse of right" and then  
21 a find function and I --

22 MR. WEILER: In the Memorial or the

1 was actually--

2 ARBITRATOR ANAYA: I know. That's why  
3 I'm asking, because it seems like there are  
4 certain elements we need to find and it seems like  
5 you're putting everything together, all these  
6 different, as you describe them, egregious acts or  
7 omissions. Is it different from just the  
8 generally shocking nature that you assert here or  
9 is it the distinct --

10 MR. WEILER: Abuse of right is a  
11 principle, and so it's a doctrine and it's a  
12 principle. The WTO calls it a principle; I  
13 usually call it a doctrine.

14 ARBITRATOR ANAYA: Are you just  
15 conflating it with all the other stuff here?

16 MR. WEILER: Well, no, I'm not  
17 conflating. My submission is that they're  
18 cumulative.

19 ARBITRATOR ANAYA: Okay. All right.

20 MR. WEILER: What I have to do to prove  
21 an 1105 breach is show you how customary  
22 international law rules contribute to this norm.

1 Reply?

2 ARBITRATOR ANAYA: In the Memorial.

3 MR. WEILER: It could have been the  
4 reply, but i will certainly.

5 ARBITRATOR ANAYA: I've been looking  
6 for it and can't find it.

7 MR. WEILER: I could--if you like, we  
8 can break and--

9 ARBITRATOR ANAYA: I found one  
10 reference to abuse of right but it's kind of  
11 buried in a general distinction.

12 PRESIDENT NARIMAN: Look for it in the  
13 afternoon. Yes.

14 MR. WEILER: Okay.

15 ARBITRATOR ANAYA: I'm just trying to  
16 understand, get the structure of all of it here.

17 MR. WEILER: Abuse of right is -- I  
18 mean, it's rooted in the general principle of good  
19 faith.

20 ARBITRATOR ANAYA: No, I understand the  
21 principle.

22 MR. WEILER: Yeah, okay.

1 ARBITRATOR ANAYA: I'm just trying to  
2 see how you're presenting it, how you're relating  
3 it to the various facts that you're putting on the  
4 table, how you're relating it to the different  
5 elements--

6 MR. WEILER: No, I--

7 ARBITRATOR ANAYA: --out of the NAFTA  
8 standard that you're articulating, how it fits in  
9 your overall structure of your argument in your  
10 Memorial; that's what I'm trying to get to.

11 MR. WEILER: Until Mr. Eckhart told us  
12 that he was doing that without authority and until  
13 we found out that he was -- he admitted that he  
14 was using the Contraband Statute even though he  
15 didn't have an escrow claim, that's why, if you  
16 will, the abuse of right was rather dormant. I  
17 mean, now it --

18 PRESIDENT NARIMAN: Could you just  
19 explain that, that contraband claim was his abuse  
20 of --

21 MR. WEILER: Mr. Eckhart explained that  
22 he used his -- sometimes they call it a listing

1 enforcement of the Escrow Statute -- primarily,  
2 excuse me, enforcement of the Escrow Statute,  
3 because what the complementary legislation does is  
4 you cannot sell from January 1 to December 31  
5 unless you do certain things under the  
6 complementary legislation. Those things are:  
7 Fill out a form, says your name, give pictures of  
8 your plant, say who you're owned by, or your  
9 address. The other thing you need to do is say  
10 you're in compliance with the Escrow Statute and  
11 that you will comply with the Escrow Statute. You  
12 must adopt as brand as your brand family. So, in  
13 this case Grand River will have to say, Seneca is  
14 my brand and the Seneca brand family is mine and I  
15 will be responsible for it.

16 One of the other things you have to do  
17 under the complementary legislation is waive  
18 personal jurisdiction. You have to say that you  
19 agree that the Attorney General can sue you for  
20 enforcement of the Escrow Statute. You have to  
21 waive personal jurisdiction.

22 Now, what we've said is that is a

1 statute, a contraband law, the complementary  
2 legislation -- he admitted to Mr. Violi --  
3 actually, Mr. Violi, if you want to actually say  
4 it, it might actually be easier.

5 PRESIDENT NARIMAN: Go ahead, whoever  
6 wants to.

7 MR. VIOLI: He said that -- first, he  
8 said that, as the other A G said, it enforces --  
9 it helps the enforcement and as the NAAG documents  
10 show, it was to help the enforcement of the Escrow  
11 Statute, because the Escrow Statute you have to  
12 wait 15 months to enforce. So, you start January  
13 to December, you make sales, and then you have to  
14 make a payment on April 15 of the following year  
15 -- well that's 16 months. So, what happens is,  
16 then, if you don't make that payment on April 15th  
17 of the following year the Attorney General gets to  
18 bring a lawsuit against you under the Escrow  
19 Statute to seek enforcement.

20 So, as Mr. Hering testified, the  
21 complementary legislation was meant to do a couple  
22 of things, right? The first of which was to aid

1 little bit of a problem because it tried to  
2 correct, although they never told us why -- it  
3 tried to correct the situation where they don't  
4 have personal jurisdiction over a foreign  
5 manufacturer, which they admitted in private. So,  
6 what they did is, let's get around the due process  
7 limitations that we have and just force a company  
8 to waive personal jurisdiction under the  
9 complementary legislation, and then we solved our  
10 foreign manufacturer problem. So, that's what the  
11 complementary legislation does and then you have  
12 to certify all that in a document. And then, when  
13 you give it to the Attorney General, he can  
14 approve or deny it and then he will -- if he  
15 approves it then he puts your brand on the  
16 approved list, the white list, and then it can be  
17 sold.

18 So, what I believe Mr. Eckhart's  
19 testimony was is, well, it stands alone, it also  
20 stands alone, meaning it's not just to enforce the  
21 Escrow Statute so that we make sure you pay your  
22 escrow and if you don't pay we can ban you or we

1 can ban you before unless you agree to pay escrow.  
 2 What it also does according Mr. Eckhart  
 3 is stand alone and allows him to band the product  
 4 separate and apart from, apparently, in compliance  
 5 with the Escrow Statute. He's right, it does act  
 6 independently that way because it acts as band, an  
 7 embargo -- an interim embargo against your brand  
 8 even before the time that it's due to make payment  
 9 for it.

10 So, he said that it stand alone and it  
 11 allows him to tell someone not to let the  
 12 cigarettes in the state, not to sell the  
 13 cigarettes in the state, or not to sell to someone  
 14 in the state independently of compliance with the  
 15 Escrow Statute; that's what Mr. Eckhart testified  
 16 yesterday.

17 So, my --

18 PRESIDENT NARIMAN: So, what's wrong  
 19 with that?

20 MR. VIOLI: What's wrong with it is  
 21 that it imposes a couple of thing.

22 First thing is the due process

1 --  
 2 MR. VIOLI: NWS did, spend a lot of  
 3 money in defending against California because  
 4 California brought a lawsuit against NWS for the  
 5 complementary legislation, and NWS obtained a  
 6 jurisdictional award -- right -- by the court in  
 7 California. The California court said you have no  
 8 jurisdiction over this NWS with respect to this  
 9 Indian commerce even under the complementary  
 10 legislation. You cannot ban the sale. What did  
 11 the Attorney General California say yesterday? I  
 12 don't care what the court says. I enforce the  
 13 laws of California and to me you are violating  
 14 California law and we're not putting you on the  
 15 list, even though I don't have jurisdiction to  
 16 prosecute you or regulate you under that law, I'm  
 17 still not putting you on the list, you're not on  
 18 the list, and it's over. If you want to come in,  
 19 he said, at the end of his testimony, come in, pay  
 20 us all the money we say is due, get certified,  
 21 waive your personal jurisdiction, do all those  
 22 things -- to Grand River -- and then we'll let NWS

1 limitation. It requires a manufacturer, as they  
 2 called it -- Philippines, India, or China -- who  
 3 are not subject to personal jurisdiction in  
 4 California. It requires them in international  
 5 commerce they sell to a manufacturer -- they sell  
 6 to a manufacturer --

7 PRESIDENT NARIMAN: But this is only a  
 8 challenge to the statute you are now saying.

9 MR. VIOLI: Yes, yes.

10 PRESIDENT NARIMAN: But then, nobody  
 11 has challenged the statute.

12 MR. VIOLI: Yes the complementary  
 13 legislation is challenged; it is one of the  
 14 measures. The Contraband Law --

15 PRESIDENT NARIMAN: No, by "challenge"  
 16 I mean challenge in a court of law not challenged  
 17 here.

18 MR. VIOLI: There was a challenge in  
 19 the court of law but you can't get damages, again.  
 20 You're limited to what you can do. You --

21 PRESIDENT NARIMAN: But you can get a  
 22 declaration that it is unconstitutional, invalid

1 sell.  
 2 So, even in the face of a judicial  
 3 finding. Mr. President, the judge of California  
 4 has said you can't enforce this law on-Reservation  
 5 with respect to NWS.  
 6 PRESIDENT NARIMAN: That's Superior  
 7 Court judgment?  
 8 MR. LUDDY: Yes.  
 9 MR. VIOLI: Indeed, indeed. Not  
 10 withstanding a judge telling the Attorney General  
 11 -- and it's always been the system of a law i  
 12 think in the world let alone the United States  
 13 that the courts are the authority; they're the  
 14 final authority. Not in this case. The court of  
 15 law does not exist with respect to these laws;  
 16 it's amazing. We had the South Dakota Attorney  
 17 General -- Grand River went all the way up to the  
 18 Supreme Court of South Dakota because their  
 19 product went to the Sioux, the Yankton Sioux in  
 20 South Dakota through various channels. So, it  
 21 gets up to the Tribe--they sue--South Dakota  
 22 Attorney General sues Grand River, all the way up

1 to the Supreme Court of South Dakota. South  
2 Dakota court says sorry just like the Wisconsin  
3 court, just like the other Superior Court in  
4 California. There's no jurisdiction over at Grand  
5 River. It is a foreign manufacturer; it deals  
6 with the NWS, the Nation trading, and then it goes  
7 through interstate channels or international  
8 channels and it gets here to a tribe in  
9 California, Wisconsin, or South Dakota. We don't  
10 have jurisdiction -- South Dakota Supreme Court,  
11 it's a six-member panel, whatever it was.

12 What does the South Dakota Attorney  
13 General say? We -- we -- may have lost this  
14 battle but I can assure you we did not lose the  
15 war. With all due respect, who is the "we"? The  
16 highest court of South Dakota has told the  
17 Attorney General, back off: You don't have the  
18 authority to enforce this law.

19 PRESIDENT NARIMAN: How many such  
20 actions there are in which you have judgments  
21 secured in the present case which are on record,  
22 roughly?

1 this against Grand River. He submits in an  
2 article -- he says in an article -- he says, I am  
3 working -- we are all working together with other  
4 states -- "we," right? And although we lost this  
5 battle, I can assure you we did not lose the war.  
6 What is the battle? What is this working group?

7 PRESIDENT NARIMAN: What is this  
8 article you are talking?

9 MR. VIOLI: Right after Grand River  
10 secured the--

11 PRESIDENT NARIMAN: It's on record?

12 MR. VIOLI: No, no, in south Dakota,  
13 right after--

14 MR. FELDMAN: Counsel, is this on  
15 record?

16 MR. VIOLI: It's in the record. It's  
17 in the materials.

18 MR. FELDMAN: What do you mean by "the  
19 materials"?

20 MR. VIOLI: It was submitted in the  
21 materials in the case -- the South Dakota opinion  
22 in the articles is certainly in the case. I don't

1 MR. VIOLI: There are default judgments  
2 which Mr. Luddy spoke about yesterday. There are  
3 quite a few. I think Mr. Hering said maybe a  
4 dozen, few more -- a dozen --

5 PRESIDENT NARIMAN: Can you give us a  
6 list in your closing argument.

7 MR. VIOLI: We can of what they said.

8 Then, we went back in select states  
9 where the states really tried to push South  
10 Dakota, Wisconsin, and California where the states  
11 tried to push their enforcement of these default  
12 judgments. We went back in the state courts and  
13 in every case so far that has been decided, we  
14 have won.

15 So, the courts have recognized -- but  
16 my point is that the South --

17 PRESIDENT NARIMAN: Can you give us  
18 that.

19 MR. VIOLI: We will, absolutely.

20 What was particularly egregious is the  
21 South Dakota Attorney General is told by his  
22 highest court in his state, you cannot enforce

1 know if it's in the Memorial.

2 PRESIDENT NARIMAN: You better check on  
3 it.

4 MR. VIOLI: Yeah. And that's where we  
5 saw this claim of, we lost the battle but I can  
6 assure you we have not lost the war.

7 In all due respect, this is the highest  
8 court telling the Attorney General you don't have  
9 authority to enforce. Why is the South Dakota  
10 Attorney General engaged in a war in battles in  
11 other jurisdictions? He has no jurisdiction in  
12 other states. He has no jurisdiction to meet with  
13 NAAG and the California Attorney General or the  
14 New Mexico Attorney General or the South -- but  
15 that's what's going on: They are waging a war  
16 evidenced by that Grand River working group.

17 Now, I submit we did not know it was  
18 called the Grand River working group so I did not  
19 ask for all documents of the Grand River -- you  
20 can't ask for that which you don't know, but we  
21 know there's a working group. Wouldn't the  
22 Respondent have seen unto itself if they knew



1 there was a Grand River working group to produce  
2 those in good faith and to the other side? They  
3 have not. Even absent our request, because we  
4 didn't know that working group existed, even  
5 absent that, didn't they have an obligation to  
6 produce that to the Tribunal and to us? So, with  
7 that, your Honor. . .

8 MR. WEILER: So Professor Anaya, with  
9 respect to the abuse of rights argument,  
10 essentially I'd say it would boil down to two  
11 things, the new evidence we heard from Mr. Eckhart  
12 about issuing directions without authority or  
13 without a known authority, and the other one is,  
14 and this is -- I understand the gravity of what  
15 I'm saying, a number of attorneys general appear  
16 to be on some sort of warpath against our clients  
17 and it doesn't seem -- they're not deterred by  
18 statements of law in their court.

19 Now, I understand my friend will say,  
20 with respect to Mr. Eckhart, well he's got it on  
21 appeal. I understand there's some niceties there,  
22 but the bottom line is this just doesn't smell

1 claim in a particular way in your -- the last two  
2 pleadings you've done. As Professor Anaya pointed  
3 out abuse of right doesn't seem to have been in  
4 there. I don't recall it and if it is I  
5 apologize. But I certainly don't remember it  
6 being there and apparently he can't find it.

7 Now, we've just had a brand new  
8 presentation of the abuse of right claim with  
9 respect to matters that really weren't laid out in  
10 any of the written materials. At some point, does  
11 the Tribunal need to sort of try to freeze the  
12 claim?

13 MR. WEILER: I think probably the  
14 Tribunal --

15 MR. VIOLI: Can I explain -- do you  
16 mean that we didn't bring up the South Dakota  
17 opinion and how -- or something else? I'm sorry,  
18 Mr. Crook?

19 ARBITRATOR CROOK: I don't recall the  
20 law review article or the attorneys general being  
21 on the warpath before. If it was, I apologize but  
22 I don't really recall that.

1 like the normal public authority use. This sound  
2 like overzealous prosecution of a particular group  
3 which does reminds me of Duplesy versus the Crown  
4 -- or no, it was Duplesy versus -- I can't  
5 remember, but anyway the Duplesy case. That's the  
6 case for abuse of authority in Canada that  
7 actually went -- it was a Quebec case, went over  
8 to the Crown because the privy counsel was still  
9 in charge and then came back to Canada in the  
10 common law as an abuse of authority tort even  
11 though this left the country as civil law which is  
12 kind of neat, which by the way explains the whole  
13 notion of abuse of authority and how it crosses  
14 different legal cultures, left Canada as a civil  
15 law claim came back as a common law tort. So--

16 PRESIDENT NARIMAN: Mr. Crook has a  
17 question.

18 MR. WEILER: Yes.

19 ARBITRATOR CROOK: Okay. So, Professor  
20 Weiler you're now -- I'm just concerned about the  
21 way the claims keep evolving.

22 You presented the denial of justice

1 MR. WEILER: We actually feel kind of  
2 aggrieved, too, Mr. Crook, because we only found  
3 out about it the past few days. And we asked --  
4 we did ask -- we're going to get to those slides  
5 when I'll show you what we asked for. We did not  
6 get the production about a Grand River working  
7 group. We did not find out that it turns out that  
8 Mr. Eckhart was freelancing on his authority. We  
9 didn't know there was a working group. So, I  
10 would agree with you, it was definitely not in our  
11 statement of claim because we didn't find out  
12 about it until yesterday.

13 MR. VIOLI: But the South Dakota -- the  
14 point we have made is that throughout, since day  
15 one, because the South Dakota case started before  
16 this one, I believe, is that they proceeded  
17 without the diligence required to determine  
18 whether they had personal jurisdiction or  
19 jurisdiction at all over these Claimants.

20 There's an assumption which we'll find  
21 out and read. The assumption is that if your  
22 cigarette is found in the State of South Dakota

1 and everywhere else -- and it's in the first  
 2 slide of the presentation they gave yesterday --  
 3 if your cigarettes are found in the state, the  
 4 assumption is you sold it in the state. And on  
 5 that assumption, which violates every principle of  
 6 due process that I know of and I've read in either  
 7 in international or domestic law -- on the  
 8 assumption that due -- that your jurisdiction --  
 9 the jurisdiction follows the product. A company  
 10 in India that sells it to an importer who's in  
 11 Germany who then has it imported into the United  
 12 States and then sold eventually in Illinois -- and  
 13 I know because I represent this Indian company,  
 14 okay? It ends up in Illinois, the company in  
 15 India doesn't own the trademark; it doesn't have  
 16 any control over it after it's sold to the  
 17 immediate seller, and it ended up in Illinois,  
 18 Illinois brings one of the most massive cases  
 19 against this Indian company and the personal  
 20 jurisdiction and the owner of the Indian company  
 21 says, this violates international law. This is  
 22 over eight years ago. How can the State of

1 their diligence when they went and sued Grand  
 2 River in California, when they sued them in  
 3 Wisconsin, when they sued them in South Dakota.  
 4 All of the courts have held no personal  
 5 jurisdiction.

6 ARBITRATOR ANAYA: The fact they lost  
 7 doesn't mean they didn't come to a good faith  
 8 argument, or at least good faith from the  
 9 standpoint of their standpoint.

10 MR. VIOLI: Their standpoint.

11 ARBITRATOR ANAYA: Well, do you have to  
 12 win an argument -- I mean, is that what you're  
 13 saying, to win --

14 MR. VIOLI: No, but give the basis for  
 15 it.

16 ARBITRATOR ANAYA: Well, he said that  
 17 they had basis.

18 MR. VIOLI: Not really. I don't see  
 19 anything in the record that has basis.

20 PRESIDENT NARIMAN: He said there were  
 21 documents and the lady judge overlooked them;  
 22 that's what he said.

1 Illinois reach across the world simply because --

2 ARBITRATOR ANAYA: Mr. Violi, that's  
 3 not this case, is it?

4 MR. VIOLI: It is.

5 ARBITRATOR ANAYA: It is. Okay.

6 MR. VIOLI: It is indeed because this  
 7 is why -- this is why: The states just assume  
 8 that if your product is in their state they have  
 9 personal jurisdiction over you. That's an  
 10 exercise of jurisdiction that has never been  
 11 placed before anywhere in the record books. It  
 12 was an abuse. They did no research, Professor  
 13 Anaya, to determine whether they had jurisdiction  
 14 over Grand River before and when they launched  
 15 their lawsuits. We saw it today, no jurisdiction  
 16 -- it's a pattern. I don't know if I have  
 17 jurisdiction over the Foreign Trade Zone,  
 18 Mr. Eckhart said, so did Mr. Thomson, but I'm  
 19 going to write the letter, anyway.

20 ARBITRATOR ANAYA: I don't know if he  
 21 said that, but I --

22 MR. VIOLI: Certainly they didn't do

1 MR. VIOLI: Indeed, between NWS and  
 2 California.

3 ARBITRATOR ANAYA: Okay. So, we have  
 4 to -- so, we need, I mean what I'm trying -- I'm  
 5 grappling with -- I mean, I may not agree with his  
 6 position on the law and the substance and the  
 7 outcome of the California litigation and I may  
 8 happen to agree -- I'm not saying I do, I'm just  
 9 saying I may happen to agree with the Superior  
 10 Court decision, but that's one thing. Quite  
 11 another thing is for me to say they were committing  
 12 an abuse of authority even taking that position  
 13 and they're committing an abuse of authority in  
 14 appealing. I mean, that's quite --

15 MR. VIOLI: What you'll find on this  
 16 issue that I find concretely and was stated in the  
 17 slide by the Government, which is nowhere --  
 18 there's no precedent for it anywhere.

19 PRESIDENT NARIMAN: No what?

20 MR. VIOLI: No precedent for it -- is  
 21 that they assumed jurisdiction.

22 PRESIDENT NARIMAN: If it's found

1 there.

2 MR. VIOLI: If the product they assume  
3 in rem jurisdiction over the manufacturer if the  
4 product is found in a jurisdiction in a state.  
5 That, Professor Anaya, there's no precedent for it  
6 anywhere.

7 Now, if the foreign manufacturer  
8 commits a tort, makes it defective tire rim or  
9 tube, like in the Asahi case in Japan, or valve  
10 that goes into a tube that goes into California  
11 and when the tire blows in California -- right --  
12 - then you look at foreseeability, as Justice  
13 O'Connor said, and you have this plurality  
14 opinion, I would agree, but when there's no  
15 allegation of the commission of a tort but only  
16 the need to put money away based on a future  
17 potential liability -- when there is no tort,  
18 there is no authority for following the  
19 jurisdiction in rem over the person wherever his  
20 product goes. That is unprecedented. I've never  
21 seen it in international law. Certainty, I  
22 haven't seen it in domestic law and I've looked

1 PRESIDENT NARIMAN: That memo. All  
2 right. Give it to him.

3 MR. LUDDY: I believe it's core  
4 document --

5 SPEAKER: No, not the QA --

6 PRESIDENT NARIMAN: Not the Q&A, the  
7 other one. The other one.

8 MR. WEILER: Professor Anaya, just to  
9 be clear, I didn't--

10 MR. LUDDY: Core Document 11.

11 MR. WEILER: I did not want to give you  
12 the impression that I think appealing a judgment  
13 is an abuse of authority and no way did I intend  
14 to say that.

15 What I think is happening is a number  
16 of state attorneys general seemed to be going out  
17 of their way to almost, I would say, in a  
18 vindictive fashion against these Claimants.

19 MR. VIOLI: I'll read it. Let me --

20 MR. WEILER: But to be clear, people  
21 are allowed to appeal.

22 MR. VIOLI: I will read that for the

1 for it high and low. That is where I think they  
2 have abused their authority, by trying to extend  
3 jurisdiction in a way that has no basis.

4 PRESIDENT NARIMAN: Well, according to  
5 you, Mr. Violi, why are they, as it were,  
6 according to you, going for you, all these states?  
7 What for? What's your explanation?

8 MR. VIOLI: Competition, Mr. President.

9 PRESIDENT NARIMAN: But states have no  
10 competition.

11 MR. VIOLI: The tobacco companies that  
12 they get their money from under the MSA. It is in  
13 all of the papers we've seen so far. We have to  
14 reduce the NPMs, take all steps necessary.  
15 Remember the NPM, the NAAG memo, take all steps  
16 necessary to reduce NPMs, because when you reduce  
17 NPMs, you raise the MSA -- OPMs, Phillip Morris,  
18 and when you raise them up high, you get \$3 per  
19 carton from them.

20 PRESIDENT NARIMAN: Do you have that  
21 memo, Mr. Luddy.

22 MR. VIOLI: The NAAG memo.

1 record, not to get off the point.

2 These results -- this is the result of  
3 the lower payments and the lower sales by Phillip  
4 Morris and those companies and the highest sales  
5 by our client, NPMs.

6 "These results underscore the urgency  
7 of all states taking steps to deal with the  
8 proliferation of NPM sales, including enactment of  
9 complementary legislation and allocable share  
10 legislation and consideration of other measures  
11 designed to serve the interest of the states in  
12 avoiding reductions in tobacco settlement  
13 payment."

14 He goes on: "It should be stressed  
15 NPMs sales anywhere in the country hurt all  
16 states."

17 PRESIDENT NARIMAN: Hurt all of them?

18 MR. VIOLI: Hurt all states.

19 All payment calculations are done on  
20 the basis of cigarette sales nationally. NPMs  
21 sales in any state reduce the payments to every  
22 other state. All states have an interest in

1 reducing NPM sales in every state.  
 2 MR. WEILER: Should we take our break.  
 3 ARBITRATOR ANAYA: Yeah, are you at a  
 4 good point in your presentation?  
 5 MR. WEILER: I'm at a good point in the  
 6 presentation, but I don't mind. I kind of have to  
 7 go to the bathroom.  
 8 ARBITRATOR ANAYA: I think he needs to  
 9 take a break.  
 10 PRESIDENT NARIMAN: We'll meet at two.  
 11 (Whereupon, at 12:50 p.m., the hearing  
 12 was adjourned until 2:00p.m, the same day.)  
 13  
 14  
 15  
 16  
 17  
 18  
 19  
 20  
 21  
 22

1 construction. So, the whole point is we're not  
 2 trying to say that a good faith breach in and of  
 3 itself is cause to find a breach of the minimum  
 4 standard but rather that it is further evidence,  
 5 if you will, to help you construe the obligation,  
 6 should you choose. So, it's the construction as  
 7 opposed to the right base because the right base  
 8 has to come from fair and equitable treatment.  
 9 I have here some submissions taken from  
 10 WTO cases in which the Respondent to a certain  
 11 extent admits or, if you will, stipulates what it  
 12 considers the purpose of Article 31(3)(c) to be.  
 13 It acknowledges that the provision is supposed to  
 14 be used to interpret a particular treaty term, and  
 15 it does agree that it can apply to agreements.  
 16 I would certainly acknowledge, though  
 17 that in the Banana (ph.) Submission, the point  
 18 that the U.S. wanted to make was that they thought  
 19 it should be restricted to custom but nonetheless  
 20 they did seem to admit that an agreement between  
 21 two states could have relevance in the WTO treaty,  
 22 even though the agreement between those states

1 A F T E R N O O N S E S S I O N  
 2 PRESIDENT NARIMAN: Okay, are we ready?  
 3 MR. WEILER: So, we begin, again, with  
 4 our march through the legal justification, the  
 5 "Why is this a NAFTA claim?", and I've so far gone  
 6 through denial of justice and reasonable  
 7 expectation and abuse of right.  
 8 And now, I'm going to have a look at  
 9 international human rights and how it may have  
 10 some bearing on the fair and equitable treatment  
 11 for protection and security standards. I remember  
 12 on the first day I did go over Article 31(3)(c) of  
 13 the Vienna Convention, and I would submit that it  
 14 is authority for a Tribunal to look to other  
 15 sources of law to make a determination as to how  
 16 to construe a treaty obligation.  
 17 I give an example which is actually  
 18 this interesting exchange between Senator Root and  
 19 Sir Robinson which I think does encapsulate, even  
 20 though it's a century old this year, I think from,  
 21 the case from which it's quoted. The effect of  
 22 rule of international law is rather a rule of

1 could be completely outside the WTO framework.  
 2 And as -- I'm assuming we all know, but just to be  
 3 sure the WTO with a Lex Bes E Alis and very well  
 4 accepted lex specialis, very strong dispute  
 5 settlement rules built into the treaty mechanism;  
 6 and yet, nonetheless, despite that fact, the  
 7 appellate body has consistently ruled that it is  
 8 still nonetheless a creature of Public  
 9 International Law and that, therefore, from time  
 10 to time when interpreting a provision, other parts  
 11 or other quadrants of Public International Law may  
 12 be relevant.  
 13 So shrimp turtle is another example  
 14 which I don't have here but there are a number of  
 15 examples where the appellate body may be  
 16 interested to know whether or not a convention on  
 17 environmental protection has been signed by all  
 18 parties or what have you.  
 19 In this context, we would submit that  
 20 the treaty obligations undertaken by the United  
 21 States with respect to Haudenosaunee peoples and  
 22 the obligation it undertook to the British empire

1 in Jay Treaty and then further in the Treaty of  
2 Ghent for the benefit of Haudenosaunee and other  
3 indigenous peoples is relevant to the extent that  
4 it helps the Tribunal form an opinion of what fair  
5 and equitable treatment means with respect to how  
6 it is keeping its obligations.

7 That does not mean, though, that I'm  
8 suggesting that the a breach of the Jay Treaty is  
9 an instant after breach because that would  
10 contradict the third paragraph of the January --  
11 I'm sorry, the July 31st interpretive statement  
12 which says that a simple breach of another  
13 agreement is not constitutive of a breach of the  
14 minimum standard. So, it's clear it's about  
15 construing the obligation. It has to be  
16 interpretive exercise and no more.

17 That is, I submit to you, one reason  
18 why human rights obligations that --

19 ARBITRATOR ANAYA: Excuse me, are you  
20 going to get into at some point how, what  
21 specifically the implications of the Jay Treaty  
22 are?

1 never conquered they never had to make a treaty of  
2 some sort of peace and amnesty. They evolved much  
3 like the Two-Row Wampum Belt: They evolved  
4 together with our societies.

5 They don't see this treaty, this Jay  
6 Treaty, as somehow just because it's a little old  
7 that it doesn't matter anymore. But this is a  
8 constitutional democracy that's been around since,  
9 oh, I think it is about six, seven hundred years  
10 now.

11 ARBITRATOR ANAYA: Yeah, the bar  
12 counters the argument are pretty well understood,  
13 I think, but do you have, like, authority, and are  
14 you saying that this --

15 MR. WEILER: The authority is the  
16 treaty.

17 ARBITRATOR ANAYA: Okay any  
18 interpretive court decisions or...

19 MR. WEILER: The expert submission of  
20 Professor Fletcher is the primary authority we use  
21 to --

22 ARBITRATOR ANAYA: Fletcher or Clinton?

1 MR. WEILER: Yes. They are under  
2 submissions under --

3 ARBITRATOR ANAYA: This theoretical  
4 exposition is -- I think we've heard that. It's  
5 always useful to go over things but I think what  
6 we're really interested in -- well, speaking for  
7 myself -- I should speak for myself, the specifics  
8 of how the particular treaty is relevant.

9 MR. WEILER: In this case, the  
10 Claimants are of a strong belief and I think a  
11 very reasonable belief that they have a right to  
12 unhindered commerce and trade, unhindered by both  
13 the Canadian Government which is the successor to  
14 the British Empire and also the United States  
15 Government. They do not accept the United States  
16 Government's argument that simply because they  
17 omitted to continue the protections that were  
18 supposed to be there -- that because they just  
19 omitted them from a customs act that they just  
20 magically disappear -- as far as they're concerned  
21 they're still there and they make the point, and  
22 again, rightfully so, that they never -- they were

1 MR. WEILER: I'm sorry.

2 ARBITRATOR ANAYA: Clinton, right?

3 MR. WEILER: Clinton, who is an expert  
4 on the Jay Treaty and who provides us with the  
5 authority we believe is necessary.

6 ARBITRATOR ANAYA: Okay. Is he arguing  
7 that trade between native peoples across the  
8 border are subject to no regulation?

9 MR. VIOLI: I believe his statement --

10 ARBITRATOR ANAYA: You said --

11 "unhindered" was the terminology.

12 MR. VIOLI: I believe it's across the  
13 border in friends wherever situated.

14 ARBITRATOR ANAYA: Pardon me.

15 MR. VIOLI: Across the border in  
16 friends wherever situated. I am trying to picture  
17 --

18 ARBITRATOR ANAYA: And "friends"?

19 MR. VIOLI: Friends wherever situated.  
20 We have the three treatise, right, Jay, Ghent, and  
21 Canandaigua, and we have a situation where the  
22 early 1800s, late 1700s, the location of the

1 various members, nations of first nations of the  
2 six nations -- first nations of the six nations,  
3 then five I believe it was -- throughout North  
4 America was not delineated by states or geographic  
5 boundaries but in some cases a particular region,  
6 but maybe crossed over to more than one region.

7 We then have the movement of these  
8 nations, right, marched across the country or --  
9 put the Seneca Cayuga down in Oklahoma, with whom  
10 we continued to deal or trade with. It's not  
11 across the border but also across the United  
12 States.

13 Now, what is -- as Professor Goldberg I  
14 believe would not opine on any treaty right. So.  
15 We have -- at least, initially in her first  
16 report. We have --

17 ARBITRATOR ANAYA: She did in the  
18 reply.

19 MR. VIOLI: In the rebuttal which I  
20 think may have been in the Rejoinder, excuse me.

21 ARBITRATOR ANAYA: Whatever you call  
22 it, I'm sorry.

1 Mr. Crook?

2 ARBITRATOR CROOK: Mr. Violi, maybe we  
3 can take a second and pull out the text of the Jay  
4 Treaty.

5 MR. VIOLI: We could, Mr. --

6 ARBITRATOR CROOK: That wasn't in any  
7 of your -- it wasn't in your Memorial but I guess  
8 it is attached as an exhibit to one of your  
9 documents.

10 MR. VIOLI: It is. Why don't we --  
11 when we get to it in due course we can take it  
12 out, but --

13 ARBITRATOR ANAYA: It in one of the  
14 core documents I can't remember where.

15 MR. VIOLI: Yeah.

16 ARBITRATOR CROOK: It is in the U.S.  
17 documents, I think.

18 MR. VIOLI: But I wanted to come back  
19 with to it with more specificity I wanted to deal  
20 with one specific issue that I saw as the issue  
21 and you said, what are really the issues where the  
22 parties are --

1 MR. VIOLI: Yeah, I mean --

2 ARBITRATOR ANAYA: We know what --

3 MR. VIOLI: Professor Clinton gives an  
4 opinion and she doesn't reply to it and another  
5 brief later which I think procedurally was a  
6 little off, but the situation is that the  
7 Claimants believe -- and there are cases, the  
8 Lezore case and a couple of -- the Carnouth case,  
9 although contrasting it we, have the State  
10 Department still recognizing the Jay Treaty, so we  
11 have confusion among the various branches of the  
12 Federal Government as to whether the Jay is in  
13 full effect or was restored, whether it was  
14 restored for purposes of just passage or for also  
15 commerce. And the key thing as I see it is -- and  
16 one of the big points is, well, is this common  
17 among Indians not in bales, right?

18 PRESIDENT NARIMAN: What?

19 MR. VIOLI: Not in bales. At that  
20 time, when you transported in trade and product,  
21 commerce, typically the archeological evidence  
22 says they would use bales to carry -- yes

1 ARBITRATOR ANAYA: No, I -- he said --  
2 Mr. Weiler said the position of the clients is  
3 subject to no regulation in their trade across  
4 borders.

5 MR. VIOLI: That's our position.  
6 That's the Claimant's position.

7 ARBITRATOR ANAYA: Right, no  
8 regulation.

9 MR. VIOLI: When you're dealing with  
10 travel and you're dealing with commerce, it was  
11 unfettered commerce. But when we're dealing with  
12 -- since there there's no border, right, between  
13 the United States and Canada. That was the  
14 principal focus and idea of these treatise.

15 ARBITRATOR ANAYA: Yes, I'm somewhat  
16 familiar with the history.

17 MR. VIOLI: Right.

18 ARBITRATOR ANAYA: But I'm interested  
19 in how -- what the position is now and believe me  
20 I'm not being hostile. I'm just trying to  
21 understand --

22 MR. VIOLI: You mean the positions now

1 in this proceeding or among the Claimants or...  
2 ARBITRATOR ANAYA: In this proceeding,  
3 yeah.

4 MR. VIOLI: That there's a right among  
5 these Claimants.

6 ARBITRATOR ANAYA: Unfettered with no  
7 state regulation.

8 MR. VIOLI: No state regulation.

9 ARBITRATOR ANAYA: Or federal  
10 regulation?

11 MR. VIOLI: The treaty says free from  
12 molestation or without -- shall be able to freely  
13 pass and trade. And we're talking about trade  
14 among, first, Native Americans in North America.

15 ARBITRATOR ANAYA: No, I understand.

16 MR. VIOLI: So, really the only  
17 regulation at issue is tax -- in this case we're  
18 talking about contrabanding or whatever.

19 ARBITRATOR ANAYA: Right, but if we  
20 take this interpretation in order to sustain this  
21 position it seems like that interpretation would  
22 have broader implications.

1 something and I was going to get into the other.

2 ARBITRATOR ANAYA: No, we're talking  
3 about -- let's say we don't want to limit it to  
4 that --

5 MR. VIOLI: It's just -- okay, so we  
6 went into tobacco--

7 ARBITRATOR ANAYA: --but we extend it  
8 to this. Yeah.

9 MR. VIOLI: Okay. Let's say we applied  
10 that product --

11 ARBITRATOR ANAYA: To commercial sales  
12 of tobacco in significant quantities usually --

13 MR. VIOLI: Not uncommon to Indians and  
14 --

15 ARBITRATOR ANAYA: No, but we're using  
16 various -- yeah, I'm not contesting that it's not  
17 uncommon, always, but I mean, you are talking  
18 about commercial sales of tobacco across the  
19 border using various means of transportation and  
20 so forth.

21 MR. VIOLI: Indian to Indian, right.  
22 Indian to Indian or Indian to native tribe or

1 MR. VIOLI: Not necessarily.

2 ARBITRATOR ANAYA: No? Okay.

3 MR. VIOLI: Because we're talking about  
4 the commerce, right? We're talking about whether  
5 a duty imposed or excise, and back then that's the  
6 way you burdened commerce among sovereigns or  
7 persons doing business: Duty, excise, or imposed.  
8 That, I think a logical extension is, no state  
9 excise tax. The logical extension is no escrow in  
10 this circumstance. It's in the form of duty,  
11 excise, or imposed. It's a burden on the  
12 commerce.

13 What I wanted to speak to you,  
14 Professor, and perhaps I'm jumping -- because  
15 that's the thing that screams out to me is the  
16 idea that -- I mean, it's the notion that this  
17 should be limited to peltries and to perhaps bales  
18 of corn or tobacco as opposed to the commerce now?  
19 No treaty --

20 ARBITRATOR ANAYA: But that's not what  
21 we're talking about.

22 MR. VIOLI: Okay. You're talking about

1 sovereign triable in the case.

2 ARBITRATOR ANAYA: Yeah, it involves  
3 that, but it involves -- as you know, we need to  
4 paint an accurate picture of it and I'm not  
5 predetermining the outcome of it I'm just saying  
6 that, with this characteristics -- trade with  
7 these characteristics you're saying is exempt from  
8 any kind of regulation.

9 MR. VIOLI: I don't know if I have to  
10 go that far with this proceeding --

11 ARBITRATOR ANAYA: Yeah, that's what  
12 I'm trying ---

13 MR. VIOLI: --I don't have to go that  
14 far --

15 ARBITRATOR ANAYA: That's what I  
16 understood it -- okay.

17 MR. VIOLI: Yeah, we don't have to go  
18 that far.

19 It's exempt from state regulation --

20 ARBITRATOR ANAYA: Okay.

21 MR. VIOLI: -- state regulation that's  
22 at issue here.

1 MR. WEILER: And that's clear to the  
2 point. We don't have to go that far but we're  
3 stating the Claimant's --

4 ARBITRATOR ANAYA: I'm trying to get  
5 the basis for interpreting the treaty to get  
6 precisely to that point. Go ahead, sorry.

7 MR. WEILER: No, no, that's fine.

8 The Claimant's position is that  
9 unfettered means unfettered and it should be  
10 unfettered. They do pay federal excise taxes as  
11 in the record; we know that. So, we know that  
12 we're not talking about federal regulation in this  
13 case. We're talking about state regulation.

14 So, clearly it's not necessary to  
15 construe the Jay Treaty with respect to federal  
16 powers with -- in this case. It's not germane.  
17 The question is state authority for this case.

18 ARBITRATOR ANAYA: But you have to  
19 concede we need to come to a principle basis for  
20 getting to that precise interpretation, and that's  
21 what I'm sort of grappling with.

22 MR. WEILER: Yes, and the principle

1 Jay Treaty were restored, and as throughout the  
2 18th and 19th century, and you look for a history  
3 of the federal government taxing or putting a duty  
4 on any trade or commerce of the six Nations, and  
5 the same thing with the Yakuma in Washington under  
6 their border to border, ocean to ocean treaty, you  
7 see no imposition of a duty, an excise, an import  
8 or any kind of tax.

9 That imposition or that -- I think  
10 that's the way you have to interpret a treaty when  
11 it's written and give it room for expansion but  
12 what the parties, and particularly the people that  
13 didn't draft it, which are the Native Americans,  
14 what was their interpretation and understanding?  
15 And they perceived throughout a long history,  
16 trading in tobacco, trading in a number of product  
17 and there is no state tax or even federal imposed  
18 duty or excise imposed on that trade. So, as a  
19 point of reference I, think that's where the  
20 Tribunal should begin and I think Professor  
21 Clinton -- I mean, obviously, I cannot speak as  
22 professor Clinton would, but his report, I think,

1 should be unfettered.

2 ARBITRATOR ANAYA: But if we go  
3 unfettered, that would seem to be unfettered  
4 vis-à-vis the federal government as well.

5 MR. WEILER: Well, and that is the  
6 Claimant's position.

7 ARBITRATOR ANAYA: It is the position.

8 MR. WEILER: The Claimant's position is  
9 that it is unfettered.

10 ARBITRATOR ANAYA: Okay.

11 MR. WEILER: It's not necessary in this  
12 chase to go that far but that is definitely their  
13 position. They do not recognize the border  
14 between Canada and the United States. It's  
15 imposed and their territory is their territory and  
16 that treaty is pretty much one of the only  
17 vestiges left of the comity that was supposed to  
18 be shown between the United States and the  
19 Haudenosaunee.

20 MR. VIOLI: I think in that respect, if  
21 you go back in time to the early 1800s when the  
22 Jay Treaty was restored or the rights under the

1 makes it clear we would stand by the way he's  
2 presented the argument in the report, and  
3 certainly maintain those arguments here.

4 ARBITRATOR ANAYA: Thanks.

5 MR. VIOLI: And one of the things that  
6 is -- again, not being an expert, but Professor  
7 Clinton talked about the Jay Treaty -- and many  
8 treaties acknowledged that which is inherent. I  
9 mean, a treaty sometimes doesn't give you a right  
10 or confer a right upon you as much as it  
11 acknowledges the right, a right since time  
12 immemorial, I think, what is written, but what is  
13 it that's acknowledged, and I think if we look  
14 back in time we would see that an unfettered  
15 trade, commerce, all across the North American  
16 continent certainly for 100 or 150 years, and  
17 nothing that would detract from it in a way that  
18 would suggest that the states could impose this  
19 particular regulatory burden is something the  
20 states haven't done before in this context as we  
21 submit Professor Clinton has stated it well that  
22 would be a protected trade under these various



1 treaties.

2 MR. WEILER: We would have preferred to  
3 have Professor Clinton here but the Respondent as  
4 is its right, chose not to call him and we didn't  
5 call Professor Goldberg, so it does leave us a  
6 little wanting to answer your questions because I  
7 think we're going to, in a certain extent,  
8 referring you to our experts.

9 ARBITRATOR ANAYA: Yeah, that's fine.

10 MR. WEILER: To go on, this one is  
11 actually more tender than the last one.

12 It's very difficult to talk about the  
13 obligation to consult without unfortunately  
14 bumping into Professor Anaya's opinion. So, I do  
15 apologize for citing. It's not the kind of form I  
16 like to show, but honestly it's very difficult to  
17 do that, the root article seems to come from that  
18 one book.

19 That being said, though, I think that  
20 there's very strong basis for it as you see in our  
21 memorials. I think that our memorials do a good  
22 job of explaining why we think consultation

1 demonstrated on the record with respect to other  
2 attorneys general from the various nations that  
3 might have been interested. One of the witnesses,  
4 I believe it was the first day, didn't apparently  
5 know that attorneys general actually existed on  
6 First Nations' territory which was a little  
7 surprising to say the least but it may explain to  
8 a certain extent the level of disconnect that  
9 seems to exist between the state regulators and  
10 our Claimants.

11 It seems like the state regulators  
12 really dropped the ball when it came to just being  
13 diligent about consulting the people they should  
14 have consulted before they started doing what they  
15 did.

16 ARBITRATOR ANAYA: Excuse me,  
17 Mr. Weiler, what authority do you have that the  
18 duty to consult, even if it is part of customary  
19 international law, extends to consultations with  
20 indigenous individuals as opposed to indigenous  
21 Nation or people itself through its representative  
22 institutions?

1 obligation has formed as a matter of customary  
2 International law. It's important to note again,  
3 though, that what I'm asking to you do for the  
4 Claimants is not to say that, because there is a  
5 breach of a customary international norm, which my  
6 friend will contest is a customary international  
7 norm does not mean that you get a breach of the  
8 NAFTA but rather we have a number of different  
9 avenues which cumulatively, certainty, lead to the  
10 results that we want. The outrageous conduct when  
11 cumulatively added breaches a number of customary  
12 international law doctrines and rules and we would  
13 submit that this is one of them.

14 And in this case, I can't stress enough  
15 the frustration of the Claimants about not being  
16 consulted at the various stages of these many  
17 years of measures. As the Chairman asked, why  
18 didn't they ask the NPMs, and specifically, why  
19 didn't they ask by far the largest and clearly a  
20 very important NPM, the largest Native American  
21 NPM, why didn't they consult them and why isn't  
22 there any consultation -- there's no consultation

1 MR. WEILER: I'd refer you to our  
2 Memorial. I would like to actually take a peak at  
3 it, though, because one of the human rights  
4 treaties actually --

5 ARBITRATOR ANAYA: Just to make clear,  
6 you are not attributing that to me, anything I've  
7 written.

8 MR. WEILER: No, no. I just -- no,  
9 it's -- let's just see if I can find the  
10 particular treaty.

11 MR. VIOLI: In the meantime, leaving  
12 aside the indigenous aspect of it, the record is  
13 replete with consultations between the states  
14 proposing the measures and the big tobacco  
15 companies --

16 ARBITRATOR ANAYA: That's not the issue  
17 Mr. --

18 MR. VIOLI: (Off microphone.)

19 MR. ARBITRATOR ANAYA: Yeah, I know,  
20 but that's not the issue.

21 MR. VIOLI: If there was an obligation  
22 to consult I'm just saying it hasn't fallen upon

1 the states --

2 ARBITRATOR ANAYA: You are asserting an  
3 obligation in customary international law to  
4 consult with indigenous peoples and extending it  
5 to indigenous individuals, that's what I'm  
6 interested in, and I'm not making a determination  
7 it exists or arguing that it doesn't exist right  
8 now I'm trying to find out what the authority is.

9 MR. WEILER: I understand. I'm trying  
10 to get the authority. I understand, Professor,  
11 and I--I chose the wrong computer. The other one  
12 I actually had in the note the actual paragraphs.  
13 I could have just grabbed right to -- I apologize  
14 for the delay. I think I'll get back to it.

15 We'll get back to it but there is a  
16 treaty, a human rights treaty obligation, which we  
17 submit articulates a standard that does involve  
18 individuals as well as sovereigns and again I  
19 would --

20 ARBITRATOR ANAYA: I'm just curious, I  
21 mean, how do you then see these authorities that  
22 you're putting up? You don't have to comment on

1 Enterprises, that within Mohawk social political  
2 structures that that would be the way --

3 MR. WEILER: I would like to get back  
4 to you on that question, if I may, Professor  
5 Anaya.

6 ARBITRATOR ANAYA: I'm telling you, if  
7 you're going to invoke the duty to consult, from  
8 my point of view, this is critical because it's --

9 MR. WEILER: Yes, I understand.

10 ARBITRATOR ANAYA: And just to put this  
11 up there and then have us make that leap is asking  
12 a good bit of us.

13 MR. VIOLI: I would note that I don't  
14 have it in the record, but there is a letter from  
15 the Mohawk Attorney General -- Seneca Attorney  
16 General, Jim Gildersleeve who wrote a letter -- I  
17 can get it if the Tribunal so wishes commenting  
18 about how the Seneca were never consulted in the  
19 context of this MSA, were never asked to  
20 participate, or its members to participate and/or  
21 negotiate or, and he raised issue with -- and  
22 actually I believe the letter --

1 the reference to me, but how do you see the  
2 reference up here which is the duty to consult  
3 with indigenous people's which is about indigenous  
4 peoples and their own representative institutions?  
5 How do you see that? I mean, you put it up here  
6 for us and by doing that you're representing that  
7 it extends here, so, at least, if could you  
8 articulate what that is.

9 MR. WEILER: Yes, yes. The way we  
10 articulate it is that, again, we return to the  
11 nature of the socioeconomic structure and a  
12 governmental -- or the state structure of the  
13 sovereigns, and in respect of the Mohawk and the  
14 Seneca, they have a more diversified socioeconomic  
15 structure such that the rights are not all held in  
16 the state. The state being the tribal council.

17 ARBITRATOR ANAYA: Do you have any  
18 evidence in the record of this so we could  
19 understand that the duty to consult with  
20 indigenous people is in the context. The Mohawk  
21 people really is a right that applies through  
22 representative institutions like the Grand River

1 ARBITRATOR ANAYA: Is that part of your  
2 argument?

3 MR. WEILER: Yes, it would be. Okay,  
4 and I think he goes into the --

5 ARBITRATOR ANAYA: I understand that,  
6 and yeah, that's a different thing and that's a  
7 point that I understand.

8 MR. VIOLI: Actually, he raised it and  
9 I thought he raised some of the legal principles  
10 but --

11 ARBITRATOR ANAYA: But you keep talking  
12 about the failure to consult your client. You  
13 repeat that and it's in your Memorial which is  
14 your main argument and that is what I'm -- I  
15 understand the other and that does fall within  
16 what I understand to be the duty to consult that  
17 arises in treaties and is developing within  
18 customary international law or has developed  
19 however way you want to characterize it.

20 MR. WEILER: I do very much understand  
21 your question and I would like to give you a full  
22 answer, and I will before this hearing ends.

1 ARBITRATOR ANAYA: I would appreciate  
2 it if you could focus on it and not sort of --  
3 bringing in -- conflating these things. I  
4 understand the other points you want to make  
5 association with it, but this is a particular  
6 point that has to do with your argument that's, in  
7 my view, a key part of your argument in this  
8 regard.

9 MR. VIOLI: I understand.

10 ARBITRATOR ANAYA: I want to give your  
11 argument a full consideration, that's the gist of  
12 my questioning, it's not to be dismissive about it  
13 it's to be clear about it, to the extent you have  
14 represented that what I have written has something  
15 to do with this duty that you're talking about  
16 when in fact it's an extension of that or a  
17 difference on that.

18 MR. WEILER: We're exactly copacetic on  
19 the same page, and you'll have your answer.

20 ARBITRATOR ANAYA: I need you to be  
21 sensitive about that, as well --

22 MR. WEILER: I am very sensitive about

1 not to deny justice in criminal, civil, or  
2 administrative adjudicatory proceeding in  
3 accordance with the principles of due process and  
4 by no principle legal systems of the world.

5 It does, we assert, demonstrate even a  
6 partial acceptance on the part of the Respondent  
7 that procedural fairness extends beyond the  
8 judicial phase. I understand that the word  
9 "adjudicatory" is in there. We don't need to get  
10 into administrative law minutia with respect to  
11 what's adjudicatory and what's decision making but  
12 it's clear it does involve administration and  
13 executive -- the exercise of executive powers.

14 Now, we think it also confirms the  
15 interpretation we're suggesting you adopt with  
16 respect to Article 31(3)(c) of the Vienna  
17 Convention because it's talking about principle  
18 legal systems of the world and it's talking about  
19 the notion of due process being embodied in them.  
20 So, it seems to me that's a definite reference to  
21 principle, that's 381 sub -- it's either two or B,  
22 I can't remember which -- but that's principles

1 it --

2 ARBITRATOR ANAYA: You put my name up  
3 there representing I said something and then  
4 extended it to something else and I'm having to  
5 bring out the distinction, okay?

6 MR. WEILER: Yes.

7 MR. MONTOUR: May I say something I  
8 have something to reserve that I testified that  
9 he's not --

10 MR. FELDMAN: Mr. President, we haven't  
11 yet called Mr. Montour.

12 MR. VIOLI: He just wanted to make a  
13 point he would like to speak on his own behalf  
14 with respect to these matters, that's all he said,  
15 and not necessarily through Mr. Weiler, and as a  
16 Claimant, I think he has that right on this  
17 particular matter -- when you call him obviously.

18 MR. WEILER: With respect to the  
19 interpretation of the minimum standard, we look to  
20 the language of the United States model bilateral  
21 investment treaty, which I have up there. Fair  
22 and equitable treatment includes the obligation

1 that's not customary. It doesn't sound like a  
2 customary international rule I'm seeing there.  
3 I'm seeing it referenced to principles. So, I  
4 would submit that the only way that would make  
5 sense is if we are looking at principles through  
6 the prism of Article 31(3)(c).

7 And it seems that U.S. investment  
8 treaty practice, therefore, explicitly supports  
9 due process as this fundamental concept that  
10 demonstrates that we can also look to principles  
11 with respect to the remainder of this case on  
12 1105, and I'm sorry if I am going on about this,  
13 but I think it's very important to set the  
14 theoretical groundwork to be able to show you why  
15 this is a NAFTA claim, because there's been a lot  
16 said about the minimum standard and how one  
17 reaches it. And I think it's important to see  
18 that there is still a place for Article 31(3)(c).

19 We covered some of this already, so I  
20 think I can probably slip past the slide but I  
21 want to see -- it makes the point that I was  
22 making earlier. The Claimants really were

1 surprised that they didn't -- that there wasn't  
 2 more of a cooperative regulatory format, and I  
 3 would point to the Pope & Talbot damages decision  
 4 where actually that was the kind of language that  
 5 the Tribunal used, that one day what seemed to be  
 6 cooperative, normal regulation became adversarial  
 7 and that change was attributed to the state. And  
 8 we would submit that if there ever was a period  
 9 where this was a normal regulatory environment and  
 10 I'm not sure it was, but I would submit that we  
 11 have seen the animus from the deputy attorneys  
 12 general with respect to the client -- sorry, the  
 13 Claimant and it's adversarial -- it's clearly  
 14 adversarial. This is not cooperative regulation.  
 15 Even if we don't need to go as far as saying that  
 16 it is a duty to consult as a customary  
 17 international rule, this is just a simple good  
 18 faith, which again informs how we look at fair and  
 19 equitable treatment.

20 MR. VIOLI: I wanted to mention the  
 21 complementary legislation at this point, if I may.  
 22 What we said before, with the complementary -- you

1 person who bought them from you but somebody sold  
 2 Seneca cigarettes in my state. I deem you to be  
 3 the manufacturer regardless of jurisdiction. I  
 4 deem you must pay this amount and you must do the  
 5 following before your product can be sold in my  
 6 state. Judge, jury, and executioner. No due  
 7 process no reasonable opportunity to be heard  
 8 before the measure is enforced. And in that  
 9 respect, just one small respect among many, we  
 10 believe there's been a failure of fair and  
 11 equitable treatment here.

12 MR. WEILER: That completes our  
 13 analysis of the minimum standard of treatment and  
 14 its roots and its root in customary international  
 15 law and principles in international law, and the  
 16 ways in which we believe these other doctrines and  
 17 principles can and should be used to interpret  
 18 that provision.

19 I now move to the definition of  
 20 investment enterprise which was another question  
 21 the Chairman had in the first day.

22 In this regard. I think it's one thing

1 remember how I described how the Escrow Statute  
 2 had worked before? It was enacted, product was  
 3 sold in jurisdiction, and then the state would  
 4 come in and require compliance by making a payment  
 5 or bringing a lawsuit in which the manufacturer  
 6 could contest the regulatory measure. That's how  
 7 the law was between '99 and roughly 2002 vis-à-vis  
 8 Grand River. The states would make a claim,  
 9 threat of prosecution, bring on the prosecution or  
 10 the civil action, and then Grand River would have  
 11 had its day in court to litigate and deal with  
 12 those issues. What the complementary legislation  
 13 did, in effect, and we mentioned this, is it made  
 14 the Attorney General something that we normally  
 15 don't see under administrative law. It made the  
 16 Attorney General the judge, the jury, and the  
 17 executioner. Under the complementary legislation,  
 18 the Attorney General says unfettered, complete and  
 19 absolute discretion, I think you are a  
 20 manufacturer and you sold this many cigarettes in  
 21 my state. Granted you didn't sell them, but  
 22 somebody sold them, and granted it was not the

1 we should note which doesn't come out often until  
 2 -- well. Until this stage when you're doing an  
 3 oral argument. There's two issues when it comes  
 4 to investment. The one question is, do you meet  
 5 the threshold to be here and that's one the  
 6 Claimant had to bear the burden of proving. The  
 7 other one, the other notion of investment has to  
 8 do with causation and damages.

9 There are a number of ways in which one  
 10 can surmount that threshold test, and we submit we  
 11 have demonstrated a number of ways in which we've  
 12 done that. To be clear, though, when we talk  
 13 about the investment in terms of the impairment of  
 14 the investment, we have decided that it is best to  
 15 measure the brand which is a type of investment  
 16 and that's why you see the brand analysis.

17 So, just to be clear, but now before  
 18 one gets there, you recall that my friends were  
 19 asking Mr. Wilson about why this \$27 million  
 20 figure would still be there. This is the  
 21 incremental cost of the various assets used by  
 22 Grand River in Ohsweken to produce cigarettes for

1 the United States market exclusively.

2 The reason that that's there is because  
3 we have two claims, two types of claim. We have  
4 an Article 1116 claim, which is a claim by the  
5 investor on its own behalf and we have an  
6 Article 1117 claim, which is a claim by the  
7 investor on behalf of an investment enterprise.  
8 To be clear, the \$27 million claim is a claim by  
9 the investor, Grand River enterprises. The  
10 impairment claims that we're making are  
11 Article 1117 claims made by the other Claimants on  
12 behalf of the enterprise which they operate on  
13 Seneca territory for the promotion of the brand.

14 Now, I'm going to attempt to  
15 demonstrate to you why we are confident that we  
16 have an investment enterprise which is an  
17 association on Seneca land.

18 First, the definition as to why we get  
19 there. We're talking about an enterprise because  
20 the definition of investment includes an  
21 enterprise. We refer to Article 201 the general  
22 definition provision to figure out what enterprise

1 Well, Mr. Jerry Montour, Mr. Arthur Montour,  
2 Mr. Hill, they're engaged in a business endeavor.  
3 It's very clear that they're engaged in a business  
4 endeavor and they have been form a number of years  
5 and that's to promote these brands. It's also  
6 very clear that, in the tobacco business, brand is  
7 everything. For example, we see the -- and we do  
8 have this and again, my colleagues are recording  
9 this to give you the exact pinpoint references --  
10 we do have on the record documentation from the  
11 majors in other jurisdictions, other countries,  
12 demonstrating how seriously they take their  
13 investment in brand in response to the proposal of  
14 plain paper packaging regulation, the idea that  
15 you no longer put your mark on the product but  
16 instead it's blank. Maybe it says your name, but  
17 there's no style, no symbol, no trademark, no  
18 colors. They're vehement in their opposition to  
19 that. And in the case of Canada when that was  
20 taking place, they didn't pull any punches. They  
21 made it very clear, they would bring a Chapter  
22 11-case if -- these are American Corporations in

1 means and this is a very inclusive choice.

2 Investment enterprise means any entity -- any  
3 entity -- constituted or organized, and key  
4 there, "organized," under applicable law, whether  
5 or not for profit, whether or not privately or  
6 governmentally owned and it includes these various  
7 species, corporation, trust, partnership,  
8 proprietorship, joint venture, and other  
9 association. We submit that, if you recall, the  
10 object and purposes of this treaty which is to  
11 protect investment and to promote investment, that  
12 you should construe this provision broadly and  
13 purposefully. That doesn't mean I'm suggesting  
14 that you're in any way departing from the text.  
15 The text is very clear it says "association" but I  
16 would submit that if it was a toss up, this one  
17 goes to the -- the tie goes to the runner. In  
18 this case you would want to, if you have two  
19 choices of interpretation, both seem equally  
20 solid, you would want to choose the one that more  
21 befits the object and purpose of the treaty.

22 So, what is the investment enterprise?

1 Canada -- they would bring a Chapter 11 case if  
2 plain paper packaging came in. That makes perfect  
3 sense to us, because that's the nature of the  
4 business. Cigarettes are essentially a tube with  
5 a filter and a blend, a proprietary blend, of  
6 tobacco.

7 You know, it's not that hard for  
8 someone to go use a machine and start making them;  
9 that's not where the investment is, that's not  
10 where the money is. That's in building a brand  
11 and it takes time it takes a lot of time, and we  
12 submit that these three investors have done that.  
13 They have created an investment in the brand and  
14 they have done it via their association together.

15 Now, Professor Goldberg, in her  
16 criticism of this approach, tries to draw some  
17 strict interpretation of the language of the  
18 applicable law and we think it's necessary to go  
19 over some of that.

20 Very clear, that once again it's  
21 evidenced on the record that the Seneca Nation  
22 licenses NWS, that NWS is 100 percent owned by

1 Arthur Montour and that he is 100 percent member  
2 of the Seneca Nation.

3 And as necessary, because  
4 Article 2.201(a) of the Business Code for the  
5 Seneca Nation says that has to be the case and so  
6 it is; that's for a wholesaler.

7 Article 1.109 very clearly vests  
8 jurisdiction with the Peacemakers Court, and we  
9 highlighted the word association to demonstrate  
10 that it's that same word: It's an association.  
11 It is recognized in this legal system that one can  
12 have an association as differentiated from a firm,  
13 partnership, corporation, business entity.

14 It goes onto point out exactly how --  
15 it does personal jurisdiction, does subject matter  
16 jurisdiction, does territorial jurisdiction. You  
17 see it's broad and it's even more important to  
18 note that the parties themselves and their  
19 cross-licensing arrangements contemporaneously at  
20 that time cited Seneca law. They fully intended  
21 -- they certainly didn't fully intend to fight  
22 each other, but if there ever was something it was

1 That's the contribution. That, by the  
2 way loan -- that's defined. I find it frustrating  
3 personally as a small business person to see the  
4 Respondent -- counsel for the Respondent  
5 questioning -- well they say that, you know,  
6 there's no specific maturity date. Where's your  
7 specific loan agreement? A loan is pretty  
8 straightforward. A loan is when somebody gives to  
9 another person something of value either expecting  
10 it back or expecting it back with interest. The  
11 NAFTA provision doesn't specify any more than  
12 that. It leaves it at loan and says it has to  
13 have a maturity date more than three years. It  
14 doesn't specify it has to be in writing or any  
15 other such thing.

16 So, I would submit that not only is  
17 this loan evidence of the joint commitment of  
18 these Claimants to this association that they have  
19 which is governed by Seneca law, it is also in and  
20 of itself clearly meeting the threshold of  
21 investment here, that loan in and of itself.

22 So, the next point to make is that my

1 going to go to the Seneca Peacemakers Court and it  
2 was going to be decided under Seneca Nation law.

3 We show you the definition of business.  
4 We show you the simple common dictionary  
5 definition of what an association is. We submit  
6 that this is -- it is baby steps but it seems  
7 important in light of professor Goldberg's  
8 criticism that we demonstrate that all of those  
9 steps are followed.

10 So what do we have here? We clearly  
11 have three men who are in control of their  
12 corporations, their two separate corporations.  
13 They clearly have a shared and collective interest  
14 in these trademarks succeeding, in the brands that  
15 the trademark supports. Succeeding. Significant  
16 commitments on the record, capital, so much  
17 capital committed by these interim -- I'm sorry,  
18 loans which were originally going to be of  
19 five-year duration and ended up seven or  
20 eight years ended up being. But it's very clear  
21 that NWS would not have been able to do that  
22 alone, they needed the loan from GRE.

1 friend mentioned -- they say, hey, wait a second  
2 this association doesn't have a license and  
3 everybody has to have a license. Well, no,  
4 actually, not true. NWS is the exclusive  
5 wholesaler of these products and when we look at  
6 the Seneca business -- I'm sorry, the Second  
7 Nation Business Code or their fuel and -- Tobacco  
8 and Fuel Ordinance it's very clear you don't  
9 actually -- if you're an association with someone  
10 who has that license and your association is not  
11 selling cigarettes in and of itself, which it  
12 isn't here, it's promoting a brand -- that's the  
13 venture -- it doesn't need a license to do that.  
14 The Seneca code specifically says in the case of a  
15 partnership, association, or joint venture no  
16 business license shall be required of any partner  
17 whose not selling cigarettes.

18 And there is no evidence on the record  
19 that Mr. Montour, Jerry Montour, or Kenneth Hill  
20 is selling cigarettes in the United States, much  
21 less the Seneca Nation. There is no evidence of  
22 that individually.

1           What there is a lot of evidence I would  
2 submit is that these three partners -- I'm sorry,  
3 strike that -- these three investors are in  
4 association together for a purpose. And I note  
5 what I see in the preamble and then again in the  
6 early text of this business statute.

7           The Nation couldn't be more clear about  
8 what it's saying. It's explaining it has  
9 sovereign inherent authority, and I think  
10 Mr. Violi made the point that's probably worth  
11 repeating that the Claimants don't so much look to  
12 these older treaties as a source of rights but  
13 rather a confirmation of what's already their's.  
14 Much like the original Two-Row Wampum Belt between  
15 the Dutch and the Haudenosaunee when they were the  
16 Five Nations it symbolizes inherent sovereignty  
17 they already hold and the relationship they hold  
18 with the other sovereign. We, in common law  
19 terms, so often I think treat treaties as if  
20 they're statutes and think that's actually where  
21 the power comes from but it's more complicated  
22 than that, and I think it was necessary for me to

1           clear right there in Article 1-103(a)(ii) that the  
2 purpose of this code is to permit the orderly  
3 initiation of new businesses.

4           I'm sorry to Professor Goldberg that  
5 the Seneca Nation didn't decide to have a real  
6 fancy incorporation statute, but that's their  
7 right. They don't have to have a big fancy  
8 incorporation statute to be able to validly  
9 designate what is and isn't a business on their  
10 territory.

11           And we would submit to you that this  
12 language here is very clear. And with that,  
13 actually, I'm going to go back to another issue of  
14 investment, but I have to go back this far. There  
15 we go.

16           So, I've covered the loan. I had a  
17 point to tell me to make sure I covered that.

18           One of the things I want to stress is  
19 we really think that if you look -- if the  
20 Tribunal looks at the evidence on the record, that  
21 the real life facts speak for themselves. The  
22 whole point, the thrust of a tobacco enterprise is

1           just clarify that on behalf of the Claimants.

2           So Canandaigua Treaty, and forgive me  
3 for mangling that, is also cited by the Seneca  
4 Nation, so it's very clear they know exactly what  
5 they're doing when they pass this business  
6 regulation. They cite the treaty of 1794 that  
7 cites that famous phrase, the United States will  
8 never claim, same, nor disturb them or either the  
9 six Nations nor their Indian friends residing  
10 thereupon, and united with them in the free use  
11 and enjoyment of their land. That's why the  
12 Claimants say no, federal -- no federal regulation  
13 either. Again, we don't need to go that far for that  
14 case but they're very serious about that.

15           Now, this one I felt a little -- I was  
16 surprised at with respect to Professor Goldberg  
17 because she point to these other statutes, these  
18 other First Nation statutes and other parts of  
19 North America and she demonstrates how they have  
20 these very elaborate systems for quantifying and  
21 validating what is and isn't an enterprise. With  
22 respect, that's not very respectful. It's pretty

1           to establish and support and build equity in the  
2 tobacco brand. That's why it is so deadly for a  
3 brand to be taken off the shelf even for two  
4 weeks.

5           Yes, Professor Weiler.

6           ARBITRATOR ANAYA: Clearly --

7           MR. WEILER: I'm sorry, no, I'm  
8 Professor Weiler, you're Professor Anaya.

9           ARBITRATOR ANAYA: Yes, I think that's  
10 still the case.

11           MR. WEILER: Could we trade? Actually,  
12 I would like to trade.

13           ARBITRATOR ANAYA: I've been on that  
14 side plenty of times.

15           But back to the point on business  
16 association, I understand you say it's an  
17 investment because it's a business association  
18 under Seneca law; is that right?

19           MR. WEILER: Yes, it's a business  
20 enterprise, their association together.

21           ARBITRATOR ANAYA: Do we get --

22           MR. WEILER: They are working in

1 concert together to promote the brand is an  
2 association.

3 ARBITRATOR ANAYA: And hence it's an  
4 investment under NAFTA.

5 MR. WEILER: Hence, it is an investment  
6 enterprise under NAFTA.

7 ARBITRATOR ANAYA: Do we have to find  
8 that Seneca --that it is a business enterprise or  
9 association under Seneca law in order to find that  
10 it's an investment under NAFTA or is that just one  
11 of --

12 MR. WEILER: It's one of the ways.

13 ARBITRATOR ANAYA: One of the ways.

14 MR. WEILER: We thought it was worth  
15 going through the details of that because, you  
16 know, we've had a lot of kicks at the can in this  
17 case in terms of -- and by the way, I'm thinking  
18 probably it is a particular statement of claim  
19 where we might find the good faith. Remember that  
20 was a long time ago.

21 ARBITRATOR ANAYA: That's one of the  
22 ways. Are there any other independent ways if we

1 it and so we felt it behooved us to address it.

2 ARBITRATOR ANAYA: I understand the  
3 Respondent is taking issue with all these other  
4 arguments, as well.

5 MR. WEILER: None of which required the  
6 opinion of an expert, but we're more than happy --  
7 I mean we have 15 hours and we're --

8 ARBITRATOR ANAYA: Okay. No, no.  
9 Okay. Well, all right.

10 MR. WEILER: --more than happy to spend  
11 time on any of the investment issues you'd like to  
12 discuss.

13 ARBITRATOR ANAYA: So do you have --  
14 are there any -- sorry.

15 MR. VIOLI: The other reason we wanted  
16 to demonstrate that it was an association, a  
17 business association, an investment enterprise,  
18 among Native Americans and governed by Native  
19 American law, in this case Seneca law, is because  
20 -- and I remember dealing with this issue --  
21 should any one or more of these individuals or the  
22 companies try to attain an Indian trader statute.

1 didn't find --

2 MR. WEILER: The loan is another  
3 independent way. The brand is another independent  
4 way. There's more, I just have to turn my mind to  
5 them because I'm fixated on those ones. Do either  
6 of you two want to name one of the other ones?

7 MR. VIOLI: I think under any law,  
8 certainty U.S. law, the trademark licensing  
9 agreement, Professor Anaya, with the attendant  
10 exclusivity to use the trademark for purposes  
11 having the exclusive right to manufacture  
12 cigarettes for the U.S. market, the contract  
13 manufacturing relationship among them, I think  
14 evidence is their association as a matter of even  
15 domestic law.

16 ARBITRATOR ANAYA: You seem to put a  
17 lot of emphasis on the assertion that it's a  
18 business association under Seneca law. Is that  
19 because you think it's the best argument for  
20 finding this as investment under NAFTA.

21 MR. WEILER: No it's because Professor  
22 Goldberg, in the final Rejoinder, took issue with

1 And when I researched the law, Indian trader  
2 statute really applied -- particularly to  
3 non-native enterprises doing business on Indian  
4 land. And so, what I think this did and the  
5 agreement I mentioned before says it governed by  
6 Seneca Nation law, what it does is it reinstilled  
7 in them in their mind for their own understanding,  
8 that they were really dealing in -- maybe it's  
9 misplaced and I use it wrong and forgive me --  
10 what I call Nation-to-Nation commerce. I view  
11 Nation-to-Nation commerce, perhaps incorrectly,  
12 but I think it's still nonetheless protected.

13 When a member of the Seneca Nation  
14 deals with the Coeur d'Alene or the Isleta Pueblo,  
15 either directly with those tribes or nations or  
16 with their tribal-owned distributors or with their  
17 tribal-licensed entities. Including entities that  
18 are owned by tribal members. That's what we've  
19 used generally to mean Nation-to-Nation. Maybe it  
20 doesn't mean that in the real Indian law sense but  
21 certainly when we have association among First  
22 Nations members and their businesses constituted



1 and certainly their relationship governed by  
 2 Nation law and they trade with their friends or  
 3 other nations, I think it, what we understood and  
 4 what they understood and what I understood them to  
 5 understand is that it really -- it was really a  
 6 focus it was an intent to deal in Nation-to-Nation  
 7 commerce, to have their relationships and this  
 8 business constitute or come within  
 9 Nation-to-Nation commerce the way they understood  
 10 it and I understood it. So, that's why we mention  
 11 it here, but it's not precluded as being  
 12 association under domestic law, individuals  
 13 setting up a --

14 ARBITRATOR ANAYA: Okay. Yeah, that  
 15 was one point.

16 Okay, but as to this argument that it's  
 17 a business association under Seneca law, do you  
 18 have any -- is anything in the record -- I don't  
 19 recall seeing it -- any kind of expert opinion and  
 20 I don't mean it has to be a legal expert, or  
 21 expert trained in U.S. law but an elder or some  
 22 authority in Seneca law that has opined about this

1 ARBITRATOR ANAYA: I'm not arguing with  
 2 your interpretation.

3 MR. VIOLI: No, other than Professor  
 4 Clinton's -- I mean, discussion of native law, but  
 5 this is --

6 ARBITRATOR ANAYA: No, no. He's  
 7 discussing Federal Indian Law; right?

8 MR. VIOLI: Yeah, this is the dilemma  
 9 we found, Professor Anaya --

10 ARBITRATOR ANAYA: Just please --

11 MR. WEILER: No, we did not have an  
 12 elder --

13 MR. VIOLI: No, see, it presupposes we  
 14 could have done -- this is what --

15 ARBITRATOR ANAYA: No, it doesn't  
 16 presuppose you could have done it: I'm perfectly  
 17 --

18 MR. VIOLI: We tried to.

19 ARBITRATOR ANAYA: --willing to hear  
 20 why could not have of done it. Yeah, I mean,  
 21 believe me --

22 (Simultaneous discussion.)

1 matter? I mean, you're advancing interpretation  
 2 of Seneca law.

3 MR. VIOLI: Yes.

4 ARBITRATOR ANAYA: So I'm wondering if,  
 5 you know, often, in many justice systems or  
 6 indigenous justice systems, you have people who  
 7 are authorized or authorities in the law of that,  
 8 and so we look to the people or the elders or  
 9 other kinds of indigenous authorities to give  
 10 expert opinions. Sometimes it's touchy because  
 11 those matters are somewhat private or sensitive  
 12 otherwise, but in any case I'm asking, do you have  
 13 any kind of -- such evidence in the record of  
 14 Seneca -- or is it just the argument you're  
 15 presenting to us on the basis of your own  
 16 interpretations of the code and the sociology or  
 17 political make-up or authority of the Nation?

18 MR. VIOLI: It's consistent with the  
 19 plain terms of the Seneca code.

20 ARBITRATOR ANAYA: Okay. So you don't  
 21 have it.

22 MR. VIOLI: We don't.

1 MR. VIOLI: That's what I want to do, I  
 2 want to tell you why.

3 ARBITRATOR ANAYA: -- I understand you  
 4 --

5 MR. VIOLI: I'm sorry.

6 ARBITRATOR ANAYA: I'm sorry. I'm  
 7 sorry. Please.

8 Look, please don't prejudge what I'm  
 9 trying to say, I'm trying to say this in a  
 10 sensitive way. I understand how sometimes this  
 11 can not be an easy thing to do for a number of  
 12 reasons. I'm just asking if you have any such --

13 MR. WEILER: We do not have --

14 ARBITRATOR ANAYA: --or if I just have  
 15 to rely -- we just have to rely on your own  
 16 interpretations as lawyers.

17 MR. WEILER: You have to rely.

18 ARBITRATOR ANAYA: On you as lawyers.

19 MR. WEILER: Yes, you have --

20 ARBITRATOR ANAYA: --then it's a  
 21 different kind of analysis put into place.

22 MR. WEILER: Yes, that is what we have.

1 We do not have an elder's opinion --  
 2 ARBITRATOR ANAYA: Now, then, my next  
 3 question is --  
 4 MR. WEILER: --and there were very few  
 5 -- there were no court cases for this --  
 6 Arbitrator ANAYA: My next question is,  
 7 is there any reason for that, and hence you can --  
 8 now you can --  
 9 MR. VIOLI: Sorry, Professor, I  
 10 apologize greatly.  
 11 It's never been a dispute before there  
 12 was no dispute and there's never been a dispute  
 13 that we've been able to find in a Peacemakers  
 14 Court or otherwise, but we endeavor to ask a  
 15 Peacemaker for a declaration. They don't have a  
 16 declaratory judgment or declaratory rights statute  
 17 that would have allowed us to get without some  
 18 kind of controversy -- if this controversy was  
 19 there, we were told, we would be able to get a  
 20 declaration. Ironically, that's what the status  
 21 of the U.S. law was in the original court system  
 22 of the Justice Act. Unless there was a case or

1 MR. WEILER: That's for the record.  
 2 ARBITRATOR ANAYA: Just so you know, I  
 3 wouldn't require it be a lawyer, I mean, in the  
 4 sense that we, you know, or that the western world  
 5 thinks of lawyers. It's just someone with due  
 6 expertise on Seneca law and authorized by Seneca.  
 7 MR. WEILER: Back to speaking. Sorry.  
 8 PRESIDENT NARIMAN: One question  
 9 Mr. Weiler.  
 10 MR. WEILER: Oh, yes.  
 11 PRESIDENT NARIMAN: (Off microphone)  
 12 --is trading activity an investment?  
 13 MR. WEILER: In this case it is because  
 14 we're talking about the promotion of the  
 15 establishment and promotion of a brand. The word  
 16 "trading" is coming from these treaties that are  
 17 hundreds of years old. So, in one sense, when one  
 18 calls oneself --  
 19 PRESIDENT NARIMAN: I'm not talking of  
 20 treaties. I'm saying, quite apart from the treaty  
 21 the aspects of it, I assume you had nothing to do  
 22 with the Indian tribes, et cetera or Indian

1 controversy pending in that Tribunal you couldn't  
 2 get --  
 3 ARBITRATOR ANAYA: Which Tribunal?  
 4 MR. VIOLI: Peacemakers Court.  
 5 ARBITRATOR ANAYA: Peacemakers Court.  
 6 We hired a Seneca lawyer who practiced  
 7 in the Peacemaker, and that's what we found. I  
 8 apologize trying to chomp at the bit to get that  
 9 out to you, but we did in earnest try to get a  
 10 declaration or finding and they said, we'd love  
 11 to, but we're bound by our jurisdictional  
 12 limitations which don't allow us to give a  
 13 declaratory judgment in that respect unless there  
 14 was a case in --  
 15 MR. WEILER: Just to be for the record,  
 16 the fellow -- I think his name was Jeffrey that  
 17 was helping -- I can't remember his last name --  
 18 he actually is not a lawyer; he's an advocate.  
 19 MR. VIOLI: Yeah, they have advocates.  
 20 They don't have lawyers.  
 21 ARBITRATOR ANAYA: That's not  
 22 determinative.

1 Nation. Is a trading activity, simpliciter (ph),  
 2 within a particular state or a nation an  
 3 investment? I mean, do you trade in cigarettes or  
 4 do you manufacture them within this territory?  
 5 You don't. You trade in them. Now, is trading  
 6 activity an investment?  
 7 MR. WEILER: Trading without more is  
 8 not investment.  
 9 PRESIDENT NARIMAN: That's what I  
 10 wanted to know.  
 11 MR. WEILER: It requires something more  
 12 such as the loan --  
 13 PRESIDENT NARIMAN: Something more.  
 14 What is that something more in your  
 15 case?  
 16 MR. WEILER: The one example, there is  
 17 this association that we've been discussing which  
 18 is an enterprise established under Seneca law  
 19 which qualifies under the investment code -- I'm  
 20 sorry, the investment definition.  
 21 The next one is the seven-year loan of  
 22 inventory in kind from the manufacturer arm to the

1 distributor arm which we have evidence on the  
 2 record stating was necessary to make the whole  
 3 operation work. So, and this loan, we chart --  
 4 the charts are in the record, again. It went into  
 5 the high millions for many periods of time. So,  
 6 and it even did have a credit limit. Admittedly,  
 7 I think the credit limit -- the first time I saw  
 8 the credit limit was about five years in which  
 9 maybe is because the evidence is they thought it  
 10 would take five years and then when I was looking  
 11 at the records I started finally seeing -- about  
 12 five years in I saw there's a credit limit that  
 13 can't go above this amount. Again, sounds like a  
 14 loan to me. So, the fact that they did not give  
 15 them millions of dollars but instead advanced them  
 16 millions of dollars of cigarettes without asking  
 17 for the money right away, that's a loan in kind,  
 18 and that's a very big commitment of capital. It's  
 19 a very big investment, and it was necessary for  
 20 this operation to work.

21 MR. VIOLI: Mr. President. May I add  
 22 under the investment, we have one of the

1 all constituting physical assets in the territory.

2 MR. WEILER: Yes, Mr. Crook?

3 ARBITRATOR CROOK: Factual

4 clarification on what Mr. Violi said about the 50  
 5 million.

6 I was a little confused from the  
 7 description. Is that Grand River's money? Is  
 8 that Tobaccoville's money that was secured by a  
 9 security interest in product that you shipped to  
 10 Tobaccoville? Whose money is that?

11 MR. VIOLI: The money is money that's  
 12 held for the benefit of various states because of  
 13 Grand River being the manufacturer. Now --

14 ARBITRATOR CROOK: I'm sorry,  
 15 Mr. Violi, let me try to be more precise.

16 What is the source of the funds? Who  
 17 cut the check? Did Grand River cut the check or  
 18 Tobaccoville cut the check?

19 MR. VIOLI: Actually, it's done through  
 20 our royalty. So, it would be Grand River's money  
 21 and Tobaccoville's money. The bank account and  
 22 the escrow agreement that governs the bank account

1 Claimants, Mr. Montour, Arthur Montour, he owns a  
 2 company situated in the United States that's  
 3 operating on land in the United States that has  
 4 assets in the United States, that owns a United  
 5 States trademark. Certainty, a patent or  
 6 trademark is an investment within the jurisdiction  
 7 as we know. We have a cross-licensing of that  
 8 trademark right. We also have the investor, the  
 9 individual investors through Grand River  
 10 Enterprises and Grand River Enterprises investing  
 11 now close to \$50 million, which is held in bank  
 12 accounts in the United States as a condition to  
 13 doing business. Under those Escrow Statutes, you  
 14 must put that money in U.S. bank account in order  
 15 to continue to do business otherwise you will be  
 16 band under the complimentary statutes. So, you  
 17 have that investment and the Respondent's expert  
 18 said that's a savings account, it's like a forced  
 19 savings account. These are all the investments  
 20 that these -- it's not just merely just the sale  
 21 of goods. There's a trademark, there's assets  
 22 here, vehicles here, there are bank accounts here,

1 had -- well, the Arkansas bank account is only in  
 2 Grand River's name and it's only Grand River's  
 3 money. And the other bank accounts are  
 4 Tobaccoville and Grand River -- is listed on the  
 5 account as the TPM. So, Grand River's name is  
 6 under that escrow agreement and the money is there  
 7 to security judgments against --

8 ARBITRATOR CROOK: I'm actually  
 9 familiar with the purpose of the escrow, thank  
 10 you.

11 MR. VIOLI: So, the monies are sourced  
 12 from, in many cases Grand River directly and in  
 13 other cases they're Grand River's monies but  
 14 they're coming from Tobaccoville in the form of  
 15 royalties or expenses that they have to incur  
 16 under their contract manufacturing agreement. The  
 17 contract manufacturing agreement says you must pay  
 18 all U.S. obligations --

19 ARBITRATOR CROOK: Okay. You've  
 20 answered my question, thank you.

21 MR. VIOLI: Okay.

22 But there are bank accounts in Grand

1 River's name here and the funds there are held  
2 under the escrow agreements as Grand River's  
3 monies.

4 MR. FELDMAN: Counsel, is this  
5 information in the record?

6 MR. VIOLI: It is indeed. We've said  
7 what the bank accounts -- that there's bank  
8 accounts escrow accounts in the record. I think  
9 Mr. -- isn't it in the expert reports as well, the  
10 amounts of money that are there? Certainly the  
11 financial statements show it.

12 MR. WEILER: Just one point before I  
13 move on to the next set of slides. I want to  
14 stress that the Contraband Law, if you prefer, the  
15 -- slipping from me all of a sudden --

16 PRESIDENT NARIMAN: Complementary  
17 legislation.

18 MR. WEILER: Thank you, the  
19 complementary legislation, it operates by  
20 identification of brand, no two ways about it.

21 So, not only does it demonstrate the  
22 importance of that concept in the tobacco

1 would be a matter of raising of inferences."

2 So, first, the Chairman asked if there  
3 were any other internal NAAG documents earlier in  
4 this proceeding. You asked if there were these  
5 other internal NAAG documents, I think you said,  
6 that may have been amended or placed a gloss on  
7 them -- a gloss on the opinion or whose  
8 correctness and apparently that was Mr. Hering did  
9 agree that there were and again we'll confirm that  
10 on the record but it appeared that there are these  
11 other NAAG documents and we wanted to know about  
12 that, too, which is why we asked for, quote, all  
13 documents concerning the negotiation drafting  
14 implementation or enforcement of the MSA provision  
15 that relates to SPMs or NPMs.

16 Now. My friends answer at the time was  
17 pretty uncategorically -- he said, no, it's not  
18 relevant and then he mentioned also as they did, I  
19 think, in all of the answers that it was too broad  
20 and burdensome and unspecific. I would submit to  
21 you that those NAAG documents are pretty relevant  
22 and I think they should have included. And --

1 business, but again it demonstrates the nexus  
2 between the measure and the investment. So,  
3 you'll be happy to hear that we're getting towards  
4 finished. This is actually the only point I  
5 wanted to make I already made on that.

6 And then the final one is a couple of  
7 thoughts about the state of the evidentiary  
8 record.

9 On May 14, 2007, the Tribunal issued  
10 its order and it said that requests numbers 1 to  
11 22 are not in conformity with Article 3 of the IBA  
12 Rules and therefore are denied. It goes on and it  
13 says, "however, the Respondent is directed to  
14 disclose such documents as are mentioned generally  
15 in Items 1 to 22 of the Claimant's request to  
16 produce," which Respondent considers to be  
17 included within the scope of Paragraph 1 of this  
18 order.

19 And then, on January 28th, 2008, and  
20 again confirmed on February 4, 2008, the Tribunal  
21 stated, "Each party is reminded that any  
22 unexplained non production of relevant documents

1 PRESIDENT NARIMAN: Why haven't you  
2 produced them? You are looking --

3 MR. WEILER: I asked for --

4 PRESIDENT NARIMAN: No, they are in  
5 your core bundle, a few of them.

6 MR. WEILER: Yes, the ones we received,  
7 I will let Mr. Violi or Mr. Luddy explain how they  
8 came into the Claimant's possession, but we're  
9 talk about the ones we didn't get that the witness  
10 said existed but we never saw and you haven't  
11 seen. If -- assuming the witness was correct --  
12 they may have seen. I'm not saying -- we don't  
13 know. We asked for documents that pertain to,  
14 that related to the SPMs and NPMs and the  
15 enforcement or implementation of the MSA's  
16 implementation measures, but we didn't get them.  
17 So, we would submit that that's -- these are  
18 relevant documents that we didn't get.

19 MR. VIOLI: I can speak to that also.

20 MR. FELDMAN: Mr. President, the  
21 Tribunal on several occasions has indicated  
22 discovery is closed in this matter.

1 MR. LUDDY: I don't believe we're  
2 looking for additional discovery.  
3 PRESIDENT NARIMAN: He's pointing out  
4 your evidentiary omissions. That's what he's  
5 leading too, that's why he's mentioning. He's not  
6 saying, now you produce it or don't produce it.  
7 He's only commenting on it.  
8 ARBITRATOR CROOK: Mr. Weiler, the  
9 request you just read us, was that one of the  
10 original 28 or was that subsequent to the  
11 Tribunal's order?  
12 MR. WEILER: One of the 22.  
13 ARBITRATOR CROOK: One of the 22.  
14 MR. WEILER: Yes. I actually -- funny,  
15 the one I found the quickest --  
16 ARBITRATOR CROOK: Was that one of  
17 those that --  
18 MR. WEILER: Yes one of the ones that  
19 was said --  
20 ARBITRATOR CROOK: That was denied.  
21 PRESIDENT NARIMAN: What was the answer  
22 to it?

1 working group but no documents -- they produced  
2 nothing of the sort.  
3 MR. WEILER: No memorandum, no e-mail.  
4 ARBITRATOR CROOK: And Mr. Violi, in  
5 your opinion, it's immaterial the Tribunal denied  
6 that request?  
7 MR. VIOLI: I don't think the Tribunal  
8 knew -- well, let me ask -- I'm not going to ask  
9 the Tribunal but I'll leave it to you if you had  
10 known there was a Grand River working group and  
11 you had known that they knew and we didn't know  
12 would you have denied the request nonetheless.  
13 I'd leave that to you and then you would have to  
14 make the material -- I'm not going to make the  
15 materiality finding.  
16 MR. WEILER: But I would add,  
17 Mr. Crook, as I read back the orders while the  
18 requests were ruled contrary to IBA(3) that  
19 nonetheless the word "however" is there. The  
20 Respondent is directed to disclose these documents  
21 and then -- and it does say though that it feels  
22 is relevant but then we have two admonitions, I

1 MR. WEILER: The answer was, no, it's  
2 not relevant and also that it was insufficiently  
3 specific, overly broad and unduly burdensome.  
4 PRESIDENT NARIMAN: But, then, couldn't  
5 you have narrowed it, because it is broad? Your  
6 request is very, very broad. Any documents  
7 pertaining to NAAG -- they can't bring cartloads  
8 of documents from NAAG.  
9 MR. VIOLI: We did make a specific  
10 request with respect to what we think falls within  
11 the working group, Mr. President.  
12 On the second request, number six we  
13 asked for all documents analyzing, comparing, or  
14 summarizing the operation effect or enforcement of  
15 the escrow statutes as amended or by the MSA or as  
16 originally enacted.  
17 In respect of Claimant's, in  
18 particular, or considering other tobacco industry  
19 members, but as a class or whole.  
20 PRESIDENT NARIMAN: (Off microphone.)  
21 MR. VIOLI: Yeah, we asked for this,  
22 here, number six. And now we find out there's a

1 think, because we wrote too much to you, but we  
2 have two admonitions that say each party is  
3 reminded that unexplained non production of  
4 relevant documents would be a matter of raises  
5 inferences. I am requesting inferences to be  
6 raised on this point, which is the --I think we're  
7 fairly clear on that. So I'll move on.  
8 PRESIDENT NARIMAN: What do you want?  
9 If these documents which you imagine to be there  
10 were produced, what would they have shown? I  
11 mean, what's your hunch?  
12 MR. VIOLI: May I speak to that?  
13 PRESIDENT NARIMAN: Yeah.  
14 MR. VIOLI: From what we've seen, the  
15 few documents we've seen, they will show number of  
16 meetings between the tobacco companies and the  
17 attorneys general dealing with changing the law,  
18 the reason for changing the law. The effects of  
19 changing the law and he repercussions to  
20 Claimants. We will also see a particular working  
21 group something I've never seen before where  
22 imagine a whole country of attorneys general

1 focussing on one company and one particular  
2 industry. I thank them for their attention, but  
3 my time is limited, Mr. President, among many  
4 matters that's what we have. We have a concerted  
5 effort and we've seen the results of this  
6 concerted effort. Letters to Foreign Trade Zone,  
7 and I don't want to bring it up again, but these  
8 documents which shed light on the measures at  
9 issue and their enforcement, and we think they  
10 would go direct -- because everything -- we would  
11 get a piece of document here or someone would give  
12 us a document that they found somewhere, not  
13 through our friends, and none of them mentioned  
14 healthcare; we noticed that. There's a common  
15 theme throughout all these documents that are  
16 beyond the public purview, not one -- they all  
17 mention money, they mention reduction in market  
18 share, but they don't mention healthcare.

19 So, it goes to the healthcare issue  
20 also. But certainly it goes to the intent, the  
21 purpose, and the effect of the measures at issue.

22 PRESIDENT NARIMAN: What is the

1 1105, right? We have to reach the shocking and  
2 sort of outrageous and we're really close -- we're  
3 really close as I explained this morning and I  
4 submit that they didn't want to provide the  
5 documents because we'd be past where we need to  
6 be. I think we're there, because these documents,  
7 like I said this morning, it confounds -- it's  
8 unbelievable that the government would do this.  
9 You have this working group and all that, so I  
10 think we met the standard but if there's a  
11 question whether we're just below that --

12 PRESIDENT NARIMAN: Which document  
13 you're talking about?

14 MR. VIOLI: The state's. The  
15 Respondent is vicariously responsible for the  
16 state's conduct. I'm talking about the state --

17 PRESIDENT NARIMAN: Vicariously under  
18 what?

19 MR. VIOLI: NAFTA.

20 PRESIDENT NARIMAN: NAFTA itself?

21 MR. VIOLI: Yeah, the federal  
22 government is responsible -- I'm not saying the

1 inference you want us to draw?

2 MR. VIOLI: The inference to draw is,  
3 number one, with respect to health measures, that  
4 they're either neutralized or nonexistent in  
5 comparison to what is the true purpose of these  
6 measures, and that is to take the market share  
7 away from the NPMs; that's the first inference,  
8 that the healthcare measures really aren't  
9 substantiated when we see that documents exist  
10 really speak to the true purposes of these  
11 inferences.

12 The second inference to draw is that  
13 there was an intent and an acknowledgement that  
14 these measures would harm Claimants in a  
15 quantifiable way, as measured by market share,  
16 lost volumes, and profits. So we think an  
17 inference can be drawn in that respect.

18 Also the inference that can be drawn --  
19 and we'll speak more to it in the closing -- the  
20 egregiousness of the conduct at issue. I think we  
21 have to reach that level of shock -- in one of the  
22 tests, in one of the provisions -- I believe it's

1 federal government did anything wrong here in  
2 these measures. It's the state governments that  
3 the federal government is responsible for under  
4 NAFTA. NAFTA says we cannot sue -- if we would  
5 have brought the claim here against the states, we  
6 would have, but we can only bring the federal  
7 government and they have to stand in the shoes of  
8 their states.

9 So, what I was submitting before is  
10 that if you think we're just below that egregious  
11 standard and outrageous, shocking and outrageous,  
12 I submit that the documents, the little bit that  
13 we saw -- if we were given all of their documents  
14 -- and they're demonstrated here -- and brought  
15 before the Tribunal, they would be much worse than  
16 what I attempted to describe to you this morning.  
17 The picture would be much bleaker, much more  
18 grave.

19 Finally the inference is that --  
20 competition. I'm not permitted to speak to you  
21 about something called an NPM proceeding,  
22 adjustment proceeding. I'm bound by a court order

1 that says I -- and their requirement that I not  
2 disclose certain matters to you. There's been a  
3 whole body of proceeding that the individuals  
4 testified where the tobacco companies want money  
5 back under the MSA; they want a credit, and they  
6 are adversarial to the states. The states are  
7 saying, we diligently enforce the law and there's  
8 been no market share lost and whatever they want  
9 to make as an argument.

10 In those proceedings, I can only tell  
11 you personally that they will or would have  
12 materially affected your decision on whether  
13 competition was affected -- competition was  
14 affected by these measures; whether we were harmed  
15 by these measures; and, third, whether they were  
16 truly needed.

17 PRESIDENT NARIMAN: Who injected you  
18 from --

19 MR. VIOLI: In the federal anti-trust  
20 case in New York where we're seeking a declaration  
21 -- we can't seek damages -- we were provided  
22 documents of --

## CONFIDENTIAL SESSION

1 MR. WEILER: Quick non-closed point.

2 When you have to draw an adverse  
3 inference, you only have the evidence that you  
4 have, and you have to -- you make an inference  
5 based on what you have. The few documents that we  
6 were able to get definitely point you in a  
7 direction that says absolutely nothing about  
8 healthcare; it talks about market sharing, what  
9 have you.

10 PRESIDENT NARIMAN: No, my question was  
11 -- sorry, this is not on record.

12 (Discussion off the record.)

13 (Closed session. )

14 MR. VIOLI: We will address the full  
15 impact of the adverse inferences at the closing,  
16 if that's okay, Mr. President.

17 PRESIDENT NARIMAN: (Off microphone) I  
18 just want you to know -- all that you can get out  
19 of this case was these five documents --

20 MR. VIOLI: Right. For here, they only  
21 allowed four.  
22

1 MR. LUDDY: Some.

2 MR. VIOLI: Some documents, not all.  
3 They fought us on the some we received, where the  
4 states took a position and one of the documents  
5 that's in the record I believe --

6 MR. LUDDY: This is confidential.

7 MR. VIOLI: No, the one that's the  
8 public one.

9 MR. WEILER: The New York decision.

10 MR. LUDDY: No, no. Sorrell is the one  
11 who said that. If you're going to mention any of  
12 the NPM documents that are in the record, we have  
13 to go private.

14 MR. VIOLI: Can we go closed for one  
15 second -- or ten seconds or whatever. Closed,  
16 yes.

17 Closed, please.

18 MR. WEILER: And then wait on the --  
19 (End of open session. Confidential  
20 business information redacted.)  
21  
22

1 PRESIDENT NARIMAN: (Off microphone)

2 And your complaint is only made -- the Respondent  
3 is only --

4 COURT REPORTER: I can't hear you.

5 PRESIDENT NARIMAN: Yeah, okay.

6 MR. KOVAR: Mr. President, may I ask  
7 you a question, please?

8 I'm a little bit unclear about the  
9 discomfort you have here. There's a discovery  
10 order in this case that was reached after  
11 submissions by both parties, it was duly  
12 considered by the Tribunal.

13 The Claimants now are bringing in a lot  
14 of wild accusations where there's no information  
15 on the record, and I don't -- if there's a  
16 discomfort on the part of the Tribunal, I don't  
17 think you have information with which to address  
18 that. And I don't want to be in a position where  
19 the Respondents would be prejudiced simply because  
20 the Claimants are upset and are making  
21 allegations. I think that creates a situation  
22 that could lead to unfairness.

1 PRESIDENT NARIMAN: (Off microphone) --  
2 you have 13 hours to explain to us. I have no  
3 objection to listen to you. I haven't made up my  
4 mind, speaking for myself, but I am a little  
5 disturbed, you are right. (Off microphone) -- of  
6 this, even if there are wild allegations, you  
7 please tell us later when it gets to your turn. I  
8 am willing to accept it. Yes, that's right.

9 MR. KOVAR: Okay. We'll address it  
10 then, thank you.

11 MR. LUDDY: In terms of the rest of the  
12 day, I think -- are we going to take our break  
13 now? And then, I think we're going to run into an  
14 impasse on witnesses until tomorrow morning. We  
15 may -- we're going to consult amongst ourselves.

16 PRESIDENT NARIMAN: (Off microphone) --  
17 have some sort of a --

18 MR. LUDDY: We have -- we actually have  
19 a brief tape of GRE that's in the record that we  
20 may play for the Tribunal.

21 PRESIDENT NARIMAN: What's that on?  
22 What's that on?

1 witnesses that haven't been called yet, and  
2 through no fault, I'm sure, of Respondent's, and  
3 certainly not our own, Professor Gruber is not  
4 here until tomorrow, and we've been trying to work  
5 around the schedule. So, we're doing the best we  
6 can, your Honor. If we have a dead hour, one dead  
7 hour in the week I consider that a small victory  
8 and go on.

9 PRESIDENT NARIMAN: (Off microphone) --  
10 have a break now and meet again or...

11 MR. FELDMAN: That's fine. That's  
12 fine.

13 PRESIDENT NARIMAN: Until 4:00 o'clock?

14 MR. VIOLI: Yes, please.

15 (Whereupon, a recess was taken from  
16 3:40 to 4:00 p.m. )

17 MR. WEILER: What we're about to see --  
18 (VIDEO PLAYED.)

19 (VIDEO STOPPED.)

20 MR. LUDDY: We were going to describe  
21 that briefly. It's just a brief promotional video  
22 produced during the course of this litigation. It

1 MR. LUDDY: It's a historical tape of  
2 GRE that tells a little bit about the company.

3 PRESIDENT NARIMAN: (Off microphone) --  
4 do you have any objection to any --

5 MR. FELDMAN: It's in the record.

6 MR. LUDDY: It's in the record.

7 MR. FELDMAN: We don't have an  
8 objection.

9 MR. LUDDY: And I think that's about  
10 20 minutes or so. So, if we broke now that will  
11 probably take us to closer to 4:30, but then I  
12 just --

13 PRESIDENT NARIMAN: (Off microphone) --  
14 we don't have to speed up -- want to do something;  
15 otherwise --

16 MR. LUDDY: Yeah.

17 PRESIDENT NARIMAN: -- let us have some  
18 argument on your part or something -- what's the  
19 use of wasting time -- because we have until 5:30.

20 MR. LUDDY: Yeah. Well, I mean, part  
21 of the problem is that, in terms of some of the  
22 arguments that we have left -- deals with

1 shows the facilities and the commitments of the  
2 company that we produce frankly for the Tribunal  
3 to see. I think the, I think we're probably at  
4 that hour that I forecasted before, Mr. President,  
5 where we may have a dead hour. If that's the only  
6 dead hour we have for the week, as I said,  
7 personally we consider it a success. Tomorrow  
8 we're planning on Professor Gruber first thing in  
9 the morning and then because Mr. Montour's counsel  
10 has to head to the west coast -- you know  
11 actually, either Gruber or Arthur Montour, first  
12 thing.

13 MR. FELDMAN: Yes.

14 MR. LUDDY: And one other witness  
15 tomorrow afternoon. After those two at some  
16 point, we'll -- I think that's it. All right. I  
17 think that's all for today.

18 PRESIDENT NARIMAN: Okay.

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

20 (Whereupon, at 4:15 p.m., the hearing  
21 was adjourned until 9:00 a.m., the following day.)  
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CERTIFICATE OF REPORTER

I, John Phelps, RPR, CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

JOHN PHELPS, CSR, RPR, CRR