

1988

NAFTA/UNCITRAL ARBITRATION RULES PROCEEDING

----- x
 :
 In the Matter of Arbitration :
 Between: :
 :
 GRAND RIVER ENTERPRISES SIX NATIONS LTD., :
 et al., :
 :
 Claimants/Investors, :
 :
 and :
 :
 UNITED STATES OF AMERICA, :
 :
 Respondent/Party. :
 :
 ----- x Volume No. 6

HEARING ON THE MERITS

Saturday, February 13, 2010

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

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

- MR. FALI S. NARIMAN, President
- PROF. JAMES ANAYA, Arbitrator
- MR. JOHN R. CROOK, Arbitrator

Also Present:

MS. KATIA YANNACA-SMALL,
Secretary to the Tribunal

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

C O N T E N T S

FURTHER ARGUMENT	PAGE
ON BEHALF OF THE RESPONDENT:	
By Ms. Morris	1998
By Ms. Thornton	2088
By Mr. Kovar	2130
By Mr. Feldman	2233
By Mr. Sharpe	2311
By Mr. Kovar	2365

CONFIDENTIAL PORTIONS

NUMBER	PAGE
1.	2312

1 decision in the Southern District of New York took
2 statistics from the PWC notices which contains
3 this information, and we have compiled a chart
4 directly from the numbers set forth in Freedom
5 Holdings setting forth the various market share
6 numbers, as well as the per carton payment amounts
7 for the various categories of manufacturers, and
8 that list is also being circulated at this time.
9 PRESIDENT NARIMAN: Yeah, okay.
09:00:58 10 I don't understand this freedom
11 holdings.
12 MR. FELDMAN: I'm sorry. The Freedom
13 Holdings decision, it is in the record, it is in
14 our core bundle. It's from the Southern District
15 of New York.
16 PRESIDENT NARIMAN: What is this then?
17 MR. FELDMAN: Those are statistics that
18 are contained within the freedom holdings decision
19 that, in turn, are taken from the PWC notices, and
09:01:19 20 we have produced several of these PWC notices in
21 this case.
22 Claimants have relied on them and in

P R O C E E D I N G S

1
2 PRESIDENT NARIMAN: Mr. Violi, your
3 side is ready?
4 MR. VIOLI: Yes, we are.
5 PRESIDENT NARIMAN: We are ready, if
6 you are.
7 MR. FELDMAN: Thank you, Mr. President.
8 Good morning.
9 Just housekeeping, as an initial
08:59:52 10 matter. We have two documents that we are
11 circulating in response to the Tribunal's request.
12 The first concerns a list of documents for which
13 we are claiming confidentiality protection. And
14 the second, yesterday the Tribunal had requested
15 statistic numbers on the per carton payment
16 amounts for the various categories of
17 manufacturer, as well as the market share over a
18 series of years for the various manufacturers.
19 The Freedom Holdings decision in the Southern
09:00:21 20 District of New York --
21 PRESIDENT NARIMAN: What was that?
22 MR. FELDMAN: The Freedom Holdings

1 Dr. Eisenstadt's report, and this is simply a
2 simple chart setting out the per carton payment
3 amounts and the market shares for the various
4 categories of manufacturer.
5 PRESIDENT NARIMAN: Okay.
6 MR. VIOLI: At present, we have no
7 objection to the opinion coming in. This is
8 Freedom Holdings, it's a case. In that case there
9 was no economist produced by the defendant, so I
09:01:49 10 guess this is a table that was prepared by the
11 state's expert, I don't know, but the raw data,
12 PWC documents are in the record. I don't know why
13 the Respondent is relying on a case for factual
14 statistics when the data and their economist had
15 the actual data and could have used that.
16 So we'll just reserve the objection
17 now. We don't object to the opinion coming in.
18 Whether these statistics are accurate, however, is
19 another matter.
09:02:21 20 PRESIDENT NARIMAN: Noted. Noted.
21 MR. FELDMAN: Mr. President, we would
22 just note these statistics set forth in the

1997

1 opinion, that is public information, the Tribunal
 2 -- this can be a public award. The PWC notices
 3 are confidential, so it's helpful to be able to
 4 rely on this information when it's given in a
 5 public setting decision such as the decision in
 6 Freedom Holdings.
 7 PRESIDENT NARIMAN: Okay.
 8 MR. FELDMAN: And we also from the
 9 response to the Tribunal's request from yesterday,
 09:02:46 10 we have the first amended complaint in the Philip
 11 Morris, the federal action in New York and we are
 12 circulating --
 13 PRESIDENT NARIMAN: What date is that
 14 action, is it mentioned?
 15 MR. FELDMAN: Yes. The date is
 16 February 28th of 2001.
 17 PRESIDENT NARIMAN: Thank you. That's
 18 been distributed.
 19 MR. FELDMAN: Yes.
 09:03:12 20 PRESIDENT NARIMAN: What are we doing
 21 today?
 22 MR. KOVAR: We're going to start,

1999

1 MSA serve critical public health interests of the
 2 settling states and are entirely not
 3 discriminatory. Their character, therefore, in no
 4 way supports Claimants' expropriation claim under
 5 Article 1110.
 6 Claimants' make three principle
 7 arguments as to why the MSA regime should be
 8 considered discriminatory.
 9 The first is that the settling states
 09:04:45 10 weren't actually concerned with promoting the
 11 public health, which Claimants admit is a valid
 12 public purpose. Rather, they assert that the
 13 states colluded with the participating
 14 manufacturers to protect the PMs' market share in
 15 return for payments under the MSA, all at the
 16 expense of the NPMs.
 17 The second is that the federal
 18 government of the United States has somehow
 19 implicitly endorsed Claimants' assertions about
 09:05:14 20 the motives of the states and the participating
 21 manufacturers by pointing out in various fora the
 22 inadequacies of the MSA.

1998

1 Mr. President, if you would with Ms. Morris the
 2 character of the measure under Article 1110, the
 3 expropriation article.
 4 MS. MORRIS: Good morning.
 5 PRESIDENT NARIMAN: Yes, please,
 6 Ms. Morris.
 7 MS. MORRIS: Mr. President, Members of
 8 the Tribunal. Yesterday several of my colleagues
 9 discussed Claimants' asserted expectations both on
 09:03:39 10 and off-Reservation, and I discussed the alleged
 11 economic impact of the challenged measures on
 12 Claimants' investment.
 13 I will now turn to the third and final
 14 factor in the expropriation analysis character.
 15 As Mr. Kovar noted in his introduction, the
 16 character of the challenged measures, that is
 17 whether the measures are non discriminatory in
 18 nature and serve a public purpose is also
 19 considered in determining whether regulatory
 09:04:06 20 expropriation has occurred under Article 1110.
 21 As I will discuss, there can be no
 22 doubt that the challenged measures, as well as the

2000

1 And the third is that the allocable
 2 share release mechanism is no more a loophole than
 3 the grandfather shares offered to SPMs that signed
 4 the MSA within 90 days of its execution.
 5 Claimants assert that all they want is
 6 an opportunity to join the MSA on terms equal to
 7 those granted to the grandfather SPMs. As I will
 8 explain, each of these allegations is unfounded
 9 and the MSA regime is, in fact, non discriminatory
 09:05:54 10 and serves the public health.
 11 First and foremost, the public health
 12 interest motivating the MSA and the challenged
 13 measures is evident on the face of the settlement
 14 and statutes themselves. The MSA, for example,
 15 states among its recitals, whereas the undersigned
 16 settling state officials believed that entry into
 17 this agreement and uniform consent decrees with
 18 the tobacco industry is necessary in order to
 19 further the settling states policies designed to
 09:06:29 20 reduce youth smoking, to promote the public health
 21 and to secure monetary payments to the settling
 22 states.

2001

1 Similarly, the Idaho escrow deposit
 2 statute, which is representative, lists among its
 3 findings and purposes that cigarette smoking
 4 presents serious public health concerns to the
 5 state of Idaho and to the citizens of the state.
 6 The Surgeon General has determined that smoking
 7 causes lung cancer, heart disease and other
 8 serious diseases, and that there are hundreds of
 9 thousands of tobacco-related deaths in the United
 09:07:06 10 States each year.
 11 The legislature continued. It would be
 12 contrary to the policy of the state if tobacco
 13 product manufacturers who determine not to enter
 14 into such a settlement with the state could use a
 15 resulting cost advantage to derive large
 16 short-term profits in the years before liability
 17 may arise without ensuring that the state will
 18 have an eventual source of recovery from them, if
 19 they are proven to have acted culpably.
 09:07:38 20 With respect to its complementary
 21 legislation, the Idaho legislature found that
 22 violations of Idaho's tobacco Master Settlement

2003

1 MSA addresses the public health. The first way is
 2 the payments themselves which are a public health
 3 measure because higher payments mean lower
 4 consumption. The second are the public health
 5 restrictions contained in section three of the MSA
 6 which I will be addressing at greater length later
 7 in my presentation.
 8 The third is the creation of the
 9 American Legacy Foundation, a non profit
 09:09:19 10 organization that is, quote, dedicated to a world
 11 where youth reject tobacco and everybody can quit,
 12 end quote.
 13 The fourth is the source of funds used
 14 by the states for anti tobacco and other similar
 15 measures. Professor Gruber also testified to the
 16 public health benefits of the MSA regime stating,
 17 quote, as the price of the cigarette goes up, it's
 18 a disincentive for youth to start smoking. It
 19 also helps encourage some people to quit that
 09:09:48 20 might not otherwise quit, end quote.
 21 Professor Gruber identified as another
 22 public health positive of the MSA regime, the

2002

1 Agreement Act establishing escrow deposit
 2 obligations threatened the integrity of Idaho's
 3 Master Settlement Agreement with leading tobacco
 4 manufacturers, the fiscal soundness of the state
 5 and the public health.
 6 The legislature finds that enacting
 7 procedural enhancements will help prevent
 8 violations of Idaho's tobacco Master Settlement
 9 Agreement Act and thereby safeguard the Master
 09:08:13 10 Settlement Agreement, the fiscal soundness of the
 11 state and the public health.
 12 The settling states could not have been
 13 clearer about the public health concerns
 14 motivating their adherence to the MSA and their
 15 enactment of the challenged measures. And we
 16 submit that under these facts, the Tribunal should
 17 not seek to go behind these explicit statements of
 18 purpose in search of some alleged true purpose
 19 hypothesized by Claimants.
 09:08:40 20 Mr. Hering neatly summarized the
 21 motivations behind the MSA in his testimony last
 22 Tuesday, enumerating the four different ways the

2004

1 ability of states to begin to recoup some of the
 2 costs that they had incurred as a result of prior
 3 cigarette sales. Reinforcing the validity and
 4 veracity of the stated purposes of these measures
 5 is the fact that they have, indeed, been effective
 6 at promoting the public health.
 7 U.S. courts asked to review the MSA
 8 have found that it painstakingly accommodates the
 9 public interest, and tellingly, despite their
 09:10:27 10 various attacks on the public health objectives of
 11 the MSA, Claimants themselves openly acknowledge
 12 that the MSA has successfully reduced smoking
 13 rates.
 14 As stated in Claimants' reply,
 15 independent studies attribute almost one-quarter
 16 of reductions over the past decade in youth
 17 tobacco use to a successful public information
 18 campaign executed by the American Legacy
 19 Foundation, which was created and funded under the
 09:10:54 20 MSA.
 21 In his testimony, Mr. Hering stated
 22 that in large part because of the MSA, consumption

2005

1 has gone down, sales have gone down, nearly 25
2 percent in ten years, which is something the
3 attorney generals are very pleased with.

4 Mr. Hering further testified the MSA
5 has resulted in great declines in the consumption
6 of cigarettes from over 480 billion in the year
7 before the MSA began down to 260, less than 260, I
8 believe, or thereabouts in the most recent year.
9 Over hundred billion cigarettes.

09:11:35 10 And those are cigarettes because they
11 are not being sold on which the states will never
12 be paid. We will receive no MSA payments for
13 cigarettes that are not sold. However, as one of
14 our member AGs have said, it's the best money we
15 never got because we save more in avoiding the
16 public health costs resulting from the death and
17 disease than we lose in payments.

18 ARBITRATOR ANAYA: Excuse me?

19 MS. MORRIS: Yes.

09:12:07 20 ARBITRATOR ANAYA: Is there any proof
21 in the record beyond the statements of Mr. Hering
22 that the reduction in consumption of cigarettes

2007

1 consumption charts that --

2 PRESIDENT NARIMAN: Not charts, some
3 documents.

4 MR. VIOLI: It's the CDC report that
5 Respondent put in, that said the premium cigarette
6 distribution did not go down in percentages. CDC
7 is the U.S. Government Center for Disease Control,
8 so there is, I think it was 2001 or 2003. I
9 believe Respondent put that in.

09:13:38 10 MS. MORRIS: We also have cigarette
11 sales data from the CDC that shows a remarkable
12 drop in consumption.

13 PRESIDENT NARIMAN: Thank you.

14 ARBITRATOR ANAYA: I understand that
15 there's been a reduction, there doesn't seem to be
16 a dispute, but the question is the causation.

17 MS. MORRIS: Yes. And there are
18 several journal articles that we've put into the
19 record in which social scientists and
09:14:00 20 statisticians have done studies with statistical
21 certainty that shows the MSA and related public
22 service announcements, for example, have, in fact,

2006

1 is, in fact, due to the MSA?

2 MS. MORRIS: Yes. We have various
3 charts that are based on CDC data that show a
4 dramatic reduction immediately after the MSA, and
5 there have also been several studies and journal
6 articles that are in the record that have studied
7 the matter and have determined that the MSA was,
8 in fact, effective in reducing smoking rates.

9 PRESIDENT NARIMAN: As far as I
09:12:39 10 recollect, there are also some documents on the
11 record which suggest the contrary that the -- that
12 because of the MSA, consumption has not gone down.
13 Am I right or am I wrong? There are some
14 documents, which we should have both of them, if
15 you don't mind. On the record, I've noticed I
16 remember that.

17 MS. MORRIS: Certainly, Claimants have
18 put in a variety of articles to suggest --

19 PRESIDENT NARIMAN: Not just articles,
09:13:05 20 some documentation. It may not be just the
21 opinions of some people but some documentation.

22 MS. MORRIS: Are you referring to the

2008

1 had a statistical reduction in smoking.

2 ARBITRATOR CROOK: You will give us a
3 list of where to find that.

4 MS. MORRIS: Certainly.

5 Similarly, Mr. Hering described -- I
6 got ahead of myself. Attorney General Sorrell he
7 seconded the statement in his memo to the state
8 Attorneys General writing, reductions in
9 settlement payments resulting from an overall
09:14:34 10 reduction in cigarette consumption benefit the
11 state because the healthcare costs imposed by each
12 cigarette exceed the settlement payments.

13 Similarly, Mr. Hering described the
14 willingness of the settling states to forego MSA
15 payments in return for compliance with the public
16 health provisions of the agreement, explaining, we
17 focus as much on public health as on payments in
18 terms of enforcing the Section 3 restrictions
19 against the banned uses of advertising and
09:15:07 20 marketing. And, of course, the end result of most
21 of those actions is lower sales.

22 We have most recently, I think, one of

2009

1 the cases we brought was a case against RJR for
2 advertising with cartoons in Rolling Stone
3 Magazine, and another one that was recent was a
4 case brought against an SPM, Sherman's for selling
5 brand name merchandise. That is merchandise
6 meaning clothing, trinkets, ashtrays, things like
7 that emblazoned with their logo on it, which is
8 also banned under the MSA.

9 We do all of those things and we
09:15:44 10 wouldn't do those if we were trying to maximize
11 sales and thereby payments under the MSA. As I
12 will discuss in more detail the states were also
13 willing to give up a certain amount of payments
14 from the grandfathered SPMs in the form of the
15 grandfather share in order to encourage them to
16 voluntarily settle and submit themselves to the
17 public health restrictions of the MSA.

18 Again, this is not something the states
19 would have done if the MSA were only about
09:16:12 20 revenues.

21 Also, contrary to Claimants' assertions
22 NPMs were not shut out of the legislative process

2011

1 work session on the Oregon bill included comments
2 from Philip Morris, R.J. Reynolds Tobacco and
3 American Heart Association.

4 CITMA offered several arguments against
5 the complementary legislation and Allocable Share
6 Amendment similar to that offered by Claimants
7 here before the Wisconsin, Arizona and Michigan
8 legislature, as well.

9 In Michigan, CITMA's testimony was
09:17:58 10 countered by testimony from various parties
11 including the Michigan Department of Treasury, the
12 Michigan Department of the Attorney General, the
13 Michigan Grocer's Association, the Michigan
14 Distributors and Vendor's Association, R.J.
15 Reynolds, Commonwealth brands, Altria, the current
16 owner of Philip Morris. Lorillard Tobacco.
17 Liggett group, Top Tobacco and Japan Tobacco.

18 As Mr. Hering testified, CITMA and its
19 allies were able to persuade the Missouri
09:18:33 20 Legislature not to pass the proposed Allocable
21 Share Amendment. As Mr. Hering stated, the
22 interests there had managed to defeat it, although

2010

1 through which this important public health
2 framework was established. As Mr. Hering
3 testified, he spoke in favor of the Allocable
4 Share Amendments in at least 13 states and his
5 testimony was quite often opposed by a number of
6 entities including CITMA, the Counsel of
7 Independent Tobacco Manufacturers in America and
8 on occasion NPMs, and on occasion other groups.

9 CITMA was an organization established
09:16:50 10 by certain NPMs to represent their interests,
11 including appearing before state legislature to
12 oppose the Allocable Share Amendments. That
13 organization, among others, was quite involved in
14 the legislative processes of various states,
15 considering the Allocable Share Amendments and the
16 complementary legislation.

17 For example, CITMA participated in a
18 public hearing on Oregon's proposed legislation
19 and Allocable Share Amendment. Other participants
09:17:21 20 of that hearing included representatives from the
21 Attorney General's office, Single Stick Tobacco
22 Company and USA Tobacco Distributing. A related

2012

1 I've been out to Missouri three times to testify.
2 Mr. DeLange testified that the process in Idaho
3 was similarly open, stating that the Allocable
4 Share Amendment in Idaho was vigorously opposed by
5 some NPMs who came to Idaho and disputed and
6 argued their position.

7 Mr. DeLange stated that Grand River
8 could have engaged in similar lobbying and
9 testimonial activities had it wished to do so and
09:19:07 10 that the public was made well aware of the
11 proposed legislation, in part because Idaho
12 publishes all of its proposed bills on the
13 Internet.

14 Indeed, all the states have Web sites
15 that provide information to tobacco manufacturers
16 regarding the MSA and the state's related
17 legislation, in order to provide as much
18 information as possible to the manufacturers and
19 anyone else interested in the state's tobacco
09:19:32 20 regulations.

21 Along these same lines, Claimants
22 pointed yesterday to e-mails between Phil Stanbeck

2013

1 and the Oklahoma Attorney General's office and
 2 Alex Shachnus, counsel for the OPMS as purported
 3 evidence of collusion between the states and the
 4 participating manufacturers in the passage of the
 5 Allocable Share Amendments and the complementary
 6 legislation. Claimants mischaracterized these
 7 e-mails.

8 As has already been described the
 9 states needed --

09:20:03 10 PRESIDENT NARIMAN: What do you mean by
 11 mischaracterized?

12 MS. MORRIS: I'm about to explain.

13 As has already been described the
 14 states needed to have qualifying statutes in
 15 effect in order to claim the safe harbor from
 16 application of an NPM adjustment. Section
 17 9(d)2(e) of the MSA says that the model statute in
 18 Exhibit T would be deemed a qualifying statute,
 19 quote, if enacted without modification or
 09:20:35 20 addition, open paren, except for particularized
 21 state procedural or technical requirements, close
 22 paren, and not in conjunction with any other

2015

1 original version of the e-mail, which we are happy
 2 to provide to the Tribunal, if you so wish.

3 MR. VIOLI: We would object vehemently
 4 to that because we've asked for that in New York
 5 litigation, we've asked for it in this case, and
 6 the response we received is that they could not
 7 find it. We object vehemently to the production
 8 and they've known about this since the
 9 jurisdictional hearing.

09:22:18 10 MR. KOVAR: Mr. President.

11 MR. VIOLI: Let me finish, please, Mr.
 12 Kovar.

13 We produced that in the exact form that
 14 you saw in the jurisdictional hearings three years
 15 ago and made a request when Mr. Klinefelter said,
 16 well, we'll see if we can find it. We don't know
 17 where it came from and we requested that three
 18 years ago.

19 For you now to produce it with those
 09:22:37 20 asterisks replaced has violated everything I've
 21 ever seen in a court of law.

22 PRESIDENT NARIMAN: Okay. Okay. Go

2014

1 legislative or regulatory proposal, end quote.

2 Since the Allocable Share Amendments
 3 were modifying the model statute, and the
 4 complementary legislation was in conjunction with
 5 the model statute, the states simply wished to
 6 assure themselves that the participating
 7 manufacturers would not later contend that the
 8 Allocable Share Amendments or the complementary
 9 legislation meant that the amended Escrow Statutes
 09:21:16 10 were no longer qualifying statutes.

11 These communications do not suggest,
 12 however, that the participating manufacturers
 13 forced certain laws upon the state attorney's
 14 general. That the participating manufacturers
 15 somehow controlled the outcome of votes on these
 16 measures in the state legislature or that NPMs
 17 were unable to make their voices heard during the
 18 legislative process.

19 Michael Hering's e-mail, also referred
 09:21:46 20 to by Claimants yesterday, was similarly
 21 mischaracterized. The asterisks in the copy of
 22 the e-mail produced by Claimant are not in the

2016

1 on.

2 MR. KOVAR: Mr. President, we'll be
 3 happy to go back and look at the transcript of
 4 that, but we know this document was never
 5 requested in the document discovery requests but
 6 we'll go back and look back at the jurisdictional
 7 transcript and see what that was all about.

8 In any case, we have the original. If
 9 it turns out that it's something you want to see
 09:23:08 10 and it's not a problem. Thank you.

11 PRESIDENT NARIMAN: Go on.

12 MS. MORRIS: The asterisks in the copy
 13 of the e-mail produced by Claimants are not in the
 14 original version of the e-mail which we are happy
 15 to produce to the Tribunal, if you so wish. Those
 16 asterisks are in place of the letters SC for South
 17 Carolina. The unredacted text thus stands for the
 18 unremarkable proposition that Michael Hering and
 19 his colleagues at NAAG believed that the Allocable
 09:23:38 20 Share Amendments and the complementary legislation
 21 were important to protect South Carolina by
 22 preserving its escrow deposits, enacting and

2017

1 enforcing a tobacco directory and the accompanying
2 certification requirements, and so promoting the
3 public health.

4 As such, it is apparent that the
5 various state statutes at issue here were adopted
6 through open, transparent, Democratic processes
7 after testimony by various parties representing
8 various interests, including those of the NPMs.

9 These statutes clearly stated their
09:24:15 10 public health purposes and have, in fact,
11 furthered those purposes since their enactment.
12 Turning now to Claimants' second argument, they
13 assert that the U.S. federal government has
14 pointed to the failures of the MSA supposedly
15 buttressing Claimants' allegation that the MSA
16 regime was not intended to and did not serve the
17 public health.

18 Mr. Violi stated in his opening
19 argument that, quote, Respondent itself has many
09:24:44 20 things to say about the MSA, none of which are
21 good. All that the MSA is ineffective, doesn't
22 really do its job, doesn't really accomplish its

2019

1 the Federal Court that the MSA did not bar every
2 form of misbehavior that the tobacco companies had
3 engaged in or may engage in in the future, and
4 that the states may lack the resources to fully
5 enforce the MSA's marketing restrictions.

6 As the U.S. District Court in
7 Washington, D.C., pointed out in its decision, the
8 MSA did not contain each and every provision in
9 favor of the public health that one might wish
09:26:31 10 for. For example, the MSA did not require the
11 defendants to make corrective statements regarding
12 health risks and nicotine addiction. Did not
13 include economic incentives to avoid marketing to
14 youth, otherwise known as a youth look back
15 provision, and did not ban all brand name
16 sponsorships.

17 The MSA did, however, raise the
18 marginal cost of cigarettes, which as Professor
19 Gruber explained is itself a public health
09:27:03 20 benefit. The United States also recognized in its
21 post trial brief that the truth campaign, a series
22 of antismoking public service announcements aimed

2018

1 goals or objectives, end quote.

2 However, a closer examination of the
3 sources Claimants point to reveal that they do not
4 support Claimants' assertions.

5 One of those sources is the
6 racketeering and corruption case brought by the
7 United States against Philip Morris and several
8 other major tobacco companies. The United States
9 sued because it believed that the tobacco
09:25:20 10 manufacturers continued to engage in conduct that
11 violated federal law after the signing of the
12 Master Settlement Agreement with the states.

13 These violations of federal law were
14 independent of and in addition to the claims the
15 states had asserted against the companies for
16 state law violations and had settled by entering
17 into the MSA. The defendants in the federal case
18 sought to use the MSA as a shield against
19 perspective injunctive relief arguing that the MSA
09:25:54 20 effectively barred them from engaging in any
21 future misconduct of any kind.

22 The United States wanted to convey to

2020

1 at teens and funded through the MSA was
2 responsible for approximately 22 percent of the
3 overall decline in youth smoking rates between
4 2000 and 2002.

5 Indeed, the United States noted that
6 youth smoking had decreased by 30 percent between
7 1997 and 2003. The United States also described
8 several instances similar to those identified by
9 Mr. Hering in his testimony in which the state
09:27:44 10 attorneys general successfully enforced the
11 advertising provisions of the MSA against various
12 participating manufacturers.

13 Now, the MSA is not a perfect solution
14 to the problem of smoking, and it is certainly
15 true that the United States and, indeed, the
16 individual states might prefer, for example, to
17 see even more stringent restrictions on the
18 advertising and sale of tobacco products.
19 However, that does not mean that the MSA has not
09:28:20 20 been effective or that it does not serve
21 significant public health interests of the states.
22 And indeed, it is important to remember

2021

1 that the Master Settlement Agreement was just
 2 that, a settlement between parties to litigation.
 3 As such, it necessarily involved compromises but
 4 as I will discuss those compromises were not
 5 one-sided.

6 The states received important
 7 concessions from the tobacco manufacturers that
 8 served to the public interest and the MSA
 9 successfully lowered smoking rates as the United
 09:28:57 10 States recognized in its litigation submissions.

11 The result is similar when examining
 12 the June 2009 statute Claimants introduced in
 13 their opening argument. The Family Smoking
 14 Prevention and Tobacco Control Act.

15 I would note at the outset that
 16 Claimants are attempting to rely on a statute that
 17 was passed in 2009, and so post dates all of the
 18 briefing in this case which Claimants submitted to
 19 arbitration in 2004.

09:29:24 20 In any event, Claimants argued that
 21 this statute demonstrates that the United States
 22 did not believe that the MSA was effective, and as

2023

1 governments have lacked legal and regulatory
 2 authority and resources they need to address
 3 comprehensively public health and societal
 4 problems caused by the use of tobacco products.

5 Now, my question to you is, is this not
 6 an admission that the federal government
 7 considered that the MSA did not have sufficient
 8 teeth, if I may so put it, to prevent what was
 9 sought to be prevented, namely excessive smoking?

09:31:21 10 MS. MORRIS: Well, as I'm about to
 11 explain, and I'm happy to get into this in more
 12 detail, the federal regulatory program established
 13 under the statute and the MSA did have some
 14 overlapping goals but they also had some --

15 PRESIDENT NARIMAN: I'm not asking
 16 about overlapping goals, sorry. My point is
 17 different. Of course, they overlap, definitely
 18 but it makes a finding of purposes, that is to say
 19 it reviews as it were the previous working of the
 09:31:49 20 MSA, and said that this lacked legal and
 21 regulatory authority and resources to address
 22 comprehensively public health.

2022

1 a result the federal government needed to step in.
 2 This is not the case. There are
 3 significant differences between the MSA and the
 4 June 2009 statute that undermine Claimants'
 5 self-serving argument. The findings of purpose in
 6 the federal statute state in part that federal and
 7 state governments have lacked the legal and
 8 regulatory authority and resources they need to
 9 address comprehensively the public health and
 09:30:01 10 societal problems caused by the use of tobacco
 11 products.

12 The findings continue, children who
 13 tend to be more price sensitive than adults are
 14 influenced by advertising and promotion practices
 15 that result in drastically reduced cigarette
 16 prices.

17 PRESIDENT NARIMAN: Maybe you can stop
 18 there. This is one of the measures I was thinking
 19 of and put to you when Mr. Violi interrupted and
 09:30:30 20 said look at the CDC report.

21 The June statute, federal statute says
 22 as one of its purposes that federal and state

2024

1 So, in effect, it was virtually not,
 2 could not do what it proposed to do, but
 3 presumably because it was a compromise between the
 4 majors and the states.

5 MS. MORRIS: If I can go through the
 6 next little bit, address that question
 7 specifically.

8 PRESIDENT NARIMAN: You can go through
 9 it but please bear that in mind. That's one of
 09:32:24 10 the points, at least in my mind, is somewhat of an
 11 answer to Michael Hering's testimony which says
 12 that in large part because of the MSA, consumption
 13 has gone down, sales have gone down, et cetera,
 14 which is something that the attorney general's
 15 were very pleased with.

16 Attorney generals were very pleased
 17 with but the federal government was certainly not
 18 pleased with this. That's what this purpose says,
 19 and also about youth smoking, it also seems to
 09:32:52 20 suggest that children are influenced by, still
 21 influenced, that is despite MSA provision for
 22 advertising and promotion practices that result in

2025

1 drastically reduced cigarette prices.
 2 So they feel that this is helplessness
 3 of the MSA to curb this excessive cigarette
 4 smoking.
 5 MS. MORRIS: I attempt to rebut that
 6 very implication in my the next part of my
 7 presentation. So to the extent I have not been
 8 fully successful, I look forward to discussing
 9 that point more with you, if you wouldn't mind.
 09:33:29 10 In light of these and other factors,
 11 Congress granted general regulatory authority to
 12 the federal Food and Drug Administration or FDA to
 13 oversee the tobacco manufacturing industry. The
 14 statute gives the FDA the power to set national
 15 standards controlling the manufacture of tobacco
 16 products and to regulate the level of tar,
 17 nicotine and other harmful components of tobacco
 18 products.
 19 It also establishes an inspection
 09:34:01 20 program and lays out requirements for tobacco
 21 warnings among many other provisions.
 22 Finally, the statute sets out a

2027

1 agreed to some key restrictions that could not be
 2 mandated through legislation or even won in
 3 litigation.
 4 As Mr. Hering testified, the June 2009
 5 statute and the MSA are not entirely identical and
 6 they can't be because the U.S. Supreme Court has
 7 held that certain practices that are now
 8 prohibited under the MSA are constitutionally
 9 protected under the first amendment to the United
 09:35:53 10 States Constitution as business speech and,
 11 therefore, the FDA cannot, they cannot regulate
 12 business speech. They can not restrict it,
 13 although the companies can voluntarily submit
 14 themselves to such restriction.
 15 Thus, while the June 2009 statute
 16 surely provides welcome additional regulation of
 17 the tobacco industry, it does not imply that the
 18 MSA is not effective or that it does not serve the
 19 public health. Rather, it simply indicates that
 09:36:30 20 it is always possible to do more when it comes to
 21 the regulation of addictive, carcinogenic products
 22 like cigarettes.

2026

1 schedule of fees to be paid by the tobacco
 2 industry in order to cover the administrative
 3 costs of the FDA in carrying out its oversight
 4 obligations. Congress noted its concern that
 5 state governments alone have lacked the legal and
 6 regulatory authority and the resources they need
 7 to address comprehensively the public health and
 8 societal problems caused by the use of tobacco
 9 products.
 09:34:36 10 Many of these regulatory powers are not
 11 available to the states as a result of
 12 constitutional restrictions on the regulation of
 13 speech and interstate commerce.
 14 By creating a national regulatory
 15 regime the June 2009 statute can address certain
 16 aspects of the cigarette market in a more
 17 comprehensive way than the MSA regime, which at
 18 its core embodies a settlement agreement between
 19 certain states and tobacco manufacturers.
 09:35:09 20 Nevertheless, the MSA is actually more
 21 stringent in certain respects than the June 2009
 22 statute. Because the tobacco companies have

2028

1 ARBITRATOR CROOK: Ms. Morris? Can I
 2 ask you a question under the U.S. Constitutional
 3 scheme, could individual states regulate the tar
 4 and nicotine content of cigarettes that were
 5 transported in interstate commerce?
 6 MS. MORRIS: I have to say my
 7 understanding of the dormant commerce clause is
 8 not comprehensive enough for me to answer that but
 9 I'm happy to discuss with our NAAG experts that
 09:37:06 10 I'm sure have looked into that, and if I may get
 11 back to you, I would be happy to do so.
 12 ARBITRATOR CROOK: I'm just struck that
 13 a large part of this legislation at least hit the
 14 papers most significantly was that it gave the FDA
 15 regulatory power over content of cigarettes. And
 16 I'm just curious whether that's something the
 17 states could have done on their own.
 18 MS. MORRIS: I certainly suspect they
 19 could not because of the interference with
 09:37:33 20 interstate commerce, but like I said, I would like
 21 to confirm with my colleagues and get back to you.
 22 ARBITRATOR ANAYA: In fact, under the

2029

1 Supreme Court option federal government by statute
 2 can authorize the states to regulate commerce,
 3 whereas it couldn't otherwise, when it couldn't
 4 otherwise because of the dormant commerce clause.
 5 So isn't it true that under this statute that
 6 congress could have authorized the states to do
 7 what the FDA wanted to do?
 8 MS. MORRIS: I'll be happy to defer to
 9 you on that.
 09:38:09 10 ARBITRATOR ANAYA: Let's assume that's
 11 the case and that congress could have authorized
 12 the states to regulate in this way, any insight on
 13 why it didn't go that route?
 14 MS. MORRIS: I assume when you have the
 15 FDA, which is a national regulatory authority
 16 anyway, that it makes sense to regulate -- because
 17 cigarettes are usually sold nationally, it makes
 18 sense to regulate them at a national level rather
 19 than to do it by state. That would be my
 09:38:38 20 assumption.
 21 ARBITRATOR ANAYA: Thanks.
 22 MS. MORRIS: Equally meritless is

2031

1 collusive arrangements that can harm consumers.
 2 There is no similar Antitrust exemption
 3 in the MSA. In addition, the proposed federal
 4 settlement would not only have settled all current
 5 and future claims by state Attorneys General, it
 6 would also have eliminated punitive damages for
 7 past actions by the tobacco industry, barred all
 8 private class actions against the tobacco industry
 9 and capped the total amount of damages for which
 09:40:31 10 the tobacco industry would be liable in any given
 11 year as a result of losses and suits brought by
 12 individuals.
 13 The MSA, on the other hand, settled
 14 only the lawsuits brought by the states
 15 themselves, providing a much narrower release of
 16 liability than that offered by the proposed
 17 federal settlement agreement.
 18 As Professor Gruber testified, his
 19 judgment, based on his experience as a government
 09:41:02 20 official responsible for evaluating the 1997
 21 proposed federal settlement was that, in general,
 22 the 1997 proposal was not nearly as punitive on

2030

1 Claimants' assertion that the proposed 1997
 2 federal tobacco settlement, which did not take
 3 effect due to congress's failure to adopt
 4 implementing legislation contained, quote, more
 5 concessions from OPMs than the MSA.
 6 First and foremost, even assuming that
 7 the proposed federal settlement agreement did
 8 include more concessions from OPMs that fact has
 9 no bearing on whether or not the MSA serves the
 09:39:15 10 public interest.
 11 Nevertheless, an examination of some of
 12 the central provisions of both documents readily
 13 belies Claimants' attacks. A critical component
 14 of the federal settlement agreement, for example,
 15 was a broad antitrust exemption, which would have
 16 prevented the participating manufacturers to
 17 jointly confer, coordinate or act in concert in
 18 order to achieve the goals of the agreement.
 19 The Federal Trade Commission made clear
 09:39:46 20 its concerns regarding the exemption, warning that
 21 Antitrust immunity that is unnecessary, imprecise
 22 or excessively broad can enable firms to engage in

2032

1 the OPMs, not nearly as good for the public health
 2 as was the MSA.
 3 He went on to note that the proposed
 4 federal settlement agreement required the
 5 participating manufacturers to pay more than the
 6 MSA did, but, quote, the extra amount it had them
 7 pay was not nearly enough to compensate for the
 8 huge legal risks they were getting out from under
 9 by having all these private lawsuits settled, end
 09:41:44 10 quote.
 11 In this respect, although Mr. Violi
 12 contrasts the \$207 billion, the participating
 13 manufacturers agreed to pay under the MSA with the
 14 \$356 billion face value of the proposed federal
 15 settlement, the Federal Trade Commission stated in
 16 its report on competition and the financial impact
 17 of the proposed tobacco industry settlement that,
 18 quote, after taking into account the anticipated
 19 decrease in the volume of cigarettes sold
 09:42:17 20 resulting from the likely increase in cigarette
 21 prices and a general decline in smoking in the
 22 U.S. the public sector could realize revenues from

2033

1 taxes and the settling payments of about \$207
2 billion, thus it is unclear whether the proposed
3 federal settlement actually would have resulted in
4 higher payments than those required by the MSA.

5 Until light of the fact that the
6 proposed federal settlement some offered
7 significant advantages for manufacturers then, one
8 can understand why the tobacco industry might have
9 preferred the federal settlement to the subsequent
09:43:01 10 MSA, and correspondingly, why that proposal was
11 rejected by congress.

12 I should note in this respect that
13 Claimants have pointed to no evidence indicating
14 provisions regarding native American tribes or
15 territories motivated congress's decision to
16 reject the proposed federal settlement agreement.

17 Claimants also referred in their
18 opening slides to testimony by Professor Gruber in
19 the Philip Morris case and a report for the U.S.
09:43:25 20 Department of Agriculture for the proposition that
21 the MSA has not been successful in various ways.

22 However, Professor Gruber himself

2035

1 than expected, Claimants admit that median tobacco
2 use by state has declined by at least 16 percent
3 between 1997 and 2006.

4 Furthermore, the report notes that in
5 addition to payments to the states, the MSA
6 included provisions for \$1.5 billion over ten
7 years to support antismoking measures and \$250
8 million dollars to support research in reducing
9 youth smoking.

09:45:17 10 Again, to suggest the MSA could have
11 done more is not to say it is not effective or
12 that it does not serve the public health. In sum,
13 although Claimants have pointed to several
14 documents to suggest that the federal government
15 of the United States believes that the MSA was not
16 motivating by public health concerns or has no
17 value from a public health perspective, an actual
18 examination of those documents makes clear that
19 federal agencies and the congress recognize that
09:45:47 20 the MSA indeed has value and serves the public
21 health interests of the settling states.

22 With respect to Claimants' third point,

2034

1 rejected Claimants' characterization of his
2 statements in his rebuttal report stating in
3 paragraph 126 of their reply, the Claimant states
4 that I quote, admitted that the MSA was
5 ineffective at controlling youth tobacco
6 consumption, end quote.

7 I am aware of no such statement that I
8 have made in past proceedings or written work.
9 What I have said is that the MSA's impact on youth
09:44:04 10 smoking could be strengthened by additional
11 provisions such as a youth look back penalty that
12 penalized tobacco manufacturers for a failure to
13 lower youth smoking. But saying that the MSA
14 could have done more to lower youth smoking does
15 not in any way imply that the MSA was ineffective
16 in doing so.

17 Indeed, the very sharp decline in youth
18 smoking right around the enactment of the MSA
19 shows how effective it was in lowering youth
09:44:38 20 smoking. With respect to the U.S. Department of
21 Agriculture report, although the report suggests
22 cigarette consumption might have declined less

2036

1 they assert if the allocable share release
2 mechanism was a loophole, then so must be the
3 grandfather share. As Mr. Violi argued in his
4 opening statement, quote, if a \$400 million
5 exemption, a 13 billion stick exemption does not
6 constitute a loophole, then it cannot be seriously
7 argued that Claimants were operating under a
8 loophole under the original measures at issue.

9 If it was truly a matter of youth
09:46:26 10 smoking and health initiatives, there would be no
11 exemptions, end quote. Mr. Weiler even went so
12 far as to state, quote, we doubt the veracity of
13 the statement that it was a loophole and we think
14 their feigning surprise, end quote.

15 Claimants also argued it was
16 discriminatory for the settling states to limit
17 the offer of a grandfather share to those tobacco
18 manufacturers that joined the MSA within 90 days
19 of its signing. None of these allegations,
09:46:58 20 however, would stand scrutiny.

21 As an initial matter, Claimants
22 conveniently overlooked the fact that this

2037

1 Tribunal had already determined that the original
 2 allocable share release mechanism was a loophole.
 3 In the decision on objections to jurisdiction this
 4 Tribunal stated, the states came to regard these
 5 provisions which authorized substantial rebates of
 6 escrowed funds with NPMs with sales concentrated
 7 in a few states as a loophole and the evidence
 8 indicated that 38 states had adopted amendments to
 9 plug the loophole by September 2004.

09:47:34 10 Mr. DeLange provided first-hand
 11 confirmation of that fact in his testimony. He
 12 noted that given Idaho's allocable share of 0.63
 13 percent, it would be possible for an NPM that
 14 concentrated its sales in Idaho to receive a
 15 release of over 99 percent of its escrow deposits
 16 in any given year.

17 He explained, so you're talking change
 18 left in the escrow account after the allocable
 19 share release worked. That's not what we
 09:48:09 20 intended. That's not what we imagined, and quite
 21 frankly, as much as anyone, I'm the one who took
 22 the blame. I'm the one who didn't realize the

2039

1 begun utilizing present language in Idaho's escrow
 2 deposit statute to obtain an early release of the
 3 great majority of their escrow deposits. This
 4 frustrates the purposes for which the act was
 5 passed.

6 And indeed, the unintended nature of
 7 the allocable share release mechanism is manifest
 8 in the facts, to borrow Mr. Weiler's phrase. As
 9 Mr. Hering testified, I do not think that the OPMs
 09:49:49 10 had it in mind that they would force a defective
 11 statute upon the states and then later exploit it
 12 through price advantages, and then somehow
 13 convince or force the states to pass a fix to it.
 14 I find that hard to believe.

15 Furthermore, Claimants allege that the
 16 allocable share release mechanism was intended to
 17 encourage NPMs to remain regional brands, as
 18 though the states would have some policy reason to
 19 foster the development of regional tobacco brands
 09:50:20 20 would drastically reduce escrow deposit
 21 obligations.
 22 If Claimants are right, then certain

2038

1 effects when I was advising my Attorney General of
 2 the original legislation that that's what could
 3 happen.

4 He continued, so, after we saw the
 5 allocable share release in effect working, we said
 6 that isn't what we think the legislature intended.
 7 We need to go back and explain that to the
 8 legislature and explain, here's the net effect of
 9 what's happening and we don't think this is what
 09:48:42 10 you intended. And we proposed the Allocable Share
 11 Amendment.

12 Mr. DeLange and his colleagues were
 13 correct that the legislature had not anticipated
 14 the use to which some NPMs would put the allocable
 15 share release mechanism. As indicated in the
 16 statement of purpose attached to Idaho's Allocable
 17 Share Amendment. This proposed legislation is
 18 designed to eliminate an unintended consequence of
 19 language found in Idaho's Tobacco Master
 09:49:15 20 Settlement Agreement Act.
 21 Some tobacco product manufacturers, not
 22 parties to the Master Settlement Agreement have

2040

1 states with small allocable shares were inviting
 2 Claimants and other NPMs like them to concentrate
 3 their sales in those states. Knowing that the
 4 harm to public health from those cigarettes would
 5 be concentrated in their states, but that the
 6 accompanying escrow deposits would be greatly
 7 reduced.

8 There is simply no scenario under which
 9 this would have been a rational policy and
 09:50:56 10 Claimants point to none. Clearly, the allocable
 11 share release mechanism was a loophole. As
 12 Mr. Hering explained, the great irony is that if
 13 you exploit the allocable share release to the
 14 maximum and sell your cigarettes in just one
 15 state, the harm that the cigarettes that cause the
 16 disease, the cancer, the death, all the harm is
 17 concentrated in that one state.

18 However, in that instance, the state
 19 has the least amount in escrow essentially as a
 09:51:28 20 bond to protect it whereas if that harm is spread
 21 out, potentially there is no release.
 22 Indeed, Claimants themselves admit they

2041

1 were able to use the allocable share release
2 mechanism to great effect lowering their escrow
3 deposits from approximately five dollars per
4 carton to 50 cents per carton or less.

5 I would note that even using the
6 blended or average marginal cost of grandfathered
7 SPMs as a point of comparison, which as we had
8 discuss and I will discuss further, we do not
9 believe is appropriate from an economic
09:52:04 10 standpoint. An escrow deposit obligation of 50
11 cents per carton would result in an MSA related
12 marginal cost for Grand River that is somewhere
13 between a quarter and a third of the blended
14 average MSA related marginal cost of the
15 grandfathered SPMs.

16 Furthermore, Grand River's
17 off-Reservation sales are not limited as is the
18 grandfather share by historical market shares.
19 And, indeed, the more cigarettes Grand River was
09:52:33 20 able to sell off-Reservation in a few states, the
21 larger its releases of escrow deposits and the
22 lower its MSA related marginal costs.

2043

1 application of the MSA limitations on tobacco
2 manufacturer conduct. However, as I have
3 mentioned, the MSA is an agreement and contains
4 some voluntary restrictions on speech and conduct
5 that could not have been imposed directly by
6 legislation or even won in litigation.

7 Thus, the grandfather shares were
8 offered to small market players which represented
9 approximately two percent of the cigarette market
09:54:13 10 at the time as an incentive for them to join the
11 MSA immediately. As hoped, the grandfathered
12 share successfully persuaded 15 tobacco
13 manufacturers to sign the MSA within 90 days of
14 its execution.

15 As a result, these additional 15
16 companies which combined with the original
17 participating manufacturers represented over 99
18 percent of the tobacco manufacturing market at the
19 time voluntarily waived advertising and lobbying
09:54:45 20 rights that they otherwise would have retained as
21 NPMS.

22 Claimants agree that the offer of a

2042

1 Importantly, the fact Claimant sold
2 their cigarettes off-Reservation in only a few
3 states does not mean that they sold only a few
4 cigarettes. Indeed, in 2005, Grand River alone
5 sold over one billion cigarettes just in the state
6 of South Carolina.

7 There is no reason to believe that
8 South Carolina encouraged those sales especially
9 in light of the large escrow releases that
09:53:12 10 followed simply because Grand River's so-called
11 regional status meant that it was not selling
12 equivalent numbers of cigarettes in the other 49
13 states.

14 The grandfather share offered to
15 manufacturers that signed the MSA within 90 days
16 of its execution however, differs in fundamental
17 ways from the allocable share release mechanism.
18 Had a significant and rational purpose and was not
19 a loophole.

09:53:37 20 The MSA states had a strong interest in
21 including as many tobacco manufacturers as
22 possible within the MSA. In order to maximize

2044

1 grandfather share served its purpose by
2 successfully persuading many SPMs to sign the MSA
3 within 90 days of its execution. As stated in
4 their particularized statement of claim, quote,
5 inducing manufacturers and competitors that had
6 never been accused of nor sued for any wrongdoing
7 to enter into a settlement agreement required an
8 incentive. That incentive came in the form of a
9 payment exemption or grandfather share. As such
09:55:22 10 the grandfather share functioned exactly as
11 intended hardly the definition of a loophole.

12 And although as Professor Gruber
13 testified, if you can say, take the MSA as it was
14 exactly, changing nothing and get rid of the
15 exemption, then I think that would have been a
16 good thing to do. Importantly, he continued.

17 My understanding is the reason they got
18 this exemption was to buy the cigarette
19 manufacturer's agreement with the deal. And the
09:55:50 20 issue is, without the exemption, would the deal
21 have even come together. So, in some sense when
22 you talk about do we wish the exemption weren't

2045

1 there, well, if the exemption not being there
2 would have meant would we have had the MSA at all,
3 then the exemption in my mind was a small price to
4 pay to get the MSA to come together.

5 Furthermore, unlike the allocable share
6 release mechanism, the grandfather share in
7 operation did not create unintended consequences
8 that undermined the purposes of the MSA regime.
9 As Mr. Feldman has explained, MSA exploitation of
09:56:31 10 the allocable share loophole occurred on a massive
11 scale. Indeed, Mr. Hering has testified that MSA
12 states were forced to release nearly 60 percent of
13 the escrow deposits they received for NPM sales in
14 2003.

15 Such exploitation of the allocable
16 share loophole by NPMs had several damaging
17 consequences. First, MSA states were denied
18 access to escrow deposits that would ensure
19 payment of any future judgments against or
09:57:01 20 settlements with NPMs to compensate states for the
21 health cost arising from the use of NPMs tobacco
22 products in their states. Second, NPMs were able

2047

1 MS. MORRIS: That's one reason, but
2 another reason is the ultra competitive advantage
3 they had as a result of their artificially
4 decreased marginal costs.

5 PRESIDENT NARIMAN: Is it possible to
6 assess that whether it was only because, I mean
7 can you compute these, the percentage in which
8 these reasons operated? It's very difficult
9 perhaps, that for what reason did they come
09:58:48 10 forward and grab, as it were, the share which, the
11 reduced share of OPMS which got reduced only
12 because the prices were increased many fold.

13 MS. MORRIS: I believe that Professor
14 Gruber addressed the point --

15 PRESIDENT NARIMAN: No, forget that. I
16 want you to address it, please.

17 MS. MORRIS: I would have to defer to
18 Professor Gruber and say that--

19 PRESIDENT NARIMAN: Forget Professor
09:59:16 20 Gruber. I want to know is there anything in the
21 record that you can point to that will help us to
22 determine that the sole reason was as you allege

2046

1 to maintain lower prices which did not reflect the
2 full cost of states of their products and which
3 gave them a significant competitive advantage
4 vis-a-vis participating manufacturers.

5 The ensuing loss of participating
6 manufacturer market share resulted in a reduction
7 in payments by participating manufacturers to the
8 MSA states while the loophole meant that there was
9 no adequate corresponding increase in NPM
09:57:36 10 deposits. And third, lower prices for NPMs
11 cigarettes, increased demand among price sensitive
12 consumers to the detriment of public health.

13 PRESIDENT NARIMAN: What do you say to
14 this, that there were a large number of majors who
15 had, it is said, deliberately inflated their
16 prices much higher and thereby their market share
17 went down, which the Claimants and various others
18 in the same category stepped in and took advantage
19 of. What do you say to that?

09:58:17 20 MS. MORRIS: I would say although that
21 might be one reason --

22 PRESIDENT NARIMAN: Is that one reason?

2048

1 and -- or there were two reasons and you cannot
2 say which of them operated, is that your case?

3 MS. MORRIS: Well, we certainly believe
4 that there was more than one reason. But --

5 PRESIDENT NARIMAN: And this was
6 perhaps the reason?

7 MS. MORRIS: This was, indeed, a reason
8 and as far as evidence in the record, I would
9 point to Professor Gruber's testimony that
09:59:45 10 approximately two percent of the market growth was
11 due to NPMs and the Allocable Share Amendments,
12 and so the Allocable Share Amendments were
13 intended to address that extra increase.

14 PRESIDENT NARIMAN: Okay.

15 MS. MORRIS: The grandfather share, on
16 the other hand, encouraged participation in the
17 MSA and thereby resulted in expanded coverage of
18 its healthcare provisions. Claimants argue,
19 however, that an additional undesirable
20 consequence of the grandfather share was a pricing
21 advantage for the grandfathered SPMS over NPMs, to
22 the detriment of both NPMs and the public health.

1 As Professor Gruber has explained and
2 as the U.S. District Court for the Southern
3 District of New York agreed after hearing the
4 arguments and examining the evidence on both
5 sides, the grandfather share does not lower
6 marginal cost, which is the basis for pricing and,
7 therefore, does not provide the grandfathered SPMs
8 with a competitive advantage. So while it is true
9 certain grandfathered SPMs may choose to price
10:00:55 10 below market cost in some circumstances, such a
11 strategy would not be profit maximizing and could
12 not be maintained.

13 Furthermore, such a short-term pricing
14 strategy is available not only to grandfathered
15 SPMs but also to Grand River or, indeed, any
16 company. The allocable share release mechanism on
17 the other hand did lower the NPMs marginal cost,
18 and accordingly also lowered the price of their
19 cigarettes.

10:01:21 20 As Professor Gruber testified, the
21 public health issue is not about the wealth of the
22 tobacco companies. The public health issue is

1 antitrust challenges have been brought even
2 against the MSA alleging that it results in price
3 controls. So my understanding is that it would be
4 very questionable, if not illegal, under U.S. law
5 for the state to set prices of cigarettes.

6 MR. VIOLI: Mr. Chairman, it's a
7 question. May I answer that question. I've been
8 practicing Antitrust since I got out of law
9 school. States can do that, but they have to
10:03:05 10 monitor the pricing. If the state wants to put a
11 price control on products, agricultural products,
12 whatever, in its state, it can do so pursuant to
13 public health initiatives, public welfare benefit.

14 The law provides, however, the state
15 must monitor the prices to make sure they are
16 tailored to the interest of the state and meet the
17 -- it's called a clear articulation and a close
18 supervision test.

19 PRESIDENT NARIMAN: Thank you. Sorry.

10:03:32 20 MR. FELDMAN: Mr. President, I would
21 just emphasize that in terms of the obligations
22 under NAFTA Chapter 11, these obligations, the

1 about the price of cigarettes.

2 Additionally, although Claimants hold
3 up the fact that the grandfather share gave those
4 manufacturers a permanent exemption from MSA
5 payments on sales up to their grandfather market
6 share, they ignore the benefit to the states under
7 this agreement, namely, that SPMs would be subject
8 to ask extensive restrictions on conduct that do
9 not apply to NPMs like Grand River.

10:01:58 10 PRESIDENT NARIMAN: Excuse me. Was it
11 possible, I just want to know, for the states to
12 have devised a methodology instead of amending the
13 Allocable Share Amendment, allocable share
14 provision, to in some manner devise a scheme for
15 controlling prices that you shall not charge below
16 such and such or above such and such. Was it not
17 possible for the states to do it? Was it legally
18 possible? Feldman, you can answer it, I have no
19 objection, you can answer that also. If you can.
10:02:34 20 Because I want an answer to it. I don't mind
21 whether she answers it or you answer it.

22 MS. MORRIS: My understanding is that

1 purpose of them is not to analyze whether or not a
2 state has adopted the optimal policy in a given
3 situation. The question is whether the policy
4 that has been adopted, in fact, violates
5 international law.

6 PRESIDENT NARIMAN: No, but if there is
7 an another alternative, possible alternative and
8 that's one factor to be taken into consideration.

9 MR. FELDMAN: Thank you. We would just
10:04:08 10 emphasize--

11 PRESIDENT NARIMAN: Just remember that.

12 MR. FELDMAN: Yes, thank you.

13 PRESIDENT NARIMAN: Sorry. I
14 interrupted you.

15 MS. MORRIS: For example, restrictions
16 on all participating manufacturers under the MSA,
17 including grandfathered SPMs, include the
18 obligation to refrain from targeting youth in the
19 advertising and marketing of tobacco products, to
10:04:32 20 refrain from using cartoon characters to promote
21 cigarette sales, to limit tobacco brand name
22 sponsorship of athletic, musical and other events.

2053

1 To refrain from distributing, offering or selling
2 any apparel or other merchandise bearing a brand
3 name. To refrain from using billboards or other
4 advertising. To refrain from lobbying congress to
5 diminish the states's rights under the MSA or to
6 use MSA payments for programs other than those
7 related to tobacco or health. To refrain from
8 suppressing research related to smoking and
9 health, and to refrain from representing the
10:05:14 10 dangers of using tobacco products.

11 Arthur Montour has made clear in his
12 written and oral testimony that freedom to
13 publicize the Seneca brand throughout the United
14 States has been a key to Claimants' success in the
15 market. Mr. Montour confirms NWS has distributed
16 hundreds of thousands of articles of merchandise
17 from clothing to smoking equipment to bandannas to
18 decals. NWS has erected billboards and placed
19 newspaper advertisements. It has run contests to
10:05:47 20 win free merchandise such as chopper motorcycles
21 and cars. These are all activities that
22 grandfathered SPMs are prohibited from engaging in

2055

1 only limits but does not prohibit brand name
2 sponsorships. That is true but what he failed to
3 mention is that participating manufacturers no
4 longer engage in these sponsorships making these
5 provisions to a certain extent, moot. More
6 importantly roadside billboards and T-shirts, for
7 example, like the one worn by Mr. Montour during
8 his testimony, are most certainly prohibited under
9 the MSA.

10:07:32 10 Although Mr. Violi stated that the
11 banned on merchandise and apparel doesn't apply to
12 items the sole function of which is to advertise
13 tobacco products or written or electronic
14 publications, Section 3-F of the MSA actually
15 forbids any apparel or merchandise other than
16 tobacco products, items, the sole function of
17 which is to advertise tobacco products or written
18 or electronic publications which bears a brand
19 name. This is an essential distinction.

10:08:04 20 Merchandise and apparel bearing tobacco brand
21 names may not be sold or otherwise distributed
22 under the MSA.

2054

1 under the MSA.
2 With respect to the ban on brand named
3 merchandise, Mr. Violi has asserted that, quote,
4 the MSA only stops these promotions in non adult
5 only facilities, end quote. But that Claimants'
6 merchandise is not aimed at children.

7 Mr. Violi is mistaken. The terms of
8 the MSA are quite clear that such brand name
9 merchandise is only permitted to be worn or used
10:06:23 10 while inside an adult only facility and may not be
11 distributed to any member of the general public.
12 Thus, even if Claimants argue that their T-shirts,
13 for example, are not sized for children that does
14 not change the fact that they are selling brand
15 name merchandise to the general public, which
16 would be prohibited under the MSA.

17 Furthermore, yesterday Mr. Violi
18 misrepresented various conduct restrictions in the
19 MSA implying that the exceptions had somehow
10:06:56 20 swallowed the rule and undermined the purpose
21 behind those provisions.

22 Mr. Violi highlighted the fact the MSA

2056

1 Tobacco products such as the cigarettes
2 themselves may bear tobacco brand names but that
3 is a very different matter. Matchbooks like those
4 distributed by NWS are banned by the MSA because
5 they do not serve the sole function of advertising
6 Claimants' brand.

7 So although it is true that any gift
8 may be given in consideration for a purchase of
9 cigarette provided proof of age is required, that
10:08:41 10 gift could not consist of any of these forbidden
11 forms of advertising or merchandising making it
12 hard to discern the value such a program might
13 hold for the tobacco manufacturers.

14 As Mr. Hering testified, then after the
15 90-day window closed, 99.6 percent of the U.S.
16 market was a participating manufacturer in the
17 MSA. That means they were subject to the multiple
18 public health restrictions that you've heard
19 about. That is no more T-shirts with Marlboro on
10:09:10 20 them, no more belt buckles, leather jackets,
21 billboards, hats, no more Joe Camel, no more other
22 cartoon advertising, no more marketing to youth in

2057

1 youth magazines. All those public health
2 restrictions came into play and they apply to 99.6
3 percent of the U.S. market.

4 In contrast to the allocable share
5 release mechanism which only benefitted the NPMs,
6 the grandfather share was part of a deal that
7 benefitted both the participating manufacturers
8 and the settling states and cannot be considered a
9 loophole. Nor should the offer of grandfather
10:09:48 10 shares only to those manufacturers that adhere to
11 the MSA within 90 days be considered
12 discriminatory.

13 As confirmed by both Professor Gruber
14 and Mr. Hering, there was a reasonable public
15 health rationale for the time limited nature for
16 the offer of grandfather share. In his rebuttal
17 expert report, Professor Gruber explained
18 subsequent manufacturers had the right to join the
19 MSA upon the inception of the company and pay no
10:10:14 20 premium.

21 However, as Claimants note
22 manufacturers who chose instead to operate outside

2059

1 matter of negotiation between the states and the
2 NPM.

3 PRESIDENT NARIMAN: So that's a matter
4 of negotiation.

5 MS. MORRIS: Yes, sir.

6 PRESIDENT NARIMAN: Between the
7 relevant state and the NPM and the concerned
8 applicant NPM.

9 MS. MORRIS: It would be the settling
10:11:31 10 states, so all of the MSA states and the NPM who
11 wishes to become a participating manufacturer,
12 yes.

13 PRESIDENT NARIMAN: So they could give
14 them five years to pay back or two years to pay
15 back.

16 MS. MORRIS: Yes, and I believe with
17 General Tobacco it was 12 years even, depending on
18 the circumstances the parties could come to an
19 agreement.

10:11:50 20 PRESIDENT NARIMAN: But see the point
21 is, did you offer, did any of the states, is it on
22 record that they offered them -- all right, you

2058

1 of the MSA then faced a back payment obligation if
2 they later wanted to join the MSA. This is a
3 sensible public policy which ensures that
4 manufacturers face the right pricing incentives--

5 PRESIDENT NARIMAN: The back payment
6 obligation have a time limit according to you or
7 is it a matter of discretion of each state as to
8 when to enforce it and within what installments?

9 MS. MORRIS: My understanding is that
10:10:50 10 the back payment obligation does apply to any
11 participating manufacturer that joins -- that
12 signs the MSA after it has begun selling
13 cigarettes.

14 PRESIDENT NARIMAN: No NPM.

15 MS. MORRIS: Yes. So an NPM that
16 chooses to sign the MSA will have to make back
17 payments.

18 PRESIDENT NARIMAN: I'm asking you
19 about the time schedule.

10:11:09 20 MS. MORRIS: Yes. Under Section 2JU of
21 the MSA there is to be a reasonable time period
22 under the circumstances. So that would be a

2060

1 want to join, okay, but your back payment should
2 be spread over ten years and if they have said
3 then no, they would have been unreasonable in my
4 view, but that was not forthcoming in that May
5 letter of NAAG. Assuming that NAAG had the
6 authority of the states to write that letter.

7 MS. MORRIS: I am going to be
8 discussing Claimants' MSA application in further
9 detail. My understanding is that the states would
10:12:27 10 have been happy to engage in those negotiations
11 with the Claimants, but that the process didn't
12 reach that point because of other more fundamental
13 problems with Claimants' MSA application.

14 PRESIDENT NARIMAN: What were the other
15 problems? I mean they could have -- I just want
16 to know, because please remember, that we are
17 talking in the background of an existing NAFTA
18 proceeding that's already started.

19 MS. MORRIS: I understand.

10:12:53 20 PRESIDENT NARIMAN: In that sense, the
21 parties were -- I agree, but an offer was made by
22 them in a particular letter which is on record,

2061

1 the letter, to which the response was made no, no,
 2 that we can't even send it to the states, the
 3 states even cannot consider it but let's assume
 4 that after due consideration the states had
 5 through the NAAG written that letter of May 16th
 6 or May whatever it was, back to Violi. Now could
 7 they not have said that, are you prepared to pay,
 8 make all back payments, we accept you as a
 9 participating manufacturer. You must make these
 10:13:33 10 back payments within a reasonable time and we
 11 think that the reasonable time is say five years
 12 to which they may have responded and say give us
 13 ten years, they may have said no. And then, of
 14 course, the states could have said, no, we think
 15 five years in your circumstances are enough and
 16 that might have been a reasonable way to look at
 17 it.
 18 We don't find that sort of negotiation
 19 between the applicant, non participating
 10:14:04 20 manufacturer. We only have two letters. One a
 21 letter of April before the 15th of April and
 22 another response of May. And that's about all and

2063

1 discussing it for several months and that, in
 2 effect --
 3 PRESIDENT NARIMAN: Is it your case, is
 4 it your case that they had refused to make
 5 payments even at reasonable times, back payments
 6 within reasonable times, is it your case? I don't
 7 find that in the letter that back payments should
 8 be made within such and such number of years.
 9 MR. KOVAR: I will let Ms. Morris
 10:15:21 10 address what's on the record, but I would like to
 11 recall for you that the U.S. District Court Judge
 12 Keenan said it smacked of pretext, that it was not
 13 a serious offer on their part, that that letter
 14 was a litigation tactic. It was not a serious
 15 offer by the Claimants. And Ms. Morris can go
 16 into more detail.
 17 PRESIDENT NARIMAN: That's not how it
 18 was treated by NAAG. It was treated as on merits
 19 and they answered it on merits, in the May
 10:15:52 20 response, the April letter to which the May
 21 response.
 22 MR. KOVAR: In any case, let Ms. Morris

2062

1 there the matter ends.
 2 MS. MORRIS: If I can beg your
 3 indulgence --
 4 PRESIDENT NARIMAN: You see my point is
 5 that you must realize that that goes to the
 6 question of treatment which they are alleging
 7 whether that falls under 1102 or 1105 or is a
 8 matter which we will determine later, but I'm just
 9 asking you.
 10:14:35 10 MR. KOVAR: Mr. President, if I may
 11 just foreshadow where Ms. Morris is going.
 12 PRESIDENT NARIMAN: Please.
 13 MR. KOVAR: The problem here is the
 14 negotiations never even got close to that stage
 15 because the Claimants weren't really interested --
 16 PRESIDENT NARIMAN: No, no, no, but you
 17 refused to negotiate -- not you, NAAG refused to
 18 negotiate.
 19 MR. KOVAR: That's not true.
 10:14:55 20 PRESIDENT NARIMAN: That's the letter,
 21 the letter says, no, we closed it.
 22 MR. KOVAR: They had already been

2064

1 go into more detail.
 2 PRESIDENT NARIMAN: I'm indicating my
 3 point, so that you can deal with them. I have
 4 this problem.
 5 ARBITRATOR CROOK: All right, could --
 6 at some point, maybe Ms. Morris is going to do
 7 this. You'll address paragraph 59 of Mr. Jerry
 8 Montour's declaration where he sets out the terms
 9 under which he instructed his counsel to seek to
 10:16:22 10 join the MSA.
 11 MS. MORRIS: Yes.
 12 ARBITRATOR CROOK: Will you be
 13 addressing that?
 14 MS. MORRIS: I certainly will.
 15 ARBITRATOR CROOK: Thank you very much.
 16 MS. MORRIS: My pleasure.
 17 So this is a sensible public policy
 18 which ensures that manufacturers face the right
 19 pricing incentives inside and outside the MSA.
 10:16:43 20 Indeed, this is similar to other public policies
 21 which prevent those who do not enroll at the
 22 appropriate time from thereby reaping unwarranted

1 benefits.

2 Mr. Hering expanded on his policy
3 rationale last week, testifying that this is an
4 argument that has been made from time to time by a
5 number of NPMs who have not been pleased with the
6 grandfather share. The deal that the NPMs are
7 looking for from our perspective is the ability to
8 build up your market share through sales in the
9 previously settled states where no escrow is due,
10:17:16 10 staying out of the MSA and through, as I have said
11 earlier, exploitation of the allocable share
12 loophole.

13 Then at the time they determine that
14 it's an advantage to become a participating
15 manufacturer to demand that they receive an
16 exemption for the year prior to when they join,
17 rather than 1997 or 1998. And in most instances,
18 like with Grand River, these are companies that
19 had no market share in 1997 or 1998.

10:17:45 20 In sum, then, the allocable share
21 release mechanism was a loophole that undermined
22 the public health purposes at the core of the MSA

1 payment of escrow and for the cigarettes intended
2 for sale in the United States that are
3 manufactured for third parties, it would be even
4 more costly for Grand River to sign the MSA now
5 than it would have been in 2002, which Claimants'
6 counsel has already acknowledged would have been
7 uneconomical.

8 As I will discuss Grand River's
9 application to the MSA and its statements in this
10:19:20 10 proceeding make clear that what Claimants are, in
11 fact, seeking is treatment unlike and much more
12 favorable than the treatment offered to any other
13 tobacco manufacturer under the MSA regime.

14 Grand River's application to sign the
15 MSA, which it filed --

16 PRESIDENT NARIMAN: Excuse me for
17 interrupting, Mr. Kovar, where is Judge Keenan's
18 decision where he says this was a pretext.

19 MS. MORRIS: I have the citation for
10:19:47 20 you.

21 PRESIDENT NARIMAN: Would you give me
22 the citation later, so I can note it.

1 regime where the grandfather share furthered those
2 purposes in a non discriminatory manner.

3 Furthermore, making a grandfather share
4 available for a limited period of time in order to
5 encourage as many tobacco manufacturers as
6 possible to settle with the state by signing the
7 MSA and thus, be subject to the MSA limitations or
8 conduct plainly served the public health goals of
9 the MSA and was a reasonable policy decision
10:18:22 10 deserving of deference by this Tribunal on the
11 part of the states.

12 Turning finally to Grand River's
13 attempt to join the MSA. Claimants assert that
14 the best treatment here would be the opportunity
15 to join the MSA with grandfathering. As is clear
16 by an examination of the facts, however, this
17 claim is no more credible than when Grand River
18 filed a short lived application to join the MSA in
19 2006.

10:18:49 20 Indeed, given the back payments that
21 Grand River would need to make, both for the many
22 years it has sold Seneca cigarettes without full

1 MS. MORRIS: Certainly. It is Grand
2 River versus Pryor.

3 PRESIDENT NARIMAN: That's the Prior
4 case.

5 MS. MORRIS: Yes, but there are various
6 decisions in that case and this one has the
7 citation 2006 WL 1517603 and the relevant section
8 is around page star seven.

9 PRESIDENT NARIMAN: What?

10:20:19 10 MS. MORRIS: Star seven.

11 PRESIDENT NARIMAN: What is star seven?

12 MS. MORRIS: Westlaw, page seven.

13 MR. VIOLI: Do you have the citation
14 where that was reversed and affirmed in part by
15 the Second Circuit? Do you have that for the
16 Tribunal?

17 MR. KOVAR: That specific ruling was
18 not reversed.

19 MR. VIOLI: It went up on appeal.

10:20:44 20 MR. KOVAR: The case has gone through
21 many stages and we can give you the full --

22 PRESIDENT NARIMAN: I wanted to know

2069

1 that it's relevant, that's why I'm saying where
2 does Judge Keenan say it was a pretext. Now is
3 this reported in the authorized series --
4 MS. MORRIS: No, it's only available on
5 Westlaw. It's a very short decision.
6 PRESIDENT NARIMAN: It's not available
7 in our papers?
8 MS. MORRIS: Yes. I don't have the
9 precise tab number now but I can get back to you.
10:21:11 10 MR. FELDMAN: It's in our brief, as
11 well.
12 MR. KOVAR: You'll also find,
13 Mr. Chairman, that the decision was not reversed.
14 It was, in fact, affirmed.
15 MR. VIOLI: It was reversed on the
16 finding that good will was an asset for their
17 protection.
18 MR. KOVAR: It was affirmed on other
19 grounds, but you'll see that for yourself.
10:21:30 20 PRESIDENT NARIMAN: Okay.
21 MS. MORRIS: It's in the record in our
22 counter Memorial, volume eight, tab 118.

2071

1 River's own favor.
2 For example, Grand River requested that
3 it not have to make MSA back payments on sales of
4 certain brands for which it would otherwise be
5 responsible.
6 MR. VIOLI: May I just clarify for the
7 record. You're not now speaking about what Judge
8 Keenan said, right?
9 MS. MORRIS: No, I'm not.
10:23:00 10 MR. VIOLI: Just to make that clear.
11 MS. MORRIS: Sorry if I was unclear on
12 that.
13 PRESIDENT NARIMAN: No, that's clear.
14 MS. MORRIS: And Grand River indicated
15 that it intended to remain in default on its prior
16 escrow obligations in numerous states. Claimants
17 also suggest that Grand River would seek a
18 grandfather share based on its market share in the
19 two years prior to joining the MSA, rather than
10:23:23 20 1997 and 1998, in which it had no market share.
21 Despite the very nature of the MSA as a
22 settlement, Grand River also makes the stunning

2070

1 PRESIDENT NARIMAN: Volume eight.
2 MS. MORRIS: Tab 118.
3 PRESIDENT NARIMAN: Thank up very much.
4 MS. MORRIS: My pleasure measure.
5 Grand River's application to sign the
6 MSA which it filed on April 3rd, 2006, readily
7 reveals its lack of interest in actually signing
8 the agreement. Indeed, Judge Keenan of the
9 Southern District of New York, stated in the
10:22:02 10 course of the Grand River V Prior case, that Grand
11 River's stance with respect to its MSA
12 application, quote, smacked of pretext, end quote.
13 This is not only because Grand River
14 gave the settling states a mere ten days to
15 consider its application before requesting a
16 judicial order requiring the states to permit
17 Grand River to sign the MSA, a process that
18 Mr. DeLange explained could take months.
19 It is also because Grand River sought
10:22:30 20 in its application and sought here concessions
21 that would fundamentally alter the compromise
22 represented by the MSA in a way solely in Grand

2072

1 request that its application to join the MSA be
2 without prejudice to its continuing to pursue
3 litigation in various fora challenging the
4 legality of the MSA regime.
5 Claimant seemed to present the request
6 as entirely ordinary but in doing so, they
7 apparently overlooked the oddity of seeking to
8 enter into a settlement of claims while
9 nevertheless pursuing legal claims related to that
10:24:04 10 settlement.
11 PRESIDENT NARIMAN: Yeah, that's a good
12 point.
13 MS. MORRIS: Thank you. Grand River's
14 position is antithetical to the very nature of the
15 MSA and is prohibited by one of the MSA's
16 provisions. Furthermore, in his second witness
17 statement, Jerry Montour explains that he insisted
18 that, quote, our right to serve on-reserve markets
19 without application of the MSA regime be fully
10:24:28 20 respected by every MSA state, end quote.
21 The implication of that statement is
22 that Grand River would have refused to make MSA

2073

1 payments on cigarettes that were ultimately sold
 2 on reservation. Such a position, however,
 3 contradicts the manner in which all MSA payments
 4 are calculated. Obviously, a fundamental aspect
 5 of the agreement.

6 Indeed, all participating manufacturers
 7 make MSA payments with respect to their cigarettes
 8 that are sold on-Reservations. It also happens in
 9 this case that the result would be the exclusion
 10:25:08 10 of a substantial majority of Claimants' sales from
 11 any payment obligation. Mr. Montour also insisted
 12 that, quote, eventually the grandfathered SPMS
 13 lose their exclusive exemptions, end quote.

14 It is unclear whether Mr. Montour
 15 maintains this condition in light of Claimants'
 16 demand here for Grand River's own grandfather
 17 share, but it was in any case a condition that
 18 Mr. Montour was in no position to impose. Given
 19 that he sought voluntarily to sign a settlement
 10:25:42 20 agreement with certain basic fixed terms such as
 21 the grandfather share.
 22 Equally fundamentally, Claimants have

2075

1 Mr. Arthur Montour in his testimony would be
 2 prohibited under the MSA.

3 For example, Claimants could no longer
 4 sell hundreds of thousands of shirts with the
 5 Seneca logo on them. Claimants could no longer
 6 sell or give away decals with the Seneca logo on
 7 them. Motorcycles emblazoned with the Seneca
 8 brand name would also be prohibited. So will
 9 would Claimants' billboards and hundreds of
 10:27:19 10 thousands of matchbooks they have distributed.

11 In short, almost all of NWS would be
 12 prohibited under the MSA. So requesting an
 13 exemption from those requirements contrary to
 14 Claimants' counsel representation would be no
 15 small matter. Taking Claimants' negotiating
 16 position with respect to the MSA as a whole, it
 17 becomes apparent that Grand River made no bona
 18 fide attempt to join the MSA. What they are
 19 really seeking is what they claim under their
 10:27:49 20 alternative damages theory, namely, a so-called
 21 partial payment exemption from their obligations
 22 under the Allocable Share Amendments.

2074

1 asserted at this hearing that Grand River would
 2 not concede to the advertising and marketing
 3 restrictions that form the core of the public
 4 health provisions of the MSA. Claimants' counsel
 5 seems to suggest that these advertising provisions
 6 would not actually affect any of Claimants'
 7 promotional activities, stating, quote, the types
 8 of health considerations that -- the things that
 9 one would have to give up here were really the
 10:26:17 10 kind of things that a company like Grand River
 11 wasn't doing.

12 It would not be hard to give up. End
 13 quote.

14 Contrary to Claimants' assertions,
 15 however, and as i have already described, it is
 16 not just advertising on NASCAR or advertising on
 17 television that is prohibited under the MSA.
 18 Rather, as Mr. Hering testified, virtually all
 19 forms of merchandising are prohibited as is the
 10:26:43 20 use of billboards and many forms of print
 21 advertising. As such, much of the advertising
 22 that NWS currently engages in as described by

2076

1 As Mr. Hering testified, what they
 2 wished to do is to remain an NPM and to argue that
 3 the allocable share release is akin to the
 4 grandfathered share.

5 That is, they don't want to make
 6 payments, they don't want to submit to the public
 7 health provisions of the MSA and yet they want to
 8 be able to get a release of nearly all of their
 9 escrow under the allocable share provision arguing
 10:28:21 10 that it is essentially the same deal that the SPMS
 11 got.

12 As I hope my presentation has made
 13 clear, however, these deals are not essentially
 14 the same. In fact, they are not even close.
 15 Claimants are seeking to perpetuate the benefits
 16 of the original allocable share release mechanism
 17 which this Tribunal and many state legislatures
 18 have already determined to be a loophole. While
 19 remaining outside the public health restrictions
 10:28:49 20 of the MSA. Such a position is in no way
 21 comparable to that of any other tobacco
 22 manufacturer and would put Claimants in a far

1 better position. It is hardly discriminatory of
2 the states not to agree to such terms.

3 For the reasons I have discussed, both
4 the Allocable Share Amendments and the
5 complementary legislation which are challenged
6 measures in this arbitration and the MSA, which is
7 not, serve important public health interests and
8 do so in a non discriminatory manner.

9 The character of the MSA regime thus
10:29:21 10 utterly undermines claimant's expropriation claim
11 under Article 1110. And to summarize our larger
12 presentation on Article 1110, international
13 Tribunals consider three factors in determining
14 whether an expropriation has occurred.

15 The economic impact of the measure, the
16 investor's reasonable investment backed
17 expectations and the character of the measure at
18 issue. Claimants' expropriation claim fails on
19 all three counts. The economic impact on
10:29:49 20 Claimants' overall investment is insufficient to
21 support a conclusion that their investment has
22 been taken from them.

1 beyond the record in this case in a number of
2 statements about shirts, youth magazines. She's
3 also commented about signing the MSA but reserving
4 the right to contest it. We've asked since the
5 beginning and at the first day of the hearings for
6 a complete copy of the MSA because General Tobacco
7 as you've noted --

8 MR. KOVAR: I object to this. This has
9 been gone over and over again. We have given full
10:31:07 10 copy of the MSA.

11 MR. VIOLI: General Tobacco has an
12 agreement where it says, we think this agreement
13 that we signed is anti competitive.

14 MR. FELDMAN: They're out of time,
15 Mr. President.

16 PRESIDENT NARIMAN: Yes, I agree. Yes,
17 I agree. You're out of time. You do it in your
18 turn, please. You'll have the last say.

19 MR. VIOLI: As long as I have freedom
10:31:32 20 to refer--

21 MR. KOVAR: The Claimants have an
22 opportunity in their closing to say whatever they

1 Claimants had no legitimate expectation
2 that their on-Reservation sales would be exempt
3 from state regulation or the allocable share
4 release mechanism would not be amended and the
5 challenged measure is a non discriminatory
6 regulation intended to promote the general
7 welfare.

8 For all these reasons then, Claimants'
9 expropriation claim under Article 1110 should be
10:30:17 10 rejected. Thank you.

11 MR. VIOLI: Mr. President, I need to
12 make a statement and perhaps a request. It's very
13 important. We heard a number of things --

14 PRESIDENT NARIMAN: What's your point?
15 Please let them finish.

16 MR. KOVAR: Yes, this is still our
17 case.

18 MR. VIOLI: It's not argument, but
19 we've been severely prejudiced.

10:30:39 20 PRESIDENT NARIMAN: State it in two
21 words.

22 MR. VIOLI: Ms. Morris has gone way

1 want.

2 PRESIDENT NARIMAN: They will be
3 summing up.

4 MR. KOVAR: I believe the Respondents
5 have the last word in the closing, Mr. President.

6 PRESIDENT NARIMAN: Yes, but whenever
7 they speak in response to Ms. Morris's statements.

8 MR. KOVAR: And I think, Mr. President,
9 you'll find Ms. Morris's slides are carefully
10:31:57 10 footnoted to the record and everything she's said
11 has a reference to the record. Thank you very
12 much.

13 Mr. President, we are ready now to turn
14 to 1105, the minimum standard of treatment.

15 PRESIDENT NARIMAN: We'll break now.

16 MR. KOVAR: Short break.

17 PRESIDENT NARIMAN: And come back 15
18 minutes. 10:45 sharp.

19 (Whereupon, at 10:30 a.m., the hearing
10:44:34 20 was adjourned until 10:45 a.m., the same day.)

21 PRESIDENT NARIMAN: Just before we
22 begin, again, I'd just like to know something that

2081

1 you handed up today, this United States versus
 2 Philip Morris, the defendants -- it says "et al,"
 3 which means -- are they all the majors and the
 4 exempt SPMs?
 5 MR. FELDMAN: There were several if not
 6 all of the majors. I would need to check to see
 7 precisely which of the majors were listed.
 8 PRESIDENT NARIMAN: No, because there
 9 it's mentioned in one of the paragraphs, they are
 10:45:11 10 given. So, if you can just give us the entire
 11 list of the defendants, because that's not there.
 12 MR. FELDMAN: Ms. Morris informs me the
 13 defendants were all the four majors and Lorillard.
 14 PRESIDENT NARIMAN: And?
 15 MR. FELDMAN: And Lorillard Tobacco.
 16 MR. VIOLI: And Liggett.
 17 PRESIDENT NARIMAN: But not the exempt
 18 SPMs; right?
 19 MS. MORRIS: That's my understanding.
 10:45:24 20 We're happy to get you a list of all the
 21 defendants.
 22 PRESIDENT NARIMAN: Because some of the

2083

1 the defendants are all identified in Paragraphs 10
 2 through 22 of the complaint.
 3 PRESIDENT NARIMAN: Are they all the
 4 defendants? I don't know.
 5 ARBITRATOR CROOK: They are named and
 6 described in the complaint.
 7 PRESIDENT NARIMAN: They are named, but
 8 are they part of the group? Yes, Yes.
 9 I just want to know who they are, the
 10:46:42 10 exempt SPMs and OPs like that, that's all I want
 11 to know.
 12 MS. MORRIS: And then, if I can make
 13 just two minor clarifications.
 14 The first one, I've been informed in
 15 that case the injunctive relief was granted by the
 16 district court and it was affirmed by the second
 17 circuit and is now being appealed -- the DC
 18 circuit, sorry, and it's now being appealed.
 19 PRESIDENT NARIMAN: To the Supreme
 10:47:06 20 Court?
 21 MS. MORRIS: Yes.
 22 PRESIDENT NARIMAN: I want both those

2082

1 paragraphs mentioned certain names and there are
 2 certainly more than four. I want a list of them.
 3 MS. MORRIS: Certainly. We'll get you
 4 the entire list.
 5 PRESIDENT NARIMAN: And secondly, I
 6 want you to know, sorry, Mr. Feldman -- secondly,
 7 I just want to know, did this proceed to any
 8 preliminary judgment or judgment or anything?
 9 What is the state of the stage at which this is?
 10:45:55 10 MS. MORRIS: My understanding, I think,
 11 from what Mr. Violi has said is that it's ongoing.
 12 The request for monetary relief has been dismissed
 13 and I believe --are the court --
 14 PRESIDENT NARIMAN: I want to see the
 15 judgment about dismissal of monetary relief.
 16 MS. MORRIS: And I believe that the
 17 requests for injunctive relief are still being
 18 considered.
 19 PRESIDENT NARIMAN: Yes, but I want to
 10:46:19 20 see the dismissal of the --
 21 ARBITRATOR CROOK: While that's being
 22 clarified, we can just note for the record that

2084

1 judgments.
 2 MS. MORRIS: And then my second point
 3 of clar --
 4 PRESIDENT NARIMAN: Yes, please
 5 provide. I'm telling you today because we don't
 6 have, now, any time, so that this record becomes
 7 complete one way or another.
 8 MS. MORRIS: And then my second point
 9 of clarification you were asking why the MSA
 10:47:22 10 states hadn't begun to negotiate with Claimants
 11 regarding their back payments, and I just wanted
 12 to note that in the letter to Mr. Violi from
 13 Mr. Greenwald, which is in the record, he states
 14 in the second paragraph, "As you have been
 15 informed on numerous occasions, the settling
 16 states require that a manufacturer be in
 17 compliance with all applicable state laws and
 18 regulations, in particular the state Escrow
 19 Statutes before any manufacturer can join the MSA.
 10:47:53 20 The states have consistently applied this policy
 21 to all MSA applicants. Grand River has repeatedly
 22 violated the laws of numerous states and has

2085

1 refused demands by the states to bring itself into
2 compliance."
3 PRESIDENT NARIMAN: Thank you.
4 MS. MORRIS: And then, just at the very
5 end he says "You are welcome to submit a new
6 application at such time Grand River is compliant
7 with Allstate laws can demonstrate its willingness
8 to support and comply with all the provisions of
9 the MSA and can provide all the information and
10:48:24 10 documentation missing from the current
11 application."
12 PRESIDENT NARIMAN: And that was never
13 submitted?
14 MS. MORRIS: To my knowledge, no.
15 PRESIDENT NARIMAN: Thank you.
16 MR. KOVAR: Mr. President, I would ask
17 you to call Ms. Thornton to begin with 1105.
18 PRESIDENT NARIMAN: Yes.
19 Please, I didn't get the name.
10:48:45 20 MS. THORNTON: I'm Ms. Thornton.
21 PRESIDENT NARIMAN: What is
22 Ms. Thornton going to be speaking about?

2087

1 presentation now.
2 And finally, President Nariman, you
3 asked us yesterday whether the MSA states could
4 have achieved the stated purpose of the MSA in a
5 way that would have caused less loss to all
6 concerned. I'm going to address that point as
7 well and try to focus your attention on the degree
8 of deference that we believe you should extend to
9 the MSA states when reviewing the challenge
10:50:34 10 measures at issue in this arbitration.
11 So, let me start first by trying to --
12 PRESIDENT NARIMAN: And you have no
13 written presentation.
14 MS. THORNTON: I do have a written
15 presentation.
16 PRESIDENT NARIMAN: But they have not
17 been distributed.
18 MS. THORNTON: I'm sorry. Have the
19 slides not been distributed?
10:50:57 20 Catherine, could you please distribute
21 my slides?
22 Thank you.

2086

1 MS. THORNTON: I'm going to be talking
2 about the minimum standard of treatment obligation
3 in Article 1105.1. I would like to preface my
4 presentation with a few thoughts.
5 Professor Anaya, at one point, I think,
6 before the snow storm, you indicated that your
7 charge was to define the scope and the content of
8 Article 1105.1, and we submit that you are exactly
9 right in that. I'm going to be focussing
10:49:22 10 primarily on the content of the minimum standard
11 of intent and Article 1105.1. My colleague,
12 Mr. Kovar, is going to go specifically address
13 Claimants' obligation that the minimum standard
14 treatment obligation in Article 1105.1 includes
15 this obligation of nondiscriminatory treatment to
16 indigenous investors.
17 Now, Professor Crook, you've asked us,
18 and very patiently a number of times in this
19 proceeding, what our position is on whether or not
10:49:52 20 a claim for frustration legitimate expectations
21 can arise under Article 1105.1. I'm going to
22 focus chiefly on responding to that question in my

2088

1 ARBITRATOR CROOK: Ms. Thornton, I only
2 get the honorific on the days I teach.
3 MS. THORNTON: Okay. All right,
4 Mr. Cook, I'll proceed accordingly.
5 (Pause in the Proceedings.)
6 MS. THORNTON: Does everyone have my
7 slides?
8 PRESIDENT NARIMAN: Go ahead.
9 MS. THORNTON: Okay. Mr. President,
10:52:17 10 Members of the Tribunal, Article 1105 of the NAFTA
11 contains Chapter 11's minimum standard of
12 treatment obligation, which reflects the NAFTA
13 parties' commitment to provide certain basic
14 international law protections to the investments
15 of investors.
16 More specifically, Article 1105.1 -- in
17 Article 1105.1, the NAFTA parties agreed, and I've
18 projected the text of the Article on the slide for
19 your benefit, that each party shall accord to
10:52:54 20 investments of investors of another party,
21 treatment in accordance with international law,
22 including fair and equitable treatment and full

1 protection and security.

2 Now, I would like the Tribunal to focus
3 on two aspects in particular of this provision.
4 The first is that the minimum standard of
5 treatment obligation in Article 1105.1 requires a
6 standard of treatment for the investments of
7 investors.

8 You can see we've highlighted that
9 language on the screen.

10:53:32 10 The second is that the minimum standard
11 of treatment obligation Article 1105.1 requires
12 treatment in accordance with international law.
13 The United States will demonstrate --

14 PRESIDENT NARIMAN: Sorry to interrupt
15 at such an early stage because you'll probably
16 deal with it, but my reading of 1105 is that this
17 is a positive obligation on the party and on whom
18 is the burden of proof to show that treatment is
19 in accordance with international law, including
10:54:09 20 fair and equitable treatment and full protection?
21 Is it not burden of proof on the Claimants or is
22 it burden of proof on the Respondents?

1 Thank you.

2 MS. THORNTON: So, the United States
3 will demonstrates in its examination of this
4 obligation that Claimants have not established as
5 a matter of fact or of law that their investment,
6 to the extent they can establish they've made one,
7 has not received the minimum standard of treatment
8 under international law. Claimants argue that the
9 United States has violated Article 1105.1 in three
10:55:56 10 ways.

11 First, by frustrating their expectation
12 that the United States would not regulate their
13 on-Reservation sales and that the Escrow Statutes
14 would not be amended to eliminate the refund of
15 portions of their escrow deposits. That's
16 allegation number one.

17 Allegation number two is that we
18 violated the minimum standard of treatment
19 obligation in Article 1105.1 by discriminating
10:56:24 20 against them as Canadian First Nations investors
21 when failing to consult with them before enacting
22 the Allocable Share Amendments in violation of

1 MS. THORNTON: The NAFTA parties have
2 been very clear about what this obligation means,
3 and the NAFTA parties in 2001 issued a binding
4 interpretation which said, this obligation means
5 that we are obligated to provide the investment of
6 investors with the customary international law
7 minimum standard of treatment. Now, because it's
8 a customary international law doctrine, the burden
9 is on the Claimant, the proponent of a customary
10:54:46 10 norm to prove the norm's existence.

11 You'll see the ICJ held accordingly in
12 the Asylum Case when Columbia was trying to assert
13 a particular customary international law norm had
14 emerged with respect to the right of political
15 asylum. And the ICJ said, it's your burden. If
16 you're going to tell us that a custom has evolved
17 in this way, it's your burden to prove that to be
18 the case. And as we will address -- my colleague,
19 Mr. Kovar, will address this more specifically
10:55:22 20 there were requirements for proving a norm of
21 customary law has emerged.

22 PRESIDENT NARIMAN: Okay. All right.

1 their human rights and peremptory norms of
2 international law.

3 And third, they allege that the United
4 States has denied them justice when requiring that
5 Grand River make escrow payments to satisfy
6 potential future determinations of liability or
7 settlements in the absence of a present judicial
8 determination of liability against the company.
9 These are their Article 1105.1 claims.

10:57:02 10 In the process of explaining why
11 Claimants have not established a breach of Article
12 1105.1 based on such claims, I will recall for you
13 our earlier presentations addressing why Claimants
14 could not have had the legitimate expectations
15 they assert.

16 I am then, as I said before, going to
17 ask Mr. Kovar to speak specifically to you about
18 the discrimination allegations and the
19 international human rights arguments.

10:57:32 20 Finally, I'm going to come back and I'm
21 going to address Claimants' allegations that the
22 challenged measures amount to a denial of justice,

2093

1 which we do recognize as a norm subsumed with the
2 minimum standard of treatment.

3 Now, the United States and Claimants
4 concur on one thing with respect to the minimum
5 standard of treatment obligation in Article 1105.1
6 that it requires treatment in accordance with
7 customary international law.

8 Now, as I'll project on the slide, on
9 July 31, 2001, the NAFTA parties acting through
10:58:12 10 the NAFTA Free Trade Commission issued a formal
11 note interpreting the minimum standard of
12 treatment in Article 1105.1. This Free Trade
13 Commission, known as the FTC or The Commission is
14 comprised of cabinet-level trade ministers of the
15 three parties and is authorized to in interpret
16 Article 2001 to resolve -- authorize in Article
17 2001, excuse me, of the NAFTA to resolve disputes
18 regarding the agreement's interpretation.

19 Now, in Article 1131.2 of Chapter 11,
10:58:53 20 the investment chapter of the NAFTA, the NAFTA
21 parties specifically provided -- and this is
22 projected on the slide -- that an interpretation

2095

1 afforded to investments of investors of another
2 party. The Free Trade Commission clarified
3 further that the concepts of fair and equitable
4 treatment and full protection and security do not
5 require treatment in addition to or beyond that
6 which is required by the customary international
7 law minimum standard of treatment of aliens. This
8 is significant and I will return to this.

9 PRESIDENT NARIMAN: But aliens doesn't
11:01:05 10 come in 1105, does it? That's the interpretation
11 only. The word "aliens" is not there in 1105. It
12 says "each party."

13 MS. THORNTON: No, the text -- the
14 chapeau, the title of Article 1105 is the minimum
15 standard of treatment.

16 PRESIDENT NARIMAN: I'm talking of
17 aliens, to whom?

18 MS. THORNTON: What the text of Article
19 1105.1 refers to is investments of investors.

11:01:27 20 PRESIDENT NARIMAN: I'm not talking --
21 if you could deal with it later if you don't have
22 --

2094

1 by The Commission of a provision of this agreement
2 shall be binding on a Tribunal established under
3 this section.

4 As the title of Article 1131 indicates,
5 a binding FTC interpretation constitutes the
6 governing law of the case. So, this is the
7 provision in Chapter 11 which tells you what to do
8 with the binding note of interpretation that my
9 colleagues have just distributed to you.

10:59:35 10 Now, in its July 31 interpretation the
11 Free Trade Commission stated that it had "reviewed
12 the operation of proceedings under Chapter 11 and
13 adopted certain interpretations in order to
14 clarify and reaffirm the meaning of certain of its
15 provisions."

16 The The Free Trade Commission
17 specifically characterized the obligation in
18 1105.1 as the "minimum standard of treatment in
19 accordance with international law," and clarified
11:00:15 20 that, one, Article 1105.1 prescribes the customary
21 international law minimum standard of treatment of
22 aliens as the minimum standard of treatment to be

2096

1 MS. THORNTON: Yes, I understand. I
2 can deal with it right now.

3 The minimum standard of treatment for
4 aliens is a customary international law doctrine.

5 PRESIDENT NARIMAN: No, that's not my
6 query. I'm sorry, that's not my query. My query
7 is, am I right in assuming that the text of 1105.1
8 doesn't speak of aliens at all; it only speaks of
9 each party and another party.

11:01:54 10 MS. THORNTON: It speaks of investments
11 of investors and we will submit to you that that
12 informs how you should analyze the minimum
13 standard of treatment under customs.

14 PRESIDENT NARIMAN: Yes, we have to
15 read into 1105 having regard to the interpretation
16 --

17 MR. KOVAR: Mr. President.

18 PRESIDENT NARIMAN: One minute.

19 That is, each party shall accord to
11:02:13 20 investments of investors of another party who are
21 aliens, treatment in accordance with -- do we have
22 to read it like that? I want to know your

1 position.
 2 MS. THORNTON: Our position is the July
 3 31, 2001, interpretation controls your
 4 interpretation of 1105.1.
 5 PRESIDENT NARIMAN: That it does. My
 6 query --
 7 MS. THORNTON: Yes. The answer to your
 8 question is yes.
 9 PRESIDENT NARIMAN: Article 1105.1
 11:02:43 10 along with The Commission's interpretation must
 11 therefore permit us to read or require us to read
 12 that each party shall accord to investments of
 13 investors of another party who are aliens in
 14 treatment with accordance with international law.
 15 MS. THORNTON: Right.
 16 MR. KOVAR: Mr. Chairman, just to point
 17 out, what is implicit there is that, of course, in
 18 the United States it has to be an investor from
 19 Canada or Mexico who are by definition an alien.
 11:03:14 20 PRESIDENT NARIMAN: I just want to
 21 know, yes. I just want to know whether I'm right.
 22 MS. THORNTON: Yeah you're right.

1 "alien" here, because it's not really -- there's
 2 not really a question here about whether any of
 3 the Claimants are aliens; right?
 4 MS. THORNTON: There's no question
 5 about that but the issue is --
 6 ARBITRATOR ANAYA: Yes, I understand
 7 the issue is -- I misspoke. When we look at the
 8 standard we have to look at --
 9 MS. THORNTON: Well, looking at the
 11:04:27 10 standard but we submit you have to look at the
 11 standard in the context of the ordinary meaning of
 12 the treaty. The ordinary meaning of the words of
 13 the treaty understood in context in light of its
 14 object and purpose. And in our view, Article --
 15 Catherine, can you que the 1105.1 slide, please.
 16 Article 1105.1 is an obligation that
 17 goes to investments of investors, right? Some of
 18 the obligations Chapter 11 go to both the
 19 investor, the alien, and its investment, its
 11:05:08 20 property interest. This obligation goes only to
 21 its property interest. This is a point Mr. Kovar
 22 is going to develop at some length in his

1 You're right. And other NAFTA Tribunals have
 2 taken a look at this question and have been very
 3 clear that that Chapter 11 applies to foreign
 4 investors and their investments. So, that's what
 5 the parties are getting at with that obligation.
 6 Yes.
 7 ARBITRATOR ANAYA: Ms. Thornton.
 8 There's no question Grand River falls under the
 9 category of alien; is that right?
 11:03:46 10 MS. THORNTON: Yes.
 11 ARBITRATOR ANAYA: How about the other
 12 Claimants?
 13 MS. THORNTON: Yes, I believe they are
 14 -- well, the citizenship of Arthur Montour, I
 15 think he submits he's a member of a First Nations
 16 tribe and not a Canadian citizen, but we assume
 17 he's an alien for purposes of this analysis.
 18 ARBITRATOR ANAYA: For purposes of this
 19 case.
 11:04:09 20 MS. THORNTON: Yes.
 21 ARBITRATOR ANAYA: So, we don't really
 22 have to concern ourselves too much with the word

1 presentation, but just to give you a full answer I
 2 wanted to address it.
 3 So, if we could go back to the July 31
 4 slide, the binding interpretation. The final
 5 conclusion of the FTC was that a determination
 6 there has been a breach of the determination of
 7 the NAFTA or a separate international agreement
 8 does not establish that there is a breach of
 9 Article 1105.1.
 11:05:48 10 ARBITRATOR ANAYA: Could it, though, be
 11 relevant to a breach of 1105?
 12 MS. THORNTON: The violation of another
 13 international agreement? No.
 14 ARBITRATOR ANAYA: Another
 15 international agreement or -- it couldn't be
 16 relevant?
 17 MS. THORNTON: Our position is the only
 18 the legal obligations that are relevant in Article
 19 1105.1 are the customary international law
 11:06:12 20 obligations subsumed within the minimum standard
 21 of treatment.
 22 ARBITRATOR ANAYA: But what if those

2101

1 customary international law obligations are
 2 embodied in a treaty or the same norm is related
 3 to a treaty norm?
 4 MS. THORNTON: Well, it's true that
 5 treatise can, for lack of a better word, codify
 6 custom, but your task is to identify any customary
 7 international law norm that Claimants have
 8 proffered, determined whether it's subsumed within
 9 the minimum standard of treatment of aliens as
 11:06:43 10 applied to their economic interest, their property
 11 interest, their investments, and establish whether
 12 or not that's been breached.
 13 So, I mean, the point of this provision
 14 --
 15 ARBITRATOR ANAYA: I'm not sure about
 16 your answer, though, that it's not relevant. I'm
 17 having a difficult time seeing how --
 18 MS. THORNTON: It could be relevant --
 19 ARBITRATOR ANAYA: I understand your
 11:07:04 20 argument that it's not -- a breach of another
 21 treaty doesn't breach this provision, in and of
 22 itself, but I can't see how it wouldn't be

2103

1 that we have accorded to investment of investors
 2 of aliens treatment in accordance with
 3 international law which is fair and equitable and
 4 giving full protection and security?
 5 MS. THORNTON: Well, if --
 6 PRESIDENT NARIMAN: That's the question
 7 I asked you initially. Is this a positive
 8 obligation on the states?
 9 MS. THORNTON: Yes.
 11:08:39 10 The United States and its treaty
 11 partners believe this is an obligation that
 12 provides real protection for foreign investments.
 13 This is not an offset.
 14 PRESIDENT NARIMAN: Therefore it's an
 15 obligation of the state.
 16 MS. THORNTON: It's an obligation of
 17 the state, but what we say is that we acknowledge
 18 established, well settled, customary international
 19 norms that are in play here and that we obligated
 11:09:03 20 to commit ourselves when signing up to Article
 21 1105.
 22 If Claimants are going to come to you

2102

1 relevant in some cases.
 2 MS. THORNTON: Well it could be
 3 relevant to the extent the treaty codifies custom,
 4 it could be relevant. But the mere allegation of
 5 a breach -- and Claimants have not come to you
 6 with that argument. They haven't come to you
 7 saying, there's a breach of a treaty therefore
 8 there's a violation of 1105.1. They're trying to
 9 place this within the customary international law
 11:07:39 10 framework. We say that they failed for various
 11 reasons, but the Claimants are very familiar with
 12 these interpretations. Professor Weiler projected
 13 it on the screen, as well. They know the ground
 14 rules.
 15 PRESIDENT NARIMAN: Sorry to interrupt
 16 like this, but I read along with the
 17 interpretation, the binding interpretation, as you
 18 put it. It doesn't say on whom is the burden. It
 19 just says, under 1102 you cited cases showing on
 11:08:07 20 whom is the burden -- that it's always on the
 21 Claimant. This doesn't say anything about the
 22 burden, does it? The burden -- who has to show

2104

1 and say that there's an additional customary
 2 international law norm in play it's their burden
 3 to prove that, A, it is a custom -- in fact, a
 4 customary international law norm; and B, it's a
 5 customary international law subsumed within the
 6 minimal standard of treatment as it affects the
 7 foreign investors property interests.
 8 PRESIDENT NARIMAN: I understand your
 9 argument that they are not investments; that's
 11:09:38 10 already been argued.
 11 MS. THORNTON: Okay.
 12 PRESIDENT NARIMAN: But assuming they
 13 are investments and they have established that
 14 they are investments, then on whom is the burden
 15 of proof just as the burden of proof is always on
 16 the Claimant under 1102? On whom is the burden of
 17 proof under 1105? That's a little problem with
 18 me.
 19 MS. THORNTON: Well, we would submit
 11:09:57 20 the burden of proof is always on the Claimants to
 21 prove their case under Chapter 11. It's not our
 22 burden.

2105

1 If there's an established customary
2 international law norm that Claimants have alleged
3 has been violated that we recognize it's our
4 burden to prove to you we haven't violated the
5 norm, but we submit there are no established
6 customary international law norms that have been
7 violated here.

8 MR. KOVAR: Mr. President, if I can
9 clarify a little bit.

11:10:28 10 In any system of law, municipal law or
11 national law or, in this case, under a treaty,
12 there are obligations on entities and sometimes
13 it's obligations on a government. In this case,
14 the three NAFTA governments have undertaken these
15 obligations, but for a party to bring a claim that
16 those obligations have been violated, the party
17 has the burden to prove the law and the facts that
18 support their claim.

19 And in that respect, there's no
11:10:57 20 difference between Article 1105 and Article 1102.
21 And so, I think that's the question you've been
22 asking, and I just wanted to make sure you got a

2107

1 legal conclusion?

2 ARBITRATOR ANAYA: That there's
3 customary international norm, even though the
4 Claimants haven't adequately put forth -- even if
5 they haven't.

6 MS. THORNTON: I would say the parties
7 have not authorized this Tribunal to resolve
8 disputes ex aequo et bono. You are charged to
9 resolve --so that confines the jurisdiction of the
10 Tribunal.

11 ARBITRATOR ANAYA: Ex aequo et bono is
12 different, though.

13 MS. THORNTON: Right. No, I hear what
14 you're saying. And we would submit that the
15 interpretation is clear that Claimants have to
16 prove that there is a customary international law
17 norm that has been violated.

18 ARBITRATOR ANAYA: Let me put it
19 differently.

11:12:26 20 Can we look beyond -- in examining that
21 question, can we look beyond what they put to us?
22 MR. FELDMAN: Professor Anaya, I would

2106

1 very clear answer on that point.

2 Thank you.

3 ARBITRATOR CROOK: It does occur to me,
4 Mr. Chairman, that we are agreed the arbitration
5 here is to be conducted in accordance with the
6 UNCITRAL rules, which I don't have the rules
7 readily at hand, but it does have a rule to the
8 effect that the burden of proof of a proposition
9 falls on the party asserting it. And it seems to
11:11:30 10 me that if one asserts that something is a rule of
11 customary international law and that it's been
12 violated, the UNCITRAL rule indicates who has the
13 burden of showing that.

14 MS. THORNTON: We would agree with
15 Mr. Crook's assertion there.

16 ARBITRATOR ANAYA: Not to belabor this
17 --

18 MS. THORNTON: That's fine. We're here
19 to answer your questions.

11:11:50 20 ARBITRATOR ANAYA: Can we do sua sponte
21 find a fact or a legal conclusion?
22 MS. THORNTON: What kind of fact or

2108

1 just flag that, as the Respondent we should have
2 the opportunity to respond to all legal arguments
3 that are made in the case. And so, if there were
4 to be a legal argument that we did not have an
5 opportunity to respond to that would prejudice us
6 as the Respondent in this proceeding.

7 MR. VIOLI: I think Claimants' position
8 would be the relevant --

9 MR. KOVAR: Mr. President, I think this
11:13:23 10 is our case, and they made their case, and they'll
11 have time in their case --

12 MR. VIOLI: All right. I just thought
13 you wanted to hear from the Claimant; that's fine.

14 PRESIDENT NARIMAN: Hold your horses.
15 Hold your horses.

16 MS. THORNTON: Okay. So, the July 31,
17 2001, interpretation addressed two issues
18 fundamental to your resolution of this case.

19 The first is it reaffirmed the standard
11:13:49 20 of treatment owed to investments of investors and
21 other parties in Article 1105.1 is contained
22 within the customary international law and minimum

2109

1 standard of treatment of aliens.
 2 Second, it clarified the reference to
 3 fair and equitable treatment and full protection
 4 security in Article 1105.1 are not to be
 5 interpreted as requiring treatment in addition to
 6 or beyond that which is required by the customary
 7 international law standard.
 8 I would submit, therefore,
 9 Mr. President and Members of the Tribunal, that
 11:14:28 10 the legal obligation that the NAFTA parties
 11 undertook in Article 1105.1 is clear. It requires
 12 them to provide the investments of investors with
 13 the customary international law and minimum
 14 standard of treatment. While Claimants agree in
 15 principle that this customary international law
 16 doctrine is the governing law of this provision,
 17 they do not confine their arguments to allegations
 18 that establish customary international law
 19 protections for covered investments have been
 11:15:01 20 breached.
 21 Instead, they ask this Tribunal to
 22 consider customary international law protections

2111

1 MS. THORNTON: Right.
 2 PRESIDENT NARIMAN: My premise is wrong
 3 that's all I want --
 4 MS. THORNTON: The fair and equitable
 5 treatment obligation has to be analyzed in the
 6 context of custom.
 7 PRESIDENT NARIMAN: I'm asking a
 8 specific question. I'm asking a specific
 9 question.
 11:16:30 10 MS. THORNTON: Right. Well --
 11 PRESIDENT NARIMAN: Is it open to a
 12 NAFTA Tribunal to say that, having regard to
 13 everything that we have heard and the record that
 14 we have seen, the treatment accorded is not fair
 15 or equitable and that it does not matter whether
 16 it is or is not in accordance with customary
 17 international law.
 18 MS. THORNTON: No. The binding FTC
 19 interpretation, July 31, 2001, prohibits you from
 11:17:00 20 doing that.
 21 PRESIDENT NARIMAN: Which part?
 22 MS. THORNTON: I would say look to Part

2110

1 afforded to individuals rather than to
 2 investments. Furthermore, Claimants essentially
 3 invite this Tribunal to interpret the fair and
 4 equitable treatment obligation in Article 1105.1
 5 as containing additional obligations not found in
 6 customary international law, including an
 7 obligation to refrain from amending laws in a
 8 manner that frustrates an investor's expectations.
 9 PRESIDENT NARIMAN: Sorry to interrupt
 11:15:42 10 again.
 11 MS. THORNTON: That's fine.
 12 PRESIDENT NARIMAN: I just want to be
 13 very clear. Is it permissible for a NAFTA
 14 Tribunal to say that having regard to the record,
 15 we find that the treatment afforded to one party,
 16 the Claimant, is not fair and equitable, but there
 17 is no breach of customary international law? Is
 18 it possible for us to say that?
 19 MS. THORNTON: Well, I mean, to this I
 11:16:12 20 would say look to the Loewen Tribunal.
 21 PRESIDENT NARIMAN: Answer yes or no.
 22 You must say no or yes for me to understand.

2112

1 Two of the binding interpretation. The concepts
 2 of fair and equitable treatment and full security
 3 is it not require treatment in addition to or
 4 beyond that which is required by the customary
 5 international law minimum standard of treatment of
 6 aliens. Your analysis has to be within the
 7 framework of custom.
 8 PRESIDENT NARIMAN: I see.
 9 MS. THORNTON: And this way, the fair
 11:17:35 10 and equitable treatment obligation in Chapter 111
 11 is different than the fair and equitable treatment
 12 obligation in other treaties.
 13 Now, Claimants' sort of most recent
 14 arguments -- argument most recently in the
 15 context of these proceedings, Claimants' attempt
 16 to recast their good faith argument as one for an
 17 abuse of right under international law.
 18 Now, this doctrine is a difficult
 19 doctrine to understand but, we would say just as
 11:18:14 20 with the principle of good faith, the abuse of
 21 right doctrine is an equitable principle that
 22 cannot create binding legal obligations where none

2113

1 would otherwise exist. Claimants' own authority
 2 on this proposition, Ben Chang, characterizes it
 3 as such. At best, it's a general principle of
 4 international law; it's not a customary
 5 international law norm.
 6 Therefore, Claimants' interpretation of
 7 the customary international law obligation in
 8 Article 1105.1 should be rejected because they
 9 have not established the existence of any
 11:18:50 10 customary international law norms that have been
 11 breached.
 12 Now, as I mentioned -- I'm sorry.
 13 ARBITRATOR ANAYA: I don't want to get
 14 too abstract here, but is it general principle
 15 international law -- necessarily not a norm of
 16 customary international law? Are those two --
 17 MS. THORNTON: Not necessarily, but I
 18 would submit in Article 38 of the ICJ statute they
 19 are treated as different sources of international
 11:19:24 20 law and the NAFTA parties have been clear that the
 21 applicable source of international law for your
 22 determination and interpretation of Article 1105.1

2115

1 general principles, subscribes to the notion you
 2 just suggested, which is that it is derived from a
 3 comparative analysis.
 4 MS. THORNTON: Yes, that is the case.
 5 And in our view it's a very different analysis
 6 than the analysis that has to deal with the issues
 7 of customary international law norm.
 8 ARBITRATOR ANAYA: I am now arguing
 9 with my good friend, John Crook, but it is also
 11:20:53 10 the case the ICJ has looked at the general
 11 principals in the form of customary international
 12 law, right?
 13 ARBITRATOR CROOK: I think we can
 14 probably continue in private with the text of
 15 Article 38 in front of us.
 16 ARBITRATOR ANAYA: I'm sorry. I must
 17 say, this is entirely abstract. I'm struggling
 18 with the context of this particular case and the
 19 particular rules here we're having to deal with.
 11:21:18 20 So, I am trying to get a clear picture here.
 21 MS. THORNTON: Well, we would submit
 22 that the NAFTA parties have tried to be as

2114

1 is custom.
 2 Now, a general principle might inform
 3 that analysis, but it can't form a separate legal
 4 obligation to which we can be bound.
 5 ARBITRATOR ANAYA: But what if we find
 6 that customary international law includes general
 7 principles of international law like some authors
 8 have argued? And indeed, it appears that in many
 9 cases the ICJ conflated the two categories.
 11:20:01 10 MS. THORNTON: Well, in that respect
 11 I'd say we differ with the ICJ. We believe there
 12 are definite requirements for proving a rule of
 13 customary international law. A proponent has to
 14 prove state practice in opinio juris.
 15 ARBITRATOR ANAYA: Okay.
 16 MS. THORNTON: And the general
 17 principle analysis is different; it's a
 18 comparative law analysis.
 19 ARBITRATOR ANAYA: According to one
 11:20:21 20 theory. Anyway, I understand your point.
 21 ARBITRATOR CROOK: It is the case, is
 22 it not, that Ben Chang is the leading writer on

2116

1 explicit as they can on this point, that the
 2 obligation of Article 1105.1 is an obligation
 3 derived from customary international law and they
 4 were very intentional on this point. So, I take
 5 your word for it, that the ICJ may have conflated
 6 these principles, but the NAFTA parties have not.
 7 Now, as I mentioned before, we believe
 8 that the customary international law minimum
 9 standard of treatment is well settled and that
 11:21:58 10 sufficiently broad practice and opinio juris have
 11 converged to require that states provide the
 12 property interests of aliens with certain basic
 13 guarantees, such as, the protection against
 14 criminal conduct, which is referred to as the
 15 obligation of full protection and security.
 16 Freedom from judicial treatment that is
 17 "notoriously unjust" or "offends a sense of
 18 judicial propriety."
 19 Three, freedom from direct and indirect
 11:22:36 20 expropriation without payment of prompt adequate
 21 and effective compensation.
 22 Now, the prohibition against

2117

1 expropriation without compensation is the most
 2 widely recognized customary international law norm
 3 subsumed within the minimum standard of treatment
 4 rubric that applies to legislative and rulemaking
 5 acts. Given its significance, the NAFTA parties
 6 negotiated a particular provision governing this
 7 obligation in Article 1110.
 8 Now, what is the purpose of this
 9 obligation in context? States include the minimum
 11:23:20 10 standard of treatment obligation in their
 11 investment agreements to protect the investments
 12 of their investors instances where national
 13 treatment is not sufficient. The reason why this
 14 is necessary is that, in the event the host state
 15 treats the investments of its own nationals with
 16 manifest injustice and accords the investments of
 17 foreign investors the same level of treatment, the
 18 NAFTA parties wanted there to be a floor beneath
 19 which the treatment couldn't fall.
 11:23:58 20 So, the minimum standard of treatment
 21 ensures that regardless of how a host state
 22 chooses to treat the investment of its own

2119

1 Now, I think as my colleagues,
 2 Mr. Kovar and Ms. Cate, have already explained to
 3 you, Claimants could not have had a legitimate
 4 expectation that their on-Reservation sales would
 5 be completely unregulated based on either the Jay
 6 Treaty or U.S. Federal Indian Law.
 7 And my colleague Mr. Feldman explained
 8 to you yesterday that, with respect to their
 9 off-Reservation sales, Claimants could not have
 11:25:57 10 reasonably expected a -- large releases of their
 11 escrow deposits in perpetuity. Claimants had no
 12 reason to expect that the states would refrain
 13 from taking additional legislative efforts
 14 revising or adopting legislation specifically
 15 designed to regulate NPM conduct. It may be that
 16 the Claimants assumed these things or wished that
 17 the regulatory framework would not change, but
 18 they could not have legitimately and reasonably
 19 expected that the states would refrain from
 11:26:32 20 regulating the tobacco market as they have done.
 21 Nevertheless, even if we were to
 22 suppose Claimants could show their expectations

2118

1 nationals, its treatment of foreign investment
 2 can't go below that absolute minimum floor of
 3 treatment.
 4 Now, significantly, for your purposes,
 5 the customary international law minimum standard
 6 of treatment does not impose a duty on states to
 7 compensate any investor who complains that a
 8 particular law or regulation is unfair or
 9 detrimental to its interests. The exercise of
 11:24:39 10 government, governmental regulatory or legislative
 11 powers, may sometimes result in outcomes that
 12 appear unfair or erroneous to some, but in the
 13 absence of a specific customary international law
 14 rule governing state conduct, the minimum standard
 15 of treatment does not direct or limit how a state
 16 must conduct its domestic regulatory affairs.
 17 Now, Claimants argue the Allocable
 18 Share Amendments in the complementary legislation
 19 violated their expectations about the regulatory
 11:25:17 20 environment in which they were investing and that
 21 the minimum standard of treatment obligates states
 22 to refrain from frustrating those expectations.

2120

1 were legitimate and reasonable, which we submit
 2 they can't, Claimants have failed to demonstrate
 3 the existence of a customary international law
 4 norm requiring states to refrain from frustrating
 5 investor expectations regarding the treatment of
 6 their investments. As we've discussed in our
 7 colloquy, as with all customary international
 8 norms, the burden of proof is on the proponent of
 9 the norm, and I would direct you to the asylum
 11:27:12 10 case for this, to establish its existence.
 11 Claimants make no effort to identify
 12 any practice of states, much less widespread and
 13 virtually uniform practice or opinio juris that
 14 would support the existence of the norm, nor do
 15 Claimants point to any domestic law which makes
 16 the frustration of an investors expectations by
 17 the government per se unlawful.
 18 What Claimants do do is they point you
 19 to numerous investment treaty Arbitral awards such
 11:27:51 20 as the Tecmed v. Mexico award and the CME v.
 21 Czech Republic award to support the notion that
 22 the customary international and minimum standard

1 of treatment expectations includes the prohibition
2 against the frustration of an investor's
3 expectations.

4 But my point for you today is that
5 these Tribunals interpreting autonomous fair and
6 equitable treatment obligations, they weren't
7 obligated to understand the fair and equitable
8 treatment obligation in the context of customary
9 international law, so they didn't have to square
11:28:27 10 this analysis of legitimate expectations with what
11 customary international law provides. We would
12 submit that if you do square the analysis, you
13 will see it makes no sense to suggest that
14 customary international law includes a prohibition
15 against the frustration of an investor's
16 legitimate expectation about the regulatory
17 environment in which it's investing.

18 Now, in a halfhearted attempt to
19 salvage their 1105.1 expectations claim, Claimants
11:29:02 20 recasted as one for detrimental reliance on a
21 "preexisting government policy or law."
22 Now, international law has long

1 ordinary breaches of contract.

2 Well, international law prohibits
3 states from engaging in certain kind of contract
4 repudiation which is different from the breach --
5 repudiation -- and refusing to provide aliens
6 remedies for such claims. It leaves ordinary
7 breach of contract claims to the domain of
8 domestic law.

9 As the Panel in *Azinian v. United*
11:31:03 10 Mexican States made very clearly, NAFTA does not
11 allow investors to seek international arbitration
12 for mere contractual breaches. Indeed, NAFTA
13 cannot possibly be read to create such a regime
14 which would have elevated a multitude of ordinary
15 transactions with public authorities and to
16 potential international disputes. Plainly, if a
17 state cannot be found liable under customary
18 international law for violating an investor's
19 expectations, when they're based on an actual
11:31:37 20 contract with the state, it can't be found liable
21 for frustrating expectations such as the
22 Claimants, which were based simply on their

1 maintained that a state's business and regulatory
2 regime does not create vested or actionable rights
3 that would prevent it from altering that regime to
4 meet new needs or to address new economic
5 problems. We submit that the Oscar Chinn Case is
6 instructive here.

7 As this Tribunal has already expressly
8 stated, investment -- international investment
9 agreements are not substitutes for prudence and
11:29:44 10 diligent inquiry by international investors in the
11 conduct of their affairs, nor are these agreements
12 -- nor do they agreements prevent states from
13 altering their legal and regulatory regimes in a
14 manner that might impact foreign investments
15 absent specific assurances to the contrary.

16 Now, as I mentioned before the United
17 States submits that it just doesn't make sense to
18 argue that customary international law has evolved
19 to include a prohibition against the frustration
11:30:22 20 of expectations. And the reason why it doesn't
21 make sense is because a state does not ordinarily
22 incur liability under international law for

1 understanding of a regulatory regime.

2 The emphasis that Claimants have placed
3 on the legitimate expectation analysis in their
4 Article 1105 claim, we submit, is without
5 foundation in customary international law.

6 In contrast, when the Tribunal takes
7 the minimum standard of treatment obligation,
8 Article 1105.1 it should keep in mind the
9 deference that customary international law
11:32:17 10 typically extends to domestic administrative and
11 legislative decision-making.

12 This is particularly true given that
13 the Tribunal is charged with examining a complex
14 multistate regime designed by the states to ensure
15 that they can fulfill critical public health and
16 welfare responsibilities.

17 I would like to direct your attention
18 to the S.D. Myers Tribunals conclusions on this
19 subject which I will project on the screen. The
11:32:50 20 S.D. Myers Tribunal held that when interpreting
21 and applying the minimal standard a Chapter 11
22 Tribunal does not have open ended mandate to

1 second guess government decision making.
 2 Governments have to make many potential
 3 controversial choices. In so doing, they may
 4 appear to have made mistakes, to have misjudged
 5 the facts, proceeded on the basis of a misguided
 6 economic or sociological theory, placed too much
 7 emphasis on some social values over others, and
 8 adopted solutions that are ultimately effective or
 9 counterproductive. The ordinary remedy for this,
 11:33:35 10 if there were one, for errors in modern
 11 governments is through internal political and
 12 legal processes, including elections.
 13 Now, the S.D. Myers Tribunal goes on to
 14 conclude that a breach of Article 1105.1 occurs
 15 only when it is shown that an investor has been
 16 treated in such an unjust and arbitrary manner
 17 that the treatment rises to the level that is
 18 unacceptable from the international perspective.
 19 That determination must be made in light of the
 11:34:08 20 high measure of deference that international law
 21 generally extends to the right of domestic
 22 authorities to regulate matters within their

1 Now, I'm happy to address any
 2 additional questions the Tribunal might have.
 3 ARBITRATOR ANAYA: Just a
 4 clarification.
 5 I think I know the answer to this, but
 6 I just want to get your statement from you. This
 7 first bullet point where you say customary
 8 international law norm subsumed within the minimum
 9 standard of treatment. Is it possible for there
 11:35:48 10 to be a violation of another customary
 11 international law, customary international law
 12 norm, but one that is not subsumed within the
 13 minimum standard of treatment?
 14 MS. THORNTON: It's possible, but that
 15 would not be actionable in this context.
 16 ARBITRATOR ANAYA: That's what I mean.
 17 That's what I mean.
 18 MS. THORNTON: Yes. We submit that as
 19 President Nariman and his colleagues in the
 11:36:05 20 Wintershall Case pointed out, international
 21 Tribunals are Tribunals of limited competence.
 22 Your competence -- you have been charged to

1 borders.
 2 Thus, we submit that the Tribunal must
 3 extend the United States a measure of deference
 4 when examining the legislative measures at issue
 5 in this proceeding.
 6 So, in conclusion, in order to
 7 establish a violation of the minimum standard of
 8 treatment obligation in Article 1105.1, Claimants
 9 must demonstrate that the United States has
 11:34:42 10 violated a customary international law norm
 11 subsumed within the minimum standard of treatment
 12 which is applicable to their investments.
 13 Claimants have failed to demonstrate
 14 that the customary international law minimum
 15 standard of treatment includes a prohibition
 16 against frustrating the expectations of an
 17 investor about the legal and regulatory regime
 18 that will be applied to its investment, nor have
 19 Claimants demonstrate that they reasonably could
 11:35:12 20 have held legitimate expectations that the
 21 original Escrow Statutes would apply in perpetuity
 22 to their investments.

1 determine whether or not the obligations in
 2 Section A of Chapter 11 have been breached, and
 3 that's the limitation on your competence.
 4 ARBITRATOR ANAYA: So theoretically --
 5 so theoretically there could be customary
 6 international law norms that play but aren't
 7 relevant for the purposes of this claim.
 8 MS. THORNTON: Absolutely. Absolutely.
 9 ARBITRATOR CROOK: Ms. Thornton can you
 11:36:36 10 help me, I'm a little dusty here. You cited Oscar
 11 Chin. Is this case Oscar Chin?
 12 MS. THORNTON: I think it's similar to
 13 Oscar Chin in that Oscar Chin complained about the
 14 fact that the regulatory landscape that he had
 15 entered when starting up his riverboat navigation
 16 system changed because of the economic crisis in
 17 1929. And Belgium decided to adopt a measure that
 18 was only applicable to a state-owned enterprise,
 19 and Oscar Chin said you've changed the regulatory
 11:37:16 20 environment and the British government backed him
 21 up in this and said, you violated your treaty
 22 obligations to our nationals by changing the terms

2129

1 on which he made his investment in your territory.
 2 And the Tribunal in that case determined or the
 3 PCIJ, excuse me, that laws and regulations don't
 4 create vested rights, that international law is
 5 about protecting vested property rights. And we
 6 submit that you can't derive vested rights simply
 7 from your assumptions about how a legal or
 8 regulatory regime will operate.
 9 PRESIDENT NARIMAN: There is nothing
 11:38:05 10 apropos what you have said. I just want to know
 11 whether you have got offhand date of Amendment 21
 12 in the MSA. It was mentioned the other day.
 13 MS. THORNTON: I'm sorry I don't have
 14 it offhand but I believe one of my colleague does.
 15 PRESIDENT NARIMAN: Can anyone give me
 16 the date of the of the amendment of the MSA,
 17 Amendment 21 that was given?
 18 MR. KOVAR: We're still working on it.
 19 PRESIDENT NARIMAN: Okay. Thank you.
 11:38:33 20 Thanks very much. Very good. Thank you.
 21 (Pause in the Proceedings.)
 22 PRESIDENT NARIMAN: Mr. Kovar.

2131

1 received by any other NPM or tobacco wholesaler,
 2 including foreign, domestic, indigenous and
 3 non-indigenous businesses, nor do Claimants
 4 establish that the particular rights they claim
 5 under international human rights law or the UN
 6 Declaration of the Rights of Indigenous People are
 7 incorporated into the customary international law
 8 minimum standard of treatment, which under Article
 9 1105.1, as Ms. Thornton has explained, applies to
 11:40:36 10 investments and not to individuals.
 11 Finally, Claimants' arguments about the
 12 UN charter and peremptory norms of international
 13 law and the role that they might play in this case
 14 we believe are misguided, having no basis in
 15 international law. So, one way or another, these
 16 cases are not cognizable under Article 1105,
 17 Subparagraph 1.
 18 First and fundamentally, Claimants do
 19 not prove the existence of any discrimination on
 11:41:09 20 the grounds of race or indigenous status here.
 21 The statutes with which Claimants take issue are
 22 neutral on their face; they do not distinguish in

2130

1 MR. KOVAR: Mr. President and Members
 2 of the Tribunal, Claimants' second claim under
 3 Article 1105.1 is that the U.S. has violated the
 4 minimum standard of treatment by discriminating
 5 against them as indigenous investors. They allege
 6 that this discrimination consists of the failure
 7 of the MSA states to consult with them, private
 8 Canadian First Nations investors before adopting
 9 the measures they challenge in this arbitration.
 11:39:25 10 Claimants assert that certain
 11 international human rights or indigenous rights
 12 principles have been established as customary
 13 international law or as peremptory norms of
 14 international law thereby giving rise to binding
 15 obligations on the part of the U.S. that
 16 prohibited the states of the United States from
 17 enacting measures having an impact on Claimants'
 18 business when the states have not previously
 19 sought out and consulted them. We submit that
 11:39:56 20 these claims have no basis in law or in fact.
 21 Claimants point to no treatment that they've
 22 received that differs from that which has been

2132

1 any way on the basis of race or indigenous status.
 2 There is no evidence on the record of
 3 any animus on the part of state officials against
 4 Claimants or investments because of Claimants'
 5 race or indigenous status, and there is no
 6 evidence that the contested measures involved any
 7 race-based distinction that resulted in different
 8 treatment for the investments of any group of
 9 tobacco manufacturers of a certain racial or
 11:41:52 10 indigenous status.
 11 Claimants suggest that the mere fact of
 12 their indigenous status combined with the alleged
 13 adverse effects of the challenged measures is
 14 sufficient to demonstrate discrimination
 15 prohibited under international law.
 16 To the contrary, such a showing cannot
 17 be sufficient here; otherwise, any generally
 18 applicable regulation would be ipso facto
 19 discrimination, if even a single member of
 11:42:23 20 minority group happened to be adversely effected.
 21 For example, if Article 1 of the UN
 22 convention on the elimination of all forms of

2133

1 racial discrimination, which is enforced for 173
 2 states parties, including the United States -- if
 3 that were to provide the applicable case for
 4 discrimination in this context, hypothetically,
 5 let's say, Claimants' argument would be
 6 insufficient. Claimants make no serious effort to
 7 demonstration how they're alleged mistreatment
 8 involved -- and I'll quote from the treaty, "a
 9 distinction, collusion, restriction or preference
 11:42:59 10 based on race, color, dissent, or national or
 11 ethnic origin which has the purpose or effect of
 12 nullifying or impairing the recognition,
 13 enjoyment, or exercise on an equal footing of
 14 equal rights and fundamental freedoms. "

15 Even the authority cited by Claimants
 16 in support of their racial discrimination
 17 allegations, the advisory opinion of the
 18 Inter-American Court of Human Rights in the
 19 juridical condition and rights of the undocumented
 11:43:29 20 migrants case, agrees that the claims of
 21 discrimination must allege discrimination "against
 22 a specific group of persons because of their race,

2135

1 of opinion informs this analysis.
 2 MR. KOVAR: I don't have that in front
 3 of me and I can try to take a look at it before
 4 closing.
 5 ARBITRATOR ANAYA: Yes, we're closings
 6 by the Claimants.
 7 MR. KOVAR: Okay. I don't have it in
 8 front of me. I apologize for that. I'll have to
 9 see if I can get you an answer by tomorrow.
 11:44:54 10 But I will point out that the CERD is
 11 not at issue in this case. We're using it as an
 12 example. So, I'm not devaluing the point that the
 13 committee itself may have made an interpretation
 14 --
 15 ARBITRATOR ANAYA: What is the standard
 16 of discrimination, then? I assume you're trying
 17 to inform us on the standard of discrimination and
 18 you put up CERD and I'm asking you about the
 19 standard as interpreted by the relevant UN body,
 11:45:29 20 and you say we shouldn't look to CERD.
 21 MR. KOVAR: My point is I'll have to
 22 look to see what the committee --

2134

1 gender, color, or other reasons."
 2 ARBITRATOR ANAYA: Mr. Kovar, are you
 3 going to get into the way this language which
 4 you've quoted from the Convention on the
 5 Elimination of Racial Discrimination has
 6 interpreted by the UN treaty monitoring body
 7 that's happened in this regard, in the specific
 8 context of indigenous peoples?
 9 MR. KOVAR: I wasn't planning to, but
 11:44:02 10 if you had some questions we can see if we answer
 11 them.
 12 ARBITRATOR ANAYA: You seem to be
 13 arguing the CERD simply proscribes what might be
 14 affirmative, purposeful discrimination where I
 15 asserted the CERD Committee itself in its General
 16 Recommendation 23 which the Claimants cite says
 17 that there are affirmative obligations placed on
 18 states to refrain from action which may be neutral
 19 on its face but that have adverse impacts on
 11:44:30 20 indigenous peoples, somewhat akin to the U.S.
 21 trust responsibility within the U.S. domestic law.
 22 So, I'm just wondering how that interpretive body

2136

1 ARBITRATOR ANAYA: What is the relevant
 2 standard just so I know what we should be looking
 3 at.
 4 MR. KOVAR: Well, we're going to get to
 5 that, but the point in which we've been making is
 6 that there is not a case under the minimum
 7 standard of treatment of aliens of investments --
 8 ARBITRATOR ANAYA: No, I understand
 9 that, but --
 11:45:55 10 MR. KOVAR: But what my point here was
 11 even if we were to look at the CERD, the claim
 12 that they've made, which, as a private investor
 13 under the MSA regime, under the Escrow Statutes
 14 and complimentary acts -- because they claim
 15 that, like every other NPM, they have lost some
 16 market share or it has cost them some sales. That
 17 in itself does not violate the CERD. And I have
 18 to admit, I haven't looked at the decision of the
 19 committee, but I would be surprised if the
 11:46:31 20 decision of the committee would have found under
 21 those facts that there would be a violation of the
 22 CERD in this case. That's my point, but I

2137

1 apologize because I don't have that in front of
2 me. So, I pledge that I'll take a look at it.

3 PRESIDENT NARIMAN: So, you've cited
4 the definition of discrimination in CERD for some
5 purpose I have take it.

6 MR. KOVAR: Yes.

7 PRESIDENT NARIMAN: What's the purpose,
8 then?

9 MR. KOVAR: The purpose is you have to
11:46:58 10 demonstrate that there is -- that a measure has
11 adversely affected you on account of your race.
12 It can't simply be that this measure causes --
13 that certain market players do more poorly under
14 this measure than under some other measure, but
15 the fact that I am a -- of a particular race or
16 particular indigenous group, that alone doesn't
17 make a race discrimination violation. It has to
18 be that the measure itself has discriminated
19 against you on account of your status. And it
11:47:40 20 doesn't have to be intentional but it still has to
21 be linked to your indigenous status.

22 So, that's what we're trying to argue

2139

1 case of the Claimant on this duty to consult that
2 you are talking about in your note, is that --
3 it's in the context of an existing playing field
4 which was suitable to everybody concerned.

5 Now, everyone else -- that's their
6 case. Everyone else was consulted but you never
7 consulted the Claimants, that is, their group,
8 that this, that this was the best way out of the
9 loophole that was discovered. That seems to be
10 their case.

11 MR. KOVAR: Well, they certainly are
12 arguing that there was some sort of affirmative
13 obligation on the states to consult them as
14 businesses and businessmen before enacting the
15 Allocable Share Amendments and the complimentary
16 act.

17 PRESIDENT NARIMAN: No, sorry. Having
18 regard to the existing state of affairs because
19 someone was altering an existing state of affairs
11:49:50 20 in respect of which, it's not as if you didn't
21 consult the major manufacturers, exempt SPMs. You
22 consulted everybody except them who were the most

2138

1 that the Claimants have to show that there's been
2 some form of treatment that drew a distinction or
3 other restriction based on their race or
4 indigenous status and that has the purpose or
5 effect of nullifying or impairing their equal
6 rights, but they haven't alleged, much less shown,
7 that their treatment satisfied the various
8 elements of the standard.

9 Now, the fact that Grand River's owners
11:48:14 10 are members of the Canadian First Nations does
11 not, without more, transform the treatment
12 accorded to Claimants under the Allocable Share
13 Amendments and complimentary statutes into racial
14 discrimination simply because it may have had some
15 impact on their business.

16 If Claimants cannot present evidence
17 demonstrating that the economic impact they've
18 experiences was because of their race, their
19 discrimination claim appears to be a demand for
11:48:42 20 some sort of special treatment under the minimum
21 standard.

22 PRESIDENT NARIMAN: As I see it, the

2140

1 affected. That's the charge.

2 MR. KOVAR: Well, we'll get into
3 whether they are able to fit that not customary
4 international law minimum standard of treatment,
5 but I would just refer back to Ms. Morris's
6 presentation today, which is that, because the
7 Allocable Share Amendments and the complimentary
8 act has to be consistent with the MSA, the MSA
9 states and the parties to the MSA, the PMS, had to
10 reach agreement on that in order to avoid a
11 challenge that it somehow violated the MSA.

12 But then, once they agreed on what the
13 outlines of the changes would be, each state had
14 to itself go through its normal legislative
15 processes in order to pass that and in that
16 context everyone, including the NPMS, including
17 the Claimants had an opportunity to express their
18 views to the states, pro or con, and it was fully
19 vetted. And in fact, I think as it's been pointed
11:51:07 20 out, at least in one state the NPMS prevailed in
21 Missouri and Missouri did not pass the
22 legislation.

2141

1 PRESIDENT NARIMAN: But this is
2 pre-legislation that we are talking about, that
3 you need to consult. He's not saying it's in the
4 legislation. The pre-legislation when a decision
5 was arrived at, a concerted decision that we must
6 amend because of this loophole, et cetera, that's
7 the stage at which they're concerned. Everybody
8 else is consulted and they are not, although they
9 are the most affected. They could have said
11:51:39 10 suggested another way out, if at all.
11 MR. KOVAR: Again, just -- as going
12 back to the record because they were not a party
13 to the MSA and those consultations were among the
14 parties to the MSA, because the MSA is an
15 agreement. So,
16 , in order to change any element of it,
17 the parties had to agree; otherwise, one of the
18 parties could have challenged whether the change
19 was consistent with the MSA. But be that as it
11:52:06 20 may, I think I'll get to whether -- whether there
21 is any duty to consult under the minimum standard
22 of treatment in Article 1105.1. I don't know if

2143

1 you the same question I was pressing on
2 Ms. Thornton.
3 Could it be relevant though if another
4 treaty is violated particularly if it relates to
5 trade like the Jay Treaty allegedly does?
6 MR. KOVAR: Well, I guess we'd have to
7 ask what it's relevant for.
8 ARBITRATOR ANAYA: Well, the Jay Treaty
9 says -- if we interpret the Jay Treaty to say free
11:53:51 10 passage and that includes free trade and that's
11 violated, does that somehow -- is that relevant to
12 analysis of violation of minimum standard of
13 treatment?
14 MR. KOVAR: I don't think so because
15 the FTC has said that that does not constitute a
16 --
17 ARBITRATOR ANAYA: No, no, no, no. But
18 --
19 MR. KOVAR: I know, I know, I know.
20 You're asking if it is relevant --
21 ARBITRATOR ANAYA: Well, then, you keep
22 asking --

2142

1 that answers your question adequately.
2 PRESIDENT NARIMAN: Yes.
3 MR. KOVAR: Claimants argue that since
4 they're members of indigenous North American
5 Nations who run their businesses or native lands
6 they can not be subject to the state's escrow laws
7 and complementary legislation. In our view, this
8 is not a discrimination claim, nor does 1105.1
9 operate to enforce rights that they may believe
11:52:45 10 are owed to North American Indians under the Jay
11 Treaty or the Treaty of Canadaiqua, even if the
12 treatise were violated, and yesterday I tried to
13 show they were not. The NAFTA Free Trade
14 Commission stated clearly in its 2001
15 interpretation, and Ms. Thornton has already gone
16 through this, that a determination that there has
17 been a breach of a separate international
18 agreement does not establish that there's been a
19 breach of Article 1105.1 and this interpretation
11:53:14 20 is binding on all NAFTA Tribunals. Second,
21 Claimants have --
22 ARBITRATOR ANAYA: Let me just press on

2144

1 MR. KOVAR: Well, no, no, but then the
2 second -- that's the first part. The second stage
3 of the answer is, what would it be relevant to?
4 It wouldn't be relevant to trying to
5 figure out what the content of the customary
6 international law obligation is. As I think
7 Ms. Thornton pointed out, you can sometimes look
8 to treaties to help determine whether something is
9 customary international law or to help define its
11:54:35 10 content, but there could be many treatise out
11 there that some aspect of a Claimant in a Chapter
12 11 dispute -- some aspect of what they're doing
13 could be arguably a violation of, but NAFTA
14 Chapter 11 Article 1105.1 doesn't provide
15 jurisdiction for resolving those.
16 And so, the relevance in the abstract
17 is hard to define. I guess that's our problem.
18 ARBITRATOR ANAYA: Well, in the
19 specific case of the Jay Treaty we would have to
11:55:13 20 find, first of all there were a norm that were
21 applicable in this case, in some sense, and then
22 that norm embodied in the treaty were part of the

2145

1 customary law of the minimum treatment of aliens.
2 MR. KOVAR: I guess one way would --
3 but I'm not sure a violation of the Jay Treaty
4 would get you to the customary international law
5 point.

6 Perhaps the most obvious answer to your
7 question is when we go back to what we were
8 talking about yesterday. What the Claimants are
9 arguing in the Jay Treaty is part of an
11:55:43 10 expectations argument. They're saying, look, this
11 treaty has been out here for two hundred years,
12 and we've always known that it means we can -- as
13 long as we're in the tobacco business, we can --
14 we're unfettered. And we had that expectation and
15 it was reasonable; so that is relevant. Let's say
16 hypothetically they were right -- we don't think
17 they are, but hypothetically they're right, that's
18 relevant only to their expectations argument. And
19 what we've argued is the expectations argument is
11:56:17 20 under 111110, which is an expropriation claim, and
21 it is relevant there. It's always been part of
22 the expropriation analysis, but under 1105.1 our

2147

1 to having consulted one group of people who were
2 affected? You choose not to consult another group
3 who is even more affected.

4 I mean, there is where that so-called
5 duty to consult arises, not in the abstract.
6 There's no duty to consult, I will go along with
7 you, but what if you have consulted prior to
8 arriving at a decision between the contracting
9 states, between the OPMS, so on, everybody, and
11:57:58 10 you exclude NPMs who are already there, who are
11 not people who are totally outside the system?
12 They are selling cigarettes, they are at that po
13 0.40 percent, what then?

14 In that context, is there or is there
15 not some obligation? It may not be a duty, some
16 requirement to consult, and not having consulted
17 would that not breach either 1102 or 1105?

18 MR. KOVAR: Mr. President, I think
19 you're now outside the area of race
11:58:30 20 discrimination.

21 PRESIDENT NARIMAN: I'm not talking
22 about race discrimination.

2146

1 argument is -- and I think Ms. Thornton tried to
2 lay that out in some detail -- it's not relevant.
3 There is no minimum standard of treatment
4 obligation of the frustration of -- the violation
5 of frustrated expectations that the Claimants
6 would say.

7 I hope that answers your question. I'm
8 glad you asked it again.

9 Second, Claimants put forward an
11:56:54 10 argument that a prior duty to consult with in
11 indigenous groups and individuals must be read
12 into 1105.1. Claimants argue that a duty to
13 consult is guaranteed by international law and
14 must therefore be incorporated in the "fair and
15 equitable treatment provision" of Article 1105.1.
16 However, as Ms. Thornton has just discussed, the
17 NAFTA parties adopted Article 1105.1 as a limited
18 obligation and it does not incorporate all the
19 rights that an individual might arguably possess
11:57:24 20 as a result of a state's obligations under all of
21 international law.

22 PRESIDENT NARIMAN: What would you say

2148

1 MR. KOVAR: Right. I understand. I
2 think what you have -- if I may, I think the
3 question that you have posited is similar to the
4 Claimants' argument that they have been denied
5 administrative and procedural due process or, in a
6 sense, a denial of justice.

7 PRESIDENT NARIMAN: No, no I'm not on
8 that, nothing to do with due process.

9 Having consulted a group of people
11:59:00 10 deliberately before arriving at a decision whether
11 to do the thing that was intended to be done and
12 was later passed by the legislature, having
13 intended to do -- having consulted one group, you
14 do not consciously consult and you say, no, no we
15 don't want to consult these people, don't bother
16 about them. So, is that something which would
17 fall under either 1102 or 1105?

18 MR. KOVAR: And the answer is no.
19 That's not the purpose of NAFTA Chapter 11.

11:59:30 20 PRESIDENT NARIMAN: Why not? In a
21 particular instance, why not?

22 It all depends on the facts of a case.

2149

1 I agree that a duty to consult may not be there as
 2 part of the international law, customary
 3 international law, but where you have chosen to
 4 have detailed consultations and taken a certain
 5 decision and left out a group of people who may
 6 have suggested an alternative by which to proceed.
 7 MR. KOVAR: Mr. Chairman, the reason
 8 when I start today answer your question I went to
 9 the denial of justice is because I was trying to
 12:00:02 10 take your facts and apply them to the provisions
 11 of the treaty, because in life and in business
 12 there can be many things that are unfair or
 13 illegal, that are not right, but they're not
 14 necessarily violations of the NAFTA. To violate
 15 the NAFTA you have to bring your facts within --
 16 the Claimant has to bring his facts within the
 17 articles, and the facts that you've put forward in
 18 order to constitute a violation of Articles 1102
 19 or 110 three would have to go back to the
 12:00:36 20 requirements of Articles 1102 and 1103, including
 21 the distinction drawn between NPMs and non-NPMs
 22 there has to do with their nationality and other

2151

1 say? Would you like to take -- would you like to
 2 suggest some other way in which everyone else
 3 could be accommodated including NPMs, OPMS, et
 4 cetera, and you keep them out?
 5 Now, is that -- it may not be a
 6 violation of NAFTA but is that fair? Is that a
 7 fair way of looking at it?
 8 MR. KOVAR: Mr. Chairman, I think we
 9 would take issue with that that was the facts, and
 12:02:10 10 we tried to point out that that's would not be the
 11 way the facts are proffered. That's, of course,
 12 their case, but even if you took that case to be
 13 true, it doesn't violate the NAFTA. The Claimants
 14 have the burden to show that this unfair process
 15 that they argue existed.
 16 PRESIDENT NARIMAN: But you agree as
 17 the United States Government that this was an
 18 unfair thing. You are not the states. As he
 19 says, he has no complaint against you. You are
 12:02:40 20 the United States Government whose duty it is to
 21 see that everybody is treated fairly, also.
 22 It may not be, as you rightly say --

2150

1 things.
 2 And under 110 -- but otherwise, there's
 3 no violation of 1102. In other words, our bottom
 4 line here, Mr. Chairman, is that there is nothing
 5 in NAFTA Chapter 11 that says the Tribunal should
 6 decide whether something has been fair or whether
 7 it was right or even that it was wrong under
 8 domestic law. That's not what Chapter 11 is all
 9 about. Chapter 11 has very specific provisions in
 12:01:14 10 this: National treatment, most favored nation
 11 treatment -- they have very specific requirements
 12 -- expropriation, very specific requirements.
 13 PRESIDENT NARIMAN: These are all
 14 facets of treatment. All facets.
 15 We have to see the facts of each case
 16 in each specific case. In this particular case,
 17 we have this situation which I don't find an
 18 answer to -- I mean, an effective answer to, so
 19 far.
 12:01:39 20 You did ask everybody else but you
 21 never asked them this, because it's going to
 22 affect you the most. Now, what do you want to

2152

1 some case may say it's not a violation of NAFTA,
 2 but is that something which you as the United
 3 States Government consider to be fair? That's all
 4 I want to know.
 5 MR. KOVAR: Well, Mr. President, I
 6 don't think we agree with their statement of the
 7 facts, so I would say no, but if you were to
 8 hypothesize --
 9 PRESIDENT NARIMAN: I don't hypothesize
 12:03:09 10 I'm talking about statement of facts. You say
 11 they were consulted prior to any decision taken?
 12 MR. KOVAR: Let me see if I can restate
 13 your question and then maybe I'll be able to
 14 answer it.
 15 What you're asking is that, if we take
 16 as true that the MSA states and the PMs got
 17 together and discussed amendments to the MSA in
 18 terms of closing the loophole, the Allocable Share
 19 Amendments, and complementary legislation, so, to
 12:03:44 20 increase enforcement, if the question is the fact
 21 the NPMs, assuming this is true, were not
 22 consulted before they did that --

2153

1 PRESIDENT NARIMAN: That is true. That
2 is true. You're saying "assuming."
3 If you say it's not true, that's an end
4 to the argument that they were consulted. They
5 were not. That's what the records show.
6 MR. KOVAR: We will come back to the
7 record. I don't want to address the record, I'm
8 just saying if you take that as true -- if you
9 take it as true, Mr. Chairman, I've lost my train
12:04:20 10 of thought, but --
11 PRESIDENT NARIMAN: Sorry I've cut you
12 off.
13 MR. KOVAR: The point is, if you take
14 that as true that you have a case where the
15 parties to the MSA, it's their agreement, got
16 together and drafted a draft statute on how to
17 close the loophole and how to increase enforcement
18 of the MSA regime through complementary
19 legislation and after they had reached agreement
12:04:47 20 among themselves that this was consistent with the
21 MSA, that the fact that they didn't consult with
22 -- assuming it's true -- that they didn't consult

2155

1 two distinct things.
2 MR. KOVAR: But that didn't adopt
3 legislation. It still had to be passed by the
4 legislatures of the states.
5 And even today on Capitol Hill in the
6 United States or in Ottawa in Canada, legislatures
7 are talking with interests about legislation, and
8 there's no requirement before they present a draft
9 bill that they have consulted with every
12:06:08 10 conceivable interested group, and they don't. But
11 when they present the bill, the bill has to be
12 done in an open and transparent way and it has to
13 be passed through with proper procedures, and
14 there's absolutely nothing on the record that
15 suggests that was not the case here. Every one of
16 these statutes was passed completely openly and
17 properly through the normal legislative
18 procedures. I hope that answers your question but
19 we can also get back to you on --
12:06:38 20 PRESIDENT NARIMAN: That can't be
21 helpful. I'm only putting my doubts and
22 difficulties as I did with them my doubts and

2154

1 with the NPMs --
2 PRESIDENT NARIMAN: Why do you keep
3 saying it isn't true.
4 MR. KOVAR: Because we -- I don't know
5 that we agree that it's not true. I'm just
6 saying, I don't want to have to agree on the
7 record. What I want to do is say with you -- let
8 me assume.
9 PRESIDENT NARIMAN: I'm saying whether
12:05:09 10 you agree. It if you say you don't agree --
11 MR. KOVAR: We'll have to get back to
12 you on that question. I'm not in a position to
13 tell you where in the facts -- one thing or the
14 other, but even if it were true it doesn't violate
15 the NAFTA. And even if one -- do I think it's
16 unfair? No, I don't think it's unfair, because
17 this had to be passed in 46 state legislature it
18 had to be justified; it was open process; that's
19 how legislation it is made.
12:05:38 20 PRESIDENT NARIMAN: I'm not speaking of
21 legislation, Mr. Kovar. I'm speaking to the
22 decision to adopt legislation, please. They are

2156

1 difficulties I put to each side it makes no
2 difference.
3 MR. KOVAR: Thank you. I appreciate
4 that.
5 Did you want to ask something,
6 Mr. Crook?
7 ARBITRATOR CROOK: I don't think I can
8 contribute here.
9 PRESIDENT NARIMAN: Sorry we put you
12:07:00 10 off.
11 MR. KOVAR: That's okay. That's okay.
12 We were talking about -- Ms. Thornton
13 just talked about the NAFTA Article 1105 is a
14 limited obligation and it doesn't incorporate all
15 the rights that an individual might arguably
16 possess as a result of the state's obligations
17 under international law. Obviously, states have
18 multitude of such obligations.
19 In fact, the NAFTA parties guaranteed
12:07:24 20 investments under 1105.1 only those rights
21 established in the customary international law
22 minimum standard of treatment.

1 Claimants agree consistent state
2 practice and opinio juris are required to
3 demonstrate the existence of the norm of customary
4 international law, yet, as we argued, Claimants
5 have failed to make either showing with respect to
6 the establishment of their professed norm in the
7 customary international norm and minimum standard
8 of treatment here.

9 Indeed, Claimants point to not a single
12:07:54 10 instance of a state engaging in consultation with
11 indigenous investors located outside its territory
12 prior to enacting legislation that may affect
13 those investor's economic interests, much less
14 that a state engaged in such consultation out of a
15 sense of legal obligation.

16 Because the obligation in Article
17 1105.1 runs only to the investments of the
18 investors and not to the persons of the investors,
19 a Chapter 11 Claimant cannot invoke the minimum
12:08:26 20 standard of treatment obligation in Chapter 11 to
21 address all of the rights that a natural person
22 might be able to assert under customary

1 in fact there is customary international law norm
2 that relates to our duty to consult. I think our
3 position on that is pretty familiar so I won't
4 spend a lot of time on it.

5 ARBITRATOR ANAYA: Are you getting to
6 it now?

7 MR. KOVAR: I will soon. It's not that
8 long.

9 In this connection, it's instructive to
12:09:47 10 compare the language of Article of 1105.1 with the
11 language of Articles of 1102 and 1102.1 and
12 1102.2, the national treatment obligation.

13 As you can see, 1102.1 addresses
14 certain rights of investors, and 1102.2 addresses
15 those same rights with respect to their
16 investments. By contrast, in Article 1105.1, the
17 NAFTA parties guaranteed minimum standard of
18 treatment only to the investment of an investor.

19 Now, last week Mr. Crook asked if the
12:10:22 20 relevant question is not whether human rights are
21 included in the customary international and
22 minimum standard of treatment, but which rights

1 international law.

2 ARBITRATOR ANAYA: So, Mr. Kovar, are
3 you now not arguing, then, that there is -- let me
4 try to put this differently.

5 What is your position, then, now, as to
6 whether there is any customary international law
7 regarding consultation of indigenous people?

8 MR. KOVAR: I will address that,
9 Professor Anaya. I'm sure -- we have addressed it
12:08:57 10 in our briefs, but I will address it here.

11 ARBITRATOR ANAYA: It just seems like
12 you're saying something slightly different now.
13 In your briefs, I understood you to be saying
14 there is no customary international law at all
15 regarding consultation concerning indigenous
16 peoples. Now, I understand you to be saying a
17 narrower point consistent with what Ms. Thornton
18 argued there's no customary international law
19 within the framework of the NAFTA standard.

12:09:22 20 MR. KOVAR: Well, in the -- as we often
21 do, we'll make alternative arguments and so
22 eventually I'll get to the argument about whether

1 are included. I don't know if that's a fair re
2 statement of your question, and I would begin by
3 saying that question still begs the essential
4 question: Yes, the customary international law
5 minimum standard of treatment of aliens has
6 evolved to address both investment rights and
7 individual rights, but these have emerged as
8 different areas of the law.

9 For example, there may be a denial of
12:10:55 10 justice related to individual rights, violation of
11 the rights reflected, for example, in Articles 8
12 and 10 of the Universal Declaration of Human
13 Rights or there may be a denial of justice related
14 to investment rights, which would be violation of
15 the rights, for example, reflected in Article
16 1105.1.

17 Under the treaty provision at issue in
18 this case, Article 1105.1 of the NAFTA, the focus
19 must be on the customary international law minimum
20 protections for investments.

21 Now, contrary to Claimants' suggestion,
22 then, this Tribunal has not invested with

2161

1 jurisdiction to resolve any and all claims that
2 the Claimants might assert under international
3 law, even if those claims are framed as important
4 issues related to human rights. Claimants have to
5 demonstrate they're part of the customary
6 international and minimum standard of treatment
7 applicable to investments. Now, in their
8 Memorial, Claimants argued the existence of a duty
9 of government officials to consult with indigenous
10 investors before implementing any law that might
11 adversely affect those investors's economic
12 interests, asserting it is also a peremptory norm
13 of international law.

14 In their reply brief, Claimants claim
15 this right was erga omnes and incorporated in the
16 UN charter and thereby necessarily into Article
17 1105.1.

18 Now, regardless of which arguments
19 Claimants ultimately seek to rely on, their legal
12:12:25 20 assertions are unsupported in the law. Claimants
21 suggest that a duty to consult constitutes a norm
22 of customary international law and they point to

2163

1 MR. KOVAR: More over -- the ILO -- I'm
2 sorry.
3 ARBITRATOR ANAYA: Is that it with
4 regard to the Declaration.
5 MR. KOVAR: I'll be back. We'll get to
6 it. I'm sorry, it's excruciating.
7 Moreover ILO Convention 169 is enforced
8 for only 20 out of 183 members of the ILO, not
9 including the United States, despite being open
10 for signature since 1979.

11 ARBITRATOR ANAYA: I'll ask the same
12 question, notwithstanding the lack of
13 ratification by many countries, are you saying
14 that it cannot reflect customary international
15 law.

16 MR. KOVAR: Well, clearly not in
17 itself, but I can imagine circumstances where it
18 was one of many indications.

19 But my point is the Claimants point to
12:14:09 20 these things but they don't point to anything
21 else. And that's why we say they haven't seen
22 established the customary international law status

2162

1 support to the UN 888Declaration of the Rights of
2 Indigenous People and to the International Labor
3 Organization's Convention number 169, but these
4 sources are not themselves adequate for this
5 purpose.

6 The 2007 UN Declaration is
7 aspirational; it is not binding like a treaty.
8 Moreover, the ILO convention 169 is enforced.

9 ARBITRATOR ANAYA: Mr. Kovar.

10 12:12:57 MR. KOVAR: Yes.

11 ARBITRATOR ANAYA: Is it your position
12 that a UN Declaration can never, because of its
13 character -- is non-binding cannot reflect
14 customary international law or embody certain
15 principles?

16 MR. KOVAR: No, that's not my position.
17 It can reflect customary international law and it
18 can provide evidence that customary international
19 law is evolving in some circumstances, but in --I
12:13:20 20 tried to be precise, in itself --

21 ARBITRATOR ANAYA: I just wanted to be
22 clear.

2164

1 of the norm that they're arguing for, putting
2 aside whether it then is in the minimum standard
3 of treatment.

4 ARBITRATOR ANAYA: You seem to make
5 very broad statement -- or you do make very broad
6 statements in your brief and I don't know if
7 you're going to repeat them now, that the
8 declaration and the ILO 169 do not at all reflect
9 customary international law because they're not
10 binding.
12:14:38 10

11 MR. KOVAR: I don't think my position
12 is that broad. I think there could be aspects
13 that may reflect customary international law.
14 Whether or not they reflect customary
15 international law for the United States would
16 depend on which provision it is or which principle
17 it is.

18 ARBITRATOR ANAYA: How about the
19 consultation provisions of either 169 or the
12:15:02 20 Declaration. I'm not talking about the whole
21 Declaration or the whole Convention.

22 MR. KOVAR: I'll get to this, but in

2165

1 our view that hasn't arisen to the level of
2 customary international law binding on the United
3 States, and even if it has for some states,
4 arguably, and I'm not saying that it does, but if
5 arguably it did, the U.S. has been a persistent
6 objector, and under international law, that would
7 --
8 ARBITRATOR ANAYA: Specific objector to
9 a rule of consultation?
12:15:31 10 MR. KOVAR: Certainly to -- that's one
11 of the things that we objected to in the
12 Declaration when we voted against the --
13 ARBITRATOR ANAYA: What the U.S.
14 objected to, as you pointed out in the brief, is
15 provision that provides right of veto, not
16 consultation.
17 MR. KOVAR: Again, I think you could
18 define that duty to consult in different ways and
19 I'm not here to say --
12:15:55 20 ARBITRATOR ANAYA: I'm asking you to
21 define it in certain ways could there be a duty
22 to consult under customary international law.

2167

1 think that's sincere and I appreciate that, but
2 I'm just reacting and asking about the statements
3 in your brief which seem to go beyond expressing
4 frustration about certain aspects of the
5 declaration to expressing some kind of disapproval
6 with it in its entirety.
7 MR. KOVAR: Well, I mean, I'm not here
8 to -- I don't have a position that where I can
9 tell you that there was one particular aspect that
12:17:18 10 we think is customary international law.
11 ARBITRATOR ANAYA: But the consultation
12 thing, especially since the U.S. made repeated
13 statements in many contexts about its consult --
14 its favoring consultation --
15 MR. KOVAR: And in fact, we do, and
16 we've made that as something we believe ALL states
17 should do and we have tried to lead by example
18 with executive orders --
19 ARBITRATOR ANAYA: Exactly.
12:17:40 20 ARBITRATOR CROOK: I wonder if I can
21 interrupt this dialogue and ask a couple
22 questions.

2166

1 MR. KOVAR: I don't have a position
2 here to tell you whether there is some aspect of
3 the duty to consult that the United States accepts
4 as customary international law principle. I want
5 to be clear on that.
6 ARBITRATOR ANAYA: Because your brief
7 seems to read that as long as it's in the
8 Declaration there doesn't -- your brief seems to
9 read that, as long as the Declaration -- there
12:16:22 10 doesn't 00 that the norms can't be customary
11 international law.
12 MR. KOVAR: Well, we obviously have
13 stated our disappointment with the way the
14 Declaration has come out for a number of reasons
15 that it creates confusions and overlapping --
16 ARBITRATOR ANAYA: Yes.
17 MR. KOVAR: So, probably a good part of
18 our frustration is that it's hard to drill down to
19 what might be the hard principles that we can all
12:16:47 20 agree on and we express that as a true
21 frustration.
22 ARBITRATOR ANAYA: I understand. I

2168

1 Are you -- Jim, are you about done?
2 ARBITRATOR ANAYA: I'm not finished.
3 ARBITRATOR CROOK: You're not done.
4 No. Okay.
5 ARBITRATOR ANAYA: No.
6 MR. KOVAR: So, we have led by example,
7 but of course, this executive order -- I guess it
8 is 13175 from the Clinton Administration, it's an
9 executive order directing the FEDERAL agencies to
12:18:05 10 consult with Indian tribal authorities on
11 important regulatory matters at the federal level
12 it could have an impact on trials.
13 ARBITRATOR ANAYA: Let's say that we
14 were to think to that extent, the extent of the
15 United States own declarations, both domestically
16 and internationally, those are a norm of
17 consultation. How would that then impact on our
18 analysis, assuming arguendo that we were to?
19 MR. KOVAR: Let me make sure I
12:18:35 20 understand your question first.
21 You're not asking me whether what's in
22 Executive Order 13175 is customary international

2169

1 law, because of course that Executive Order only
 2 applies to federal agencies, it doesn't apply to
 3 states, and on its face it says it doesn't give
 4 rise to any rights that are enforced but --
 5 ARBITRATOR ANAYA: Let me be more
 6 general.
 7 MR. KOVAR: Okay.
 8 ARBITRATOR ANAYA: Assuming we were to
 9 assume, not necessarily find, but assume that
 12:19:03 10 there were some norm of customary international
 11 law regarding consultation along the lines of what
 12 the U.S. has said both internationally and
 13 domestically, which is a duty to, in good faith
 14 consult on the indigenous peoples on matters
 15 affecting them, to try to -- I think that you are
 16 familiar with these statements. How would that,
 17 assuming there was such a norm, that we were to
 18 find or otherwise consider that there were a norm,
 19 how would that then effect our analysis here?
 12:19:34 20 MR. KOVAR: If such a norm existed, it
 21 would almost certainly be limited to tribal
 22 authorities so the consultations would have to be

2171

1 go back to the point that 1105.1 is a limited
 2 jurisdictional grant and that, in order for a duty
 3 to consult that may violate -- let's say there's
 4 been a violation of customary international law
 5 duty to consult, assuming we have the right duties
 6 and everything, it would have to be brought within
 7 the customary international law minimum standard
 8 of treatment of investments because I think, as
 9 I've already tried to say, there could be a
 12:21:13 10 violation of individual rights which doesn't
 11 necessarily violate the investment.
 12 And that right may need a remedy, but
 13 the remedy won't be in NAFTA Chapter 11. I hope
 14 that's clear. Yes?
 15 MR. FELDMAN: Professor Anaya, I would
 16 note in our briefs we indicated, and as
 17 Ms. Thornton addressed, the minimum standard of
 18 treatment sets a floor of treatment for all
 19 aliens. And so, particularly with respect to an
 12:21:44 20 obligation such as the duty to consult, it simply
 21 would not fit into that framework because the
 22 consultation obligation would not run to all

2170

1 between the GOVERNMENTAL authorities of the state,
 2 whether it's a national or subnational part of the
 3 state, and the tribal authorities, not with
 4 private businesses and business parties. And
 5 furthermore, it would almost certainly be limited
 6 tribal authorities within the state's
 7 jurisdiction.
 8 What we have here are private Canadian
 9 businessmen and their businesses who are asserting
 12:20:07 10 that there's a customary international law duty to
 11 consult with them and, in our view, that is way
 12 beyond the realm of what one could fairly say is
 13 -- there's a great deal of support for the
 14 existence of customary international law duty.
 15 ARBITRATOR ANAYA: Right. And beyond
 16 that, how would it relate specifically to 1105?
 17 MR. KOVAR: Well, the -- let's say
 18 hypothetically we --
 19 ARBITRATOR ANAYA: If a norm exists,
 12:20:38 20 would it be a norm subsumed within the minimum
 21 standard of treatment of investment treaties?
 22 MR. KOVAR: Well, and this is where we

2172

1 aliens; it would only run to a subset of aliens.
 2 MR. KOVAR: I think I made the point
 3 about the ILO convention.
 4 ARBITRATOR CROOK: Could I maybe
 5 squeeze in my questions now?
 6 MR. KOVAR: Yes.
 7 ARBITRATOR CROOK: I think Professor
 8 Anaya, in your colloquy, just addressed one of
 9 them, which is that, if there's an obligation to
 12:22:16 10 consult, it runs to governmental entities and not
 11 to individual businessmen. But I'm just
 12 wondering, does the Tribunal need to go to these
 13 waters?
 14 Do we need to make any sort of ruling
 15 whether there is or is not a customary duty of
 16 consultation and, if so, what its content is isn't
 17 the principle inquiry that even assuming arguendo
 18 there is such a principle, the issue is whether it
 19 is subsumed within 1105, which gets you to the
 12:22:52 20 point that Mr. Feldman just made.
 21 MR. KOVAR: I would agree with that,
 22 yes.

2173

1 I don't see any scenario under which
2 the Tribunal should have to get to this question,
3 either under the facts as they've been presented
4 or even assuming the facts and the law that would
5 demonstrate a violation.
6 Claimants have not demonstrated that
7 that right is part of the customary international
8 law minimum standard of treatment as it applies to
9 investments. So, and as I said, even if there's a
12:23:26 10 violation of the individual, it doesn't
11 necessarily mean that it comes under 1105.1.
12 ARBITRATOR CROOK: And if it were to be
13 part of the minimum standard, you'd somehow have
14 to deal with the anomaly that a certain group of
15 aliens gets treatment that's better than other
16 aliens, which I guess raises question how you
17 define a minimum standard.
18 MR. KOVAR: Well, that's the point that
19 Mr. Feldman made, I think, yes.
12:23:55 20 So, I pointed out that the ILO
21 Convention 169 is only enforced for 20 states, but
22 even if these two instruments, the UN Declaration

2175

1 beyond those recognized tribes to include tribes
2 from potentially any other country where there may
3 be indigenous people that might be affected by
4 U.S. legislation would be wholly unfeasible. This
5 is even truer if consultations were required of
6 individual members of all potentially affected
7 tribes, regardless of their location.
8 So, for the United States and any other
9 state with a significant indigenous population, to
12:25:41 10 consult business with tribe -- to conduct business
11 with tribes, we must be able to work with tribal
12 government representatives and limit that
13 relationship to tribes within our jurisdiction.
14 And that, as we've discussed, is the way the
15 Federal Executive Order works.
16 Claimants' 11th hour efforts here to
17 assert that they uniquely do speak for their
18 tribes and nations, in our view, are really just
19 self-serving. Even if Claimants' businesses
12:26:07 20 provide significant employment on their
21 territories, which we certainly don't take issue
22 with, and tribal leaders supported their efforts

2174

1 and the ILO Convention reflect customary
2 international law norm of prior consultation, they
3 only address consultations with indigenous tribal
4 authorities that are located within the territory
5 of the state. This is the point we made in our
6 colloquy with Professor Anaya. They do not
7 address consultations between a state and
8 indigenous tribes located outside the territory in
9 another country, nor do these instruments suggest
12:24:32 10 a duty on states to consult with individual
11 indigenous persons, whether they're natural or
12 legal persons, particularly indigenous persons
13 from outside that state whether these instruments,
14 the ILO Declaration and the UN Declaration refer
15 to consultation between state authorities and
16 tribal or indigenous authorities. Claimant simply
17 cannot claim an individual right to consult with
18 the government under this principle. Indeed, in
19 our view, Claimants' argument would make the duty
12:25:02 20 to consult unmanageable. There are 564, about,
21 federally recognized tribes residing within the
22 United States. Any duty to consult that extended

2176

1 to market cigarettes free of state regulation,
2 that in itself does not elevate Claimants to the
3 level of tribal authorities. Indeed, Claimants
4 themselves in this proceeding -- yes? Mr. Crook?
5 ARBITRATOR CROOK: No.
6 MR. KOVAR: Oh, I'm sorry.
7 Indeed, Claimants themselves in this
8 proceeding have decried consultations between
9 states and large tobacco manufacturers. They
12:26:38 10 called it an infiltration of the core of American
11 democracy; I can quote them. So, clearly there's
12 a difference between consulting individual
13 businesses and consulting tribal authorities.
14 I will not repeat in detail other
15 defenses set out in the U.S. Counter Memorial
16 they're at pages 125 to 139 but -- and Professor
17 Anaya asked about this: The U.S. position that
18 customary international law does not include the
19 duty to consult alleged by Claimants has been
12:27:10 20 repeated publicly and is well known.
21 Moreover, the Government of Canada
22 submitted an interpretation of Article 1105.1 --

2177

1 in this case, under Article 1128, affirming their
 2 similar view that neither the UN Declaration nor
 3 ILO 169 means the legal threshold required for
 4 them to be considered customary international law.
 5 As I've already mentioned the UN Declaration and
 6 ILO 169 do not in and of themselves demonstrate
 7 state practice and opinio juris sufficient to
 8 prove existence of a customary international law
 9 norm of the duty to consult .

12:27:46 10 PRESIDENT NARIMAN: Sorry to interrupt,
 11 but this Canadian thing you cite -- you put it in
 12 here -- what is the reference to Grand River
 13 Enterprises versus United States, January 19.
 14 What has that got to do with it? You see at the
 15 bottom of --

16 MS. THORNTON: Definition of this case.
 17 PRESIDENT NARIMAN: That's only what
 18 they filed -- it is not a separate case that they
 19 filed.
 20 MS. THORNTON: No, it's this case.
 21 PRESIDENT NARIMAN: That's okay. Thank
 22 you.

2179

1 U.S. made many statements of objection and they've
 2 been listed in the record at page 134 and of the
 3 following U.S. Counter Memorial.
 4 In our view, there can be no question
 5 the U.S. satisfies the requirements of the
 6 persistent objector rule with respect to the
 7 alleged duty to consult, and Claimants decline to
 8 address this argument in their reply.
 9 Claimants also assert that the duty to
 12:29:23 10 consult is guaranteed by the UN chart. They
 11 haven't made the argument in this oral proceedings
 12 but they made it in the briefs. Even if, for sake
 13 of argument, this was true, such a claim could not
 14 be cognizable under NAFTA Article 1105.1 since, as
 15 we noted, the NAFTA The Free Trade Commission
 16 explicitly ruled out that a breach of a separate
 17 international agreement could establish a breach
 18 of 1105.1.
 19 Now, Mr. Weiler's suggestion last week
 12:29:49 20 that a breach of a separate treaty obligation,
 21 while not sufficient in itself to establish a
 22 breach of 1105.1, is another factor adding up to a

2178

1 MR. KOVAR: They're just indicating
 2 that they filed an --
 3 PRESIDENT NARIMAN: I thought it was
 4 legal authority.
 5 MR. FELDMAN: No.
 6 MR. KOVAR: Yes, no.
 7 As Canada points out in their 1128
 8 submission, this is particularly the case where
 9 states such as Canada and the United States, whose
 12:28:21 10 interests are specially affected, given their
 11 large indigenous populations, have not followed
 12 the practice out of a sense of legal obligation.
 13 Finally, even if it were agreed that
 14 customary international law norm has emerged, the
 15 United States would not be bound by such a duty in
 16 light of the persistent objector rule under
 17 international law, and we tried to clarify that
 18 we're taking the claim that the Claimants have
 19 made here. That doctrine provides, in any state
 12:28:51 20 that persistently objects to a practice while the
 21 law is still in the process of development is not
 22 bound by that rule even after it matures. The

2180

1 breach of the duty of good faith -- is what he
 2 called it -- we think that's completely
 3 unsupported.
 4 Claimants do not show how the duty of
 5 good faith, which is rule of treaty application
 6 rather than a source of independent rights, could
 7 have this effect under the customary international
 8 law minimum standard of treatment.
 9 As the International Court of Justice
 12:30:21 10 in the Border and Transporter Armed Actions case
 11 between Nicaragua and Honduras, and I'll quote,
 12 "The principle of good faith is one of the basic
 13 principles governing the creation and performance
 14 of legal obligations, but it is not in itself a
 15 source of obligation where none would otherwise
 16 exist."
 17 Moreover, every link in Claimants'
 18 argument leading to the charter is, in our view,
 19 flawed.
 12:30:48 20 First, Claimants' pointed to Article 7
 21 of the Universal Declaration of Human Rights;
 22 however, that Article reads simply, all are equal

1 under the law and are entitled without
2 discrimination to equal protection of the law.
3 All are entitled to equal protection against any
4 discrimination in violation of this Declaration,
5 and against any incitement to such discrimination.
6 Now, despite that plain language,
7 Claimants argue that Article 7 implicitly contains
8 a duty to consult with indigenous persons, and we
9 submit that this language simply isn't found in
12:31:21 10 the provision and can't reasonably be read into
11 it. But if you did read it in, as Claimants do,
12 they next would then seek to incorporate this
13 amended or implicitly amended Article 7 into
14 Article 103 of the UN Charter, 103. Article 103,
15 like Article 7, in our view is clear and
16 unambiguous, and it states, in the event of a
17 conflict between the obligations of members of the
18 United Nations under the present charter and their
19 obligations under any other international
12:31:51 20 agreement, their obligations under the present
21 charter shall prevail.
22 However, Claimants assert without any

1 logic, the duty to consult must also be erga
2 omnis, but even if one accepted Claimants'
3 assertions that the duty to consult is established
4 as a binding principle of customary international
5 law, they cite no authority to suggest it would
6 also be erga omnis. Erga omnis norms such as the
7 prohibition against genocide are those a state
8 owes to the entire world and that convey rights
9 that are enforceable by all states. In any case,
12:33:32 10 pointing to the duty to consult as erga omnis
11 cannot require its conclusion in Article 103 of
12 the UN Charter or Article 1105.1 of the NAFTA.
13 Finally, and we believe fatally to their argument,
14 even if one assumed for the sake of argument
15 Claimants' reading to this text was persuasive,
16 Claimants also failed to demonstrate how the
17 minimum standard of treatment offered to
18 investments of alien investors under Article 1101
19 of the NAFTA conflicts with the UN Charter, simply
12:34:03 20 by failing to provide a basis to arbitrate every
21 right reflected in that charter. Claimants'
22 arguments with respect to their alleged duty to

1 authority that Article 103 must be read much more
2 broadly to say that, in the event of any conflict
3 between any so-called ergo omnis norm and the
4 obligations of members of the United Nations under
5 any other international agreement, the obligations
6 under that ergo omnis norm must prevail.
7 Claimants assert that what they
8 identify as the duty to consult and bargain in
9 good faith is such an ergo omnis norm and that it
12:32:26 10 "preempts any limitation" that might exist in the
11 scope of 1105.1's obligation. Such a reading has
12 no obligation to the reading of the text of
13 Article 103 of the charter which nowhere refers to
14 ergo omnis norms much less the relationship
15 between ergo omnis norms and other international
16 agreements.
17 Moreover, Claimants do not establish
18 that there is an ergo omnis duty to consult.
19 Claimants seem to argue that the prohibition
12:32:55 20 against racial discrimination is an erga omnis
21 norm and that it includes the duty to consult. By
22 extension, therefore, according to the Claimants'

1 consult are, in our view, baseless.
2 Similarly, to the extent Claimants
3 based their legal arguments under 1105.1 on the
4 duty to consult as a peremptory norm of
5 international law, they have utterly failed to
6 demonstrate how that duty has emerged as a
7 peremptory norm, much less how such a peremptory
8 norm would override the jurisdictional limitations
9 of NAFTA Chapter 11.
12:34:35 10 But even assuming that Claimants have
11 carried their burden of proof with respect to
12 establishing the existence of the duty to consult
13 as a peremptory norm there's no basis for their
14 assertion that Article 53 of the Vienna Convention
15 on the Law of Treaties would require the
16 incorporation of such a norm into NAFTA Article
17 1105.1. Article 53 renders void any treaty
18 provision that conflicts with the peremptory norm.
19 And according to the International Law Commission,
12:35:05 20 examples of conflicts include former treaties
21 regulating the slave trade which later came in
22 conflict with the total prohibition on all forms

2185

1 of slavery that developed as a peremptory norm of
2 international law or a treaty to commit an act of
3 genocide, for example, if such existed, or subject
4 certain individuals to torture.

5 Claimants do not assert, nor could
6 they, that the NAFTA contemplates or encourages
7 conduct in violation of a peremptory norm, even
8 assuming that a peremptory norm existed
9 encompassing the duty to consult them, Claimants
12:35:36 10 have not demonstrated that Article 53 is in any
11 way relevant here. The mere absence in the NAFTA
12 of a right to seek damages against the NAFTA
13 governments on grounds that the duty to consult
14 was violated is not a conflict with that norm.

15 Claimants' assertion that Article
16 1105.1 conflicts with any peremptory rule of law
17 is, in our view, groundless.

18 So, I'll sum up. Claimants'
19 discrimination arguments are completely
12:36:03 20 unsupported by fact or law. Claimants present no
21 evidence they have suffered any economic impact
22 due to their race or indigenous status. And

2187

1 international court of justice would be customary
2 international law for purposes of 1105?

3 MR. KOVAR: Well, the International
4 Court of Justice takes cases under different
5 grounds of jurisdiction and their decisions are
6 not on their face binding on all the states in
7 every case.

8 PRESIDENT NARIMAN: No, I'm asking a
9 simple question.

12:37:30 10 I'm saying that, is it your case, as
11 the United States of America's case, that what is
12 stated to be customary international law in
13 decisions of the International Court of Justice is
14 to be regarded as customary international law for
15 purposes of 1105?

16 MR. KOVAR: Well, again, if the
17 question is the customary international law
18 related to human rights, then that decision may be
19 binding between the parties and may be a very
12:38:04 20 important precedent for establishing that
21 customary international rule they address, but
22 that doesn't mean that customary International

2186

1 despite their attempts to conjure up a legal basis
2 to insert duty to consult in Article 1105.1, their
3 efforts have failed. Even if there was duty to
4 consult and it was incorporated in the customary
5 international law minimum standard of treatment,
6 as applied to investments, it does not extend
7 consultations with individuals or companies, much
8 less those outside the United States. The
9 customary international and minimum standard of
12:36:34 10 treatment in Article 1105.1 applies to investments
11 not to individuals, and the human rights and
12 indigenous rights asserted by Claimants are not
13 included in it.

14 Thank you.

15 And I would then ask you to invite
16 Ms. Thornton to address --

17 PRESIDENT NARIMAN: Just one minute. I
18 have a question.

19 You have cited a couple of ICJ
12:36:54 20 decisions in support of your argument. Do I take
21 it that what is stated to be customary
22 international law in decisions of the

2188

1 rule has inserted itself in 1105.1. You still
2 have to look to the moon standard of treatment
3 with respect to investments.

4 PRESIDENT NARIMAN: Then, where are we
5 to have customary international law?

6 MR. KOVAR: Claimants have to prove it.

7 PRESIDENT NARIMAN: No, no. Where are
8 we to find it, apart from them proving it? Where
9 do we find the contents of customary international
12:38:35 10 law, theoretically, not on whether they have to
11 prove --

12 MR. KOVAR: The International Court of
13 Justice addressed that and says you have to look
14 at the practice of states and their expression of
15 their intent to be bound *opinio juris*. And it's
16 not -- you can't just pull out a treaty and say,
17 this is the rule. You have to establish the
18 custom, the practice -- it has to be universal and
19 you have to show that the states have taken that
12:39:02 20 action and that practice on an understanding and
21 acknowledgement that they're bound to do it under
22 the law. That's how customary international law

1 is formed. And that -- I mean, that is
 2 international law. It's not always the clearest
 3 form of international law but that's the way it is
 4 formed in this case the burden is on the Claimants
 5 to demonstrate that it exists. I hope that helps.
 6 ARBITRATOR ANAYA: And we're competent
 7 to make that determination, you're saying.
 8 MR. KOVAR: Well, you are the Tribunal
 9 to decide in this case.
 12:39:37 10 ARBITRATOR ANAYA: So, we don't have to
 11 find someone else saying that this customary
 12 international law already exists. We can do that
 13 analysis of looking at state practice or opinio
 14 juris and so forth.
 15 MR. KOVAR: Well, if Claimants have put
 16 that before you and made their case, that's what
 17 you're --
 18 ARBITRATOR ANAYA: So, you're saying we
 19 have to limit ourselves to what the Claimants have
 12:39:55 20 brought before us. I understand that's what
 21 Mr. Feldman said before.
 22 MR. KOVAR: Yes.

1 So, that particular rule, if one were
 2 to establish that it existed and that it was
 3 violated, it would depend. If it --
 4 ARBITRATOR ANAYA: Let's say we're
 5 applying it to the context to the interest of the
 6 tribes who were excluded from the MSA and who,
 7 like various terms of the MSA, are not parties or
 8 participant but whose jurisdiction appears to be
 9 affected by all accounts, if an argument can be
 12:42:04 10 made that the U.S. has -- Federal Government or
 11 the U.S. for our purposes has the affirmative
 12 obligation to seek out and defend the interest of
 13 the tribes in this context and also that that
 14 hasn't been done, and how -- in that specific
 15 context, would the trust responsibility relate?
 16 MR. KOVAR: Speaking in the
 17 hypothetical, because I don't want to give the
 18 impression that I necessarily --
 19 ARBITRATOR ANAYA: No, no, no, and I'm
 12:42:33 20 speaking in a hypothetical, too.
 21 MR. KOVAR: Yes. Again, I think
 22 Chapter 11 isn't designed to enforce such a right.

1 ARBITRATOR ANAYA: Just to satisfy my
 2 own curiosity, though, perhaps -- but perhaps not
 3 just that, since they haven't raised this, but I
 4 want to now another putative norm that has to do
 5 with the United States admitted trust
 6 responsibility towards indigenous people's in this
 7 country, one that's well grounded in U.S. law for
 8 a century-and-a-half or more throughout the U.S.
 9 statutes relevant to Indian people and the U.S. in
 12:40:38 10 international settings have affirmed its adherence
 11 to -- without getting into a debate about whether
 12 such a trust responsibility or special duty of
 13 care towards indigenous people, such affirms --
 14 makes for affirmative obligations towards them,
 15 would such a duty, if we assumed it to exist,
 16 would it be relevant to 1105 or any other -- or
 17 1102 or 1103?
 18 MR. KOVAR: Well, I'd always take you
 19 back to the same framework for looking at it
 12:41:13 20 because as I mentioned there's a lot of potential
 21 international law rules out there but they don't
 22 all find themselves in 1105.1.

1 So, if Claimants wanted to come to a NAFTA Chapter
 2 11 Tribunal which is a specialized Tribunal, they
 3 would have to show that, first of all, that that
 4 duty existed under international law, that it was
 5 violated, and that it had relevance to one of the
 6 articles of Chapter 11, 1102, 1103, 1110 or
 7 1105.1, and it's not obvious to me how they would
 8 do that.
 9 ARBITRATOR ANAYA: John, if I could.
 12:43:19 10 I understand, okay, what you're saying
 11 with regard to 1105 and having to fit it within
 12 the customary international law minimal standard.
 13 How about as to denial of justice? Could that
 14 somehow be relevant to denial of justice claim?
 15 MR. KOVAR: Well, Ms. Thornton is going
 16 to address denial of justice, so, I don't want to
 17 preempt her discussion.
 18 ARBITRATOR ANAYA: Okay.
 19 MR. KOVAR: So, I think now that you've
 12:43:46 20 asked the question she can be ready to address
 21 that. I hope that's good enough.
 22 Mr. Crook?

1 ARBITRATOR CROOK: Referring to
 2 Professor Anaya's last question, I'm just trying
 3 to wrap my mind around it in the context of a
 4 treaty that addresses international economic and
 5 investment relations. It seems to me if there is
 6 a customary obligation of the kind he describes,
 7 it would seem to me to be one that runs from a
 8 state to indigenous persons who may lie within its
 9 territory, and it's a little hard for me to grasp
 12:44:19 10 how that kind of an inward looking obligation
 11 might then be taken out to extend to indigenous
 12 persons who are not subject to your territorial
 13 jurisdiction. I wonder if you could ponder that
 14 one with me.
 15 MR. KOVAR: Well, I think that's the
 16 same issue with respect to the duty to consult.
 17 So, if we were to look to it, duty to
 18 consult with indigenous persons, in our view there
 19 really is no authority for such a duty to extend
 12:44:49 20 beyond your borders to tribal authorities outside.
 21 And I think this would be -- if there's a duty --
 22 a trust duty under international law for a state

1 find something that you'll be interested in, in
 2 ruling on.
 3 And in our view what we've tried to do
 4 is, sometimes perhaps to too great a length, but
 5 to patiently say, you have to come back to the
 6 terms of your jurisdiction. You have to come back
 7 to the specific provisions of the NAFTA. They
 8 have to prove their case. And I think that would
 9 apply here too.
 12:46:46 10 Thank you.
 11 MS. THORNTON: I realize we're
 12 approaching the lunch hour and I can assure you my
 13 presentation is short.
 14 PRESIDENT NARIMAN: Good. First, tell
 15 us what are you --
 16 MS. THORNTON: I'm going to be talking
 17 about the denial of justice obligation. We do
 18 recognize that this is a customary international
 19 law norm subsumed within the minimum standard of
 12:47:20 20 treatment.
 21 Just, right out of the gate I want to
 22 answer Professor Anaya's question, if I could.

1 to protect indigenous people who are under its
 2 sovereignty, then it refers to them, not to those
 3 who are outside in another state.
 4 ARBITRATOR CROOK: Then further to
 5 Professor Anaya's intervention or his suggestion
 6 that perhaps we had measures here that were
 7 adverse to the interest of tribes, I take it,
 8 inside the United States, I wonder what the
 9 situation is. Do we have the competence as an
 12:45:33 10 international Tribunal to look to questions
 11 involving the rights of parties who are not before
 12 us?
 13 MR. KOVAR: Well, this Tribunal has to
 14 decide the case that's in front of it, based on
 15 the law and the facts.
 16 And I think when we opened our argument
 17 on the first day, the legal advisor, Mr. Koh, I
 18 think he addressed this point as clearly as he
 19 could, which is that the Claimants, in our view,
 12:46:05 20 really don't have a NAFTA case, so they're trying
 21 to find traction somewhere else and they're trying
 22 to create all this other stuff to encourage you to

1 The United States recognizes that it has trust
 2 obligations with respect to indigenous tribes
 3 within our territory. And as you know better than
 4 I, there are lots of doctrines of interpretation
 5 which now apply which say we have to construe the
 6 treaties we enter into with indigenous people's
 7 sort of to their benefit given the historical
 8 treatment that they received by our government.
 9 But if Claimants are alleging that
 12:47:58 10 we've somehow violated those obligations, they've
 11 got to exhaust their challenges to that in our
 12 domestic courts if they're going to make a denial
 13 of justice claim before you today.
 14 As I will try and demonstration in my
 15 presentation, the doors of our courthouses are
 16 wide open to Claimants and they are availing
 17 themselves to these domestic remedies, but the
 18 denial of justice doctrine is a distinct
 19 international law obligation and it has subsumed
 12:48:33 20 within it an exhaustion requirement. And our
 21 position is they can't bring this claim before you
 22 today because they haven't satisfied that

2197

1 requirement. So, that's what my presentation is
 2 chiefly about.

3 ARBITRATOR ANAYA: I'm sure you're
 4 going to get to this, but just so I'm clear,
 5 you're affirming the denial of justice standard
 6 has subsumed within it an exhaustion requirement.

7 MS. THORNTON: That's our position.

8 ARBITRATOR ANAYA: An exhaustion of
 9 judicial remedies.

12:48:59 10 MS. THORNTON: Yes, because, in our
 11 view, the denial of justice doctrine implies a
 12 systemic failure of our judicial system. And
 13 therefore, if you're going to go to an
 14 international Tribunal and say that one of the
 15 NAFTA parties judicial systems has failed as a
 16 system, you've got to give us an opportunity to
 17 try to correct your complaint in our courts. And
 18 the Loewen Tribunal is very clear: You have to
 19 take it to the court of highest resort before you
 12:49:25 20 can bring it to a NAFTA Chapter 11 Tribunal.

21 PRESIDENT NARIMAN: Is it reflected in
 22 the Loewen Tribunal?

2199

1 MS. THORNTON: Not in our view. What
 2 the United States acknowledges is that you can
 3 challenge a legislative measure as a denial of
 4 justice if it interferes with the process of
 5 obtaining judicial relief and you go to the
 6 domestic courts and they don't correct that
 7 problem, but there's got to be an involvement --
 8 the failure of the judicial system in play.

9 And so, Professor Weiler pointed you to
 12:51:13 10 provisions in Mr. Paulson's book which discusses
 11 when a legislative measure can give rise to a
 12 denial of justice claim, and in our view, it's
 13 only a legislative measure that interferes with
 14 the process of judicial relief that hasn't been
 15 corrected by the domestic courts. Our domestic
 16 courts have looked at Claimants' procedural due
 17 process challenge to these measures and they've
 18 said this is akin to posting of a bond and
 19 international law permits states to require this
 12:51:45 20 of Claimants in their courts. There's not a
 21 violation of international law if you have a sort
 22 of bonding obligation.

2198

1 MS. THORNTON: It is. It is.
 2 Now, under customary international law,
 3 denial of justice claims can be based on evidence
 4 that a state has delayed or obstructed access to
 5 its courts, has administered judicial process in
 6 grossly deficient way, or has failed to provide
 7 procedural guarantees generally considered
 8 indispensable to the proper administration of
 9 justice.

12:50:08 10 Importantly, the erroneous application
 11 of municipal law by domestic courts, even that
 12 cannot give rise to a denial of justice claim.

13 Mr. Crook?

14 ARBITRATOR CROOK: Ms. Thornton, as I
 15 understood their denial of justice claim, at least
 16 as it was presented in their most recent pleading,
 17 it was sort of to the effect that requiring them
 18 to pay escrow without having been convicted of bad
 19 conduct or shown to have caused cancer or any such
 12:50:40 20 things; that was the denial of justice. Is that a
 21 denial of justice as the concept exists under
 22 international law?

2200

1 So, yes, Mr. Crook, you're absolutely
 2 right, that's the challenge that their making.
 3 They're saying the legislation on its face creates
 4 a denial of justice, and our position is that,
 5 implicit within the denial of justice obligation,
 6 has to be some examination of how our judicial
 7 area has dealt with it.

8 Now, in order to assert denial of
 9 justice claim before international law, a Claimant
 12:52:20 10 must demonstrate that it has exhausted adequate
 11 and effective domestic remedies for relief.

12 MR. VIOLI: Ms. Thornton, can I just
 13 ask you where in the record you said there was a
 14 case involving our Claimants that said it's the
 15 equivalent of posting a bond.

16 MS. THORNTON: I believe that was the
 17 determination of the Second Circuit in the prior
 18 case.

19 MR. VIOLI: Equivalent of posting a
 12:52:41 20 bond?

21 MS. THORNTON: The Second Circuit
 22 analyzed your challenge -- your procedural due

2201

1 process challenge under the United States
 2 Constitution and they said it was a piece of
 3 legislation of general applicable, did not require
 4 notice of hearing; it wasn't akin to the seizure
 5 of a car in a civil forfeiture proceeding for
 6 which you were entitled to notice and a hearing.
 7 I believe that was the Second Circuit's
 8 determination, and you did not appeal that.
 9 MR. VIOLI: That's the first case,
 12:53:12 10 right?
 11 MS. THORNTON: The prior case.
 12 MR. VIOLI: There's two cases that went
 13 up on appeal in that case.
 14 MS. THORNTON: Right, but that
 15 particular determination of the Second Circuit --
 16 MR. VIOLI: There was a first one that
 17 dismissed the -- so you're referring to the first
 18 case.
 19 MS. THORNTON: I am referring to the
 12:53:24 20 first case.
 21 MR. VIOLI: As the bond.
 22 MS. THORNTON: And it wasn't appealed,

2203

1 own means within the framework of its own judicial
 2 system."
 3 Claimants failed to demonstrate that
 4 they've exhausted their local remedies, a fact
 5 which is simply fatal to their denial of justice
 6 claims. Instead, Claimants' attempt to avoid this
 7 fundamental prerequisite for the denial of justice
 8 claims by fashioning their claim, as Mr. Crook
 9 pointed out, as one for "denial of administrative
 12:54:57 10 or regulatory due process" rather than a challenge
 11 to the actions of our judiciary.
 12 But my fundamental point is this:
 13 Nothing in the measures that Claimants challenge
 14 in this proceeding prevents them from seeking
 15 relief from their application before a U.S. court.
 16 Indeed, the NAFTA Chapter 11 Tribunal
 17 in Feldman rejected a very similar denial of
 18 regulatory due process claim on the ground that
 19 "Mexican courts and administrative procedures at
 12:55:33 20 all relevant times were open to the Claimant."
 21 That case is a case that is not entirely
 22 dissimilar from this case, and the Feldman

2202

1 that determination.
 2 PRESIDENT NARIMAN: Okay. Please
 3 proceed.
 4 MS. THORNTON: The exhaustion
 5 requirement is fundamental to denial of justice
 6 claims because a finding that a state has denied
 7 an investment justice, as I mentioned to you
 8 before, implies a systemic failure of a state's
 9 judicial system. This means that, unlike other
 12:53:47 10 claims an investor can make under NAFTA Chapter
 11 11, a Tribunal cannot resolve a claim that a NAFTA
 12 party has denied to justice to an investor's
 13 investment until all available challenge to that
 14 denial have been made in the parties's domestic
 15 courts.
 16 I'm going to project this Loewen
 17 finding on the slide.
 18 As the Chapter 11 Tribunal in Loewen
 19 explained, the purpose of the exhaustion
 12:54:15 20 requirement for denial of justice claims is "to
 21 ensure that the state where the violation occurred
 22 should have the opportunity to address it by its

2204

1 Tribunal correctly concluded that, because these
 2 local remedies remained available to the Claimant,
 3 there was "no denial of due process or denial of
 4 justice there as would rise to the level of a
 5 violation of international law."
 6 So, therefore, even if Claimants'
 7 complete is not with our judicial system but
 8 rather with the legislative process whereby Grand
 9 River has been required to make escrow
 12:56:11 10 requirements to secure potential tobacco-related
 11 judicial settlements or awards, they must still
 12 exhaust their challenge that those measures in
 13 domestic courts of last resort.
 14 If the United States demonstrated in
 15 its Counter Memorial, Claimants challenge the
 16 Allocable Share Amendments adopted by 31 out of 47
 17 of the MSA states and the complementary
 18 legislation adopted by 14 of those states.
 19 I've projected the states whose measure
 12:56:40 20 Claimants have challenged and are continuing to
 21 challenge in Federal District Court in New York.
 22 PRESIDENT NARIMAN: Does that not

2205

1 satisfy the exhaustion rule or it doesn't?

2 MS. THORNTON: Well, what they're
3 complaining about here is that the legislation on
4 is face denies them justice under international
5 law.

6 PRESIDENT NARIMAN: No, that's not the
7 point.

8 You were making out a case, quite
9 rightly, that a denial of justice cannot be just
10 12:57:08 be projected before any international Tribunal
11 without exhausting domestic remedies. This is a
12 domestic remedy which they did choose and failed.

13 MS. THORNTON: Right, and they also
14 haven't exhausted this remedy. They're in the
15 middle will of these proceedings.

16 PRESIDENT NARIMAN: This is an ongoing
17 remedy?

18 MS. THORNTON: This is an ongoing case,
19 am I correct Mr. Violi?

10 12:57:29 MR. VIOLI: The due process claim was
21 dismissed. That dismissal was affirmed in the
22 Second Circuit and you don't get an automatic

2207

1 MS. THORNTON: The Loewen Tribunal
2 addressed the issue quite squarely and said that
3 you -- in order to prove that you've exhausted
4 domestic remedies you have to petition for cert.
5 They didn't petition for cert on this issue;
6 therefore, they can never satisfy the exhaustion
7 requirement with respect to the measures at issue
8 in the prior litigation.

9 MR. VIOLI: But the other issue --
10 12:58:55 PRESIDENT NARIMAN: No, let her go on.

11 MS. THORNTON: As I just mentioned, and
12 prior Claimants argued, that those measures, the
13 measures adopted by the states at issue on the
14 slide -- denied them due process of law under the
15 U.S. Constitution, because they amounted to
16 prejudgment deprivations of property, which
17 required prior notice and a hearing. This claim
18 was rejected and, in 2005, the U.S. Court of
19 Appeals for the Second Circuit affirmed the
20 12:59:26 District Court's decision.

21 PRESIDENT NARIMAN: When was that?
22 MS. THORNTON: This was in 2005.

2206

1 right to the Supreme Court of the United States.

2 PRESIDENT NARIMAN: That's exhausted.
3 That's over.

4 MS. THORNTON: No, it's not exhausted.

5 PRESIDENT NARIMAN: No?

6 MS. THORNTON: Because there was
7 petition filed for Cert, excuse me, in that case
8 by the defendant state AGs and Claimants could
9 have cross-petitioned to appeal the second
10 12:57:55 circuit's determination with respect to their
11 procedural due process claim; they did not. They
12 did not exhaust their domestic remedies to this
13 claim.

14 PRESIDENT NARIMAN: That somehow waters
15 down your case, which is an excellently presented
16 case, if I may say so; you've done it extremely
17 well, that they, for the denial of justice claim
18 they have attempted a domestic remedy. That
19 remedy has either succeeded or failed and right to
10 12:58:24 go to the Supreme Court is not a right, it's
21 subject to the discretionary powers of the Supreme
22 Court to admit certiorari or not admit.

2208

1 And this decision, just for your
2 reference, is, it's attached to our Counter
3 Memorial, Legal Authorities, Volume Eight, Tab
4 118.

5 Now, in 2005, the Court of Appeals for
6 the Second Circuit affirmed the District Court's
7 dismissal of Claimants' charge, finding that the
8 escrow deposits are "designed to ensure that funds
9 were available should litigation subsequently
10 13:00:08 begin and result in judgment against
11 manufacturers." Thus, the accounts are
12 substantially different in kind from an individual
13 prejudgment deprivation of property.

14 PRESIDENT NARIMAN: This is your
15 submission?

16 MS. THORNTON: This is the findings of
17 the United States Court of Appeals for the Second
18 Circuit.

19 PRESIDENT NARIMAN: State that again.

10 13:00:31 MS. THORNTON: The second circuit Court
21 of Appeals found that escrow deposits are --- and
22 I projected this on the slide -- designed to

2209

1 ensure that funds are available should litigation
2 subsequently begin and result in judgment against
3 manufacturers. Thus, the accounts are
4 substantially different in kind from an individual
5 prejudgment deprivation of property.
6 The reason why this is relevant is
7 because an individual prejudgment deprivation of
8 property would require notice and a hearing, but
9 the Second Circuit said, that's not what these
13:01:05 10 escrow deposits are; therefore, the notice and
11 hearing requirements are not in play.
12 ARBITRATOR ANAYA: Excuse me, that
13 statement goes to the merits of the issue as
14 opposed to the exhaustion, right?
15 MS. THORNTON: That's right. The
16 exhaustion point is simply that they didn't appeal
17 that determination.
18 ARBITRATOR ANAYA: Okay. So, what I
19 want to get clear is how we treat a matter where a
13:01:29 20 domestic certiorari remedies have been exhausted
21 or we determined they've been exhausted. Let's
22 say in this case we don't buy your point that they

2211

1 denied, at that point, you've had exhaustion.
2 MS. THORNTON: Absolutely. Absolutely.
3 We recognize Professor Anaya's point, but you have
4 to petition. You have to attempt to exhaust your
5 local remedies, and Claimants didn't, with respect
6 to these measures.
7 ARBITRATOR CROOK: And that's Loewen.
8 MS. THORNTON: And that's Loewen, yes.
9 ARBITRATOR ANAYA: That's not a binding
13:03:04 10 interpretation is it?
11 MS. THORNTON: No, no, but we -- the
12 exhaustion requirement -- it's persuasive, but the
13 exhaustion requirement is implicit in the doctrine
14 of denial of justice.
15 ARBITRATOR ANAYA: Right. I understand
16 that. I'm trying to think through the different
17 possibilities --
18 MS. THORNTON: How you're going to
19 arrive at your decision. I recognize that, yes.
13:03:18 20 ARBITRATOR ANAYA: And if we thought
21 there was exhaustion, what -- but you've answered
22 my question.

2210

1 have to go to the Supreme Court because we all
2 know the chances of getting cert review are very,
3 very low and we say that, okay, domestic remedies
4 have been exhausted, then what? What's our --
5 MS. THORNTON: Then your standard is
6 this, and I submit to you that it's extremely
7 deferential. You have to find that no impartial
8 decision-maker could have arrived at the result
9 reached by the courts to find that there's been a
13:02:04 10 denial of justice, referred to as a substantial --
11 substantive denial of justice. If you're going to
12 make a determination that our courts got to wrong,
13 you have to find that no impartial trier of fact
14 could have arrived at the decision.
15 And I would submit to you -- you've had
16 in the colloquy -- you've been liking for the
17 standard of deference from us. That's an
18 extremely differential standard in our view.
19 ARBITRATOR CROOK: Ms. Thornton, just
13:02:33 20 to be clear, you're not asserting that exhaustion
21 requires that cert be granted, but rather, as in
22 Loewen, that cert be petitioned for, and if it is

2212

1 MS. THORNTON: I would simply point you
2 to the Loewen award when -- there's lot of
3 discussion about petitions for cert and
4 probability of obtaining one, but it was found
5 that you had to actually petition for cert to
6 prove exhaustion.
7 PRESIDENT NARIMAN: Shall we break yet
8 or you take some time.
9 MS. THORNTON: I'm at page 4 of 10, so
13:03:46 10 you tell me.
11 (Discussion off microphone.)
12 MR. KOVAR: I think we should keep the
13 lunch short so we have time.
14 PRESIDENT NARIMAN: 1:45.
15 MR. KOVAR: Mr. Chairman, if you could
16 give her ten minutes to finish, I think that would
17 put us in better position after lunch.
18 PRESIDENT NARIMAN: By all means.
19 MR. KOVAR: Thanks.
13:04:13 20 MS. THORNTON: I'll be short.
21 PRESIDENT NARIMAN: No, no, no.
22 Please, you're presenting your case extremely

2213

1 well, in my view.
 2 MS. THORNTON: Thank you.
 3 So, this is our legal case about their
 4 denial of justice claim. Now, we also submit that
 5 Claimants' denial of justice claim is premised not
 6 only on a faulty legal theory, but on several
 7 mischaracterization of facts.
 8 Now I'm projecting on the slide,
 9 Claimants' central contention is that the
 13:04:42 10 Allocable Share Amendments have denied them
 11 justice because they "are forced to make payments
 12 into escrow that are equal to the payments being
 13 made by OPMs under the MSA," when the allegations
 14 of fraud, deceit, and conspiracy made against the
 15 OPMs have not been leveled against Grand River.
 16 The problem with this assertion is that
 17 it obscures the fact that the escrow deposits can
 18 be used to satisfy judgments or settlements on any
 19 released claim brought against an NPM by the
 13:05:17 20 state, not just claims involving allegations of
 21 fraud and conspiracy in the marketing of
 22 cigarettes.

2215

1 PRESIDENT NARIMAN: Philip Morris.
 2 MS. THORNTON: That's right. This is
 3 pre-MSA. New York alleged that the major tobacco
 4 companies should be strictly liable for the
 5 manufacture and sale of their tobacco products
 6 because they "were likely to cause injury to
 7 persons who use them as intended."
 8 Furthermore, New York's negligence
 9 claim was based on the assertion that "it was
 13:07:06 10 foreseeable by the defendants that certain New
 11 York residents who use their tobacco products
 12 would become ill and suffer injury, disease, and
 13 sickness as a direct result of using the tobacco
 14 products as the tobacco companies intended." New
 15 York also claimed that the major tobacco companies
 16 were negligent in failing to foresee that the
 17 state could have to pay millions of dollars each
 18 year to provide medical treatment for residents
 19 injured by tobacco products.
 13:07:34 20 The point of all this is simply to
 21 counter Claimants' suggestion in their reply that
 22 the claims brought against the major tobacco

2214

1 Now, I'd submit to you that this fact
 2 is readily apparent from the definition of release
 3 claims that you'll find in the MSA. It's in the
 4 definition section of the MSA and I've projected
 5 it on the slide, and it says claims, directly or
 6 indirectly based on arising out of or in any way
 7 related in whole or in part to the use, sale
 8 distribution, manufacture, development,
 9 advertising, marketing, or health effects of the
 13:05:59 10 exposure to or research statements or warnings
 11 regarding tobacco products fall within the
 12 definition of release claims.
 13 So, Moreover, in addition to claims for
 14 fraud, deceptive practices, and conspiracy, many
 15 states brought other claims against the major
 16 tobacco companies when they initiated suits
 17 against them prior to negotiating the MSA.
 18 As you can see from the slides, in
 19 addition to claims based on allegations of
 13:06:30 20 fraudulent conduct, the State of New York brought
 21 strict liability and negligence claims against the
 22 major tobacco manufacturers in 1997.

2216

1 manufacturers all involved fraud, deceit, and
 2 conspiracy, claims that have not been leveled
 3 against them. Our submission to you is that they
 4 are product liability claims that a state might
 5 one day be able to bring against Grand River or
 6 another NPM that don't involve the same
 7 allegations, and that's what the escrow deposits
 8 are about.
 9 Therefore, the deposits that an NPM
 13:08:12 10 places into escrow can be used to satisfy future
 11 judgments or settlements based on claims not
 12 arising from allegations of deceptive or
 13 fraudulent conduct.
 14 Moreover, Claimants' assertion that
 15 payments NPMs make into escrow are equal to the
 16 payments made by OPMs under the MSA is incorrect.
 17 The deposits NPMs are required to make under the
 18 Allocable Share Amendments do approximate the
 19 payments they would make as SPMs, but from 1999 to
 13:08:41 20 2003, OPMs were subject to initial payment
 21 obligations that exceeded \$10 billion. There are
 22 no escrow deposit obligations that correspond to

2217

1 these huge initial payment obligations that the
2 original participating manufacturers had to make.
3 Furthermore, the escrow deposit obligations of the
4 Allocable Share Amendments imposed on NPMs are
5 different in kind from the annual payment
6 obligations of OPMs under the MSA because escrow
7 deposits are the current property of an NPM unless
8 and until they are released to satisfy
9 tobacco-related judgment or settlement.

13:09:21 10 As Professor Gruber explained, and I've
11 put this on the slide, the NPMs enjoy an advantage
12 because they do not actually make payments to the
13 government but rather put money in escrow, money
14 that earns interest over time that is available on
15 a current basis to the NPMs.

16 In addition to retaining ownership over
17 its funds while they're in escrow and receiving
18 interest on those funds, an NPMs can establish its
19 escrow account with any financial institution of
13:09:49 20 its choosing, provided the institution federally
21 state chartered and has assets of at least US\$1
22 billion.

2219

1 limitations under the MSA which the states have
2 not imposed on NPMs under the Escrow Statutes or
3 complementary legislation.

4 For example, the MSA subjects OPMS and
5 SPMs to extensive restrictions on tobacco-related
6 advertising and marketing to which NPMs are not
7 subject, as well as in their ability to promote
8 products in the media and through merchandise.
9 I'm not going to belabor the point. We have tried

13:11:37 10 to identify it over the course of this hearing,
11 but the conduct restrictions imposed on
12 participating manufacturers are not imposed on
13 Claimants. Grand River's U.S.-based importer,
14 NWS, has engaged in extensive promotional
15 activities to support the expansion of the Seneca
16 brand. A participating manufacturer simply cannot
17 engage in these promotional activities under the
18 clear terms of the MSA.

19 So, for these reasons we believe the
13:12:07 20 Tribunal should reject the central factual
21 predicate of Claimants' denial of justice case,
22 namely that PMS and NPMs are subject to identical

2218

1 The key point is that these Escrow
2 Statutes, either in their original form or as
3 amended, established escrow deposits that cannot
4 be released to the states in the absence of a
5 tobacco-related judgment or settlement and that
6 the escrow deposits reverse back to the NPMs after
7 25 years if such a judgment or settlement is not
8 entered. Claimants will have the opportunity to
9 vigorously contest any judicial determination of
13:10:31 10 liability on which the release of these deposits
11 is predicated. Just as they are now, the doors of
12 our courthouses will be wide open to Claimants to
13 challenge these determinations.

14 In contrast, OPMS make annual payments
15 and strategic contribution payments in perpetuity
16 under the MSA based on their relative market
17 shares of certain base amounts. There's no
18 prospect that those payments will ever be returned
19 to them.

13:11:02 20 Moreover, as my colleague, Mr. Feldman,
21 and my colleague, Ms. Morris, have ably explained,
22 OPMS and SPMs are subject to wide ranging conduct

2220

1 obligations.

2 So, in summary, we believe that,
3 because Claimants have not exhausted their
4 challenge to the Allocable Share Amendments and
5 complementary legislation in U.S. court, and
6 nothing in the challenged measure in these
7 proceedings, either the Escrow Statutes in its
8 original form or as amended prevents Claimants
9 from challenging those statutes in U.S. courts,
13:12:40 10 Claimants denial of justice claim is just
11 inadmissible before you.

12 The fact that Claimants' denial of
13 justice claim is also predicated on a false
14 premise, namely that participating manufacturers
15 and NPMs are subject to identical obligations and
16 restrictions while not being alleged to have
17 engaged in the same conduct just confirms our view
18 that the United States has not denied Claimants'
19 alleged investment justice and has not violated
13:13:03 20 the obligation Article 1105.1.

21 PRESIDENT NARIMAN: Thank you very
22 much. I just have one question.

1 Is a petition for certiorari after
 2 failing in the normal course of the country to the
 3 Supreme Court a matter of right or --
 4 MS. THORNTON: It's a matter of the
 5 court's -- whether it grant the petition is a
 6 matter --
 7 PRESIDENT NARIMAN: Is it a matter of
 8 right?
 9 ARBITRATOR CROOK: The petition is.
 13:13:29 10 MS. THORNTON: The petition is a matter
 11 of right, but the determination whether or not we
 12 will accept the petition is in some senses up to
 13 the court's discretion, but I think there are some
 14 matters it has to accept. It has to accept --
 15 PRESIDENT NARIMAN: Is this one of
 16 those matters which it has to accept?
 17 MS. THORNTON: Am I incorrect?
 18 This is not one of those measures, but
 19 the point is they didn't file a petition.
 13:13:48 20 PRESIDENT NARIMAN: Yes, okay.
 21 MS. THORNTON: Right? The states
 22 petitioned for cert -- they could have

1 AFTERNOON SESSION
 2 PRESIDENT NARIMAN: Now we're on.
 3 MR. KOVAR: If I may, thank you very
 4 much.
 5 Mr. Anaya, first I wanted to just get
 6 back to you on your question about the General
 7 Recommendation 23 of the Committee of the Race
 8 Discrimination Convention the CERD. And I did
 9 take a look at that. It wasn't clear to me that
 13:59:36 10 the CERD was actually offering an interpretation
 11 of Article 9 that would go as far as you
 12 suggested.
 13 PRESIDENT NARIMAN: Would you read into
 14 the record General Recommendation 23.
 15 MR. KOVAR: Well, it's a little too
 16 long.
 17 PRESIDENT NARIMAN: Too long.
 18 MR. KOVAR: Yes, and it's --
 19 PRESIDENT NARIMAN: The relevant part?
 13:59:55 20 MR. KOVAR: Well, essentially, the
 21 first paragraph talks about the practice of the
 22 committee to examine reports of states' parties

1 cross-petitioned to have the Supreme Court review
 2 the determination. They didn't do it so they
 3 didn't exhaust.
 4 PRESIDENT NARIMAN: All right. Resume
 5 at what time?
 6 MR. FELDMAN: 2:00.
 7 PRESIDENT NARIMAN: 2:00? Okay.
 8 (Whereupon, at 1:13 p.m., the hearing
 9 was adjourned until 2:00 p.m., the same day.)
 10
 11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22

1 under Article 9 and of the cert of the convention,
 2 and in that respect the committee is consistently
 3 affirmed that the discrimination against
 4 indigenous peoples falls within the scope of the
 5 convention and all appropriate means must be taken
 6 into combat and eliminate such discrimination, and
 7 then they go on to talk about the international
 8 decade of the world's indigenous peoples and so
 9 on.
 14:00:31 10 But maybe you could reformulate the
 11 question that you wanted to ask about it.
 12 ARBITRATOR ANAYA: I'm not sure we're
 13 looking at the same document.
 14 MR. KOVAR: Oh.
 15 ARBITRATOR ANAYA: Do you have it some
 16 place?
 17 MR. KOVAR: This is General
 18 Recommendation 23 --
 19 ARBITRATOR ANAYA: Right.
 14:00:54 20 MR. KOVAR: -- dated 1997.
 21 ARBITRATOR CROOK: In light of the
 22 shortness of time, I wonder if Professor Anaya and

2225

1 Mr. Kovar would be willing to meet at the break
2 and sort out which document we need to look at and
3 then we'll return to it after the break. Would
4 that make sense?
5 MR. KOVAR: Sure.
6 ARBITRATOR ANAYA: Yeah. I mean, I
7 don't know if we need to spend a lot of time on
8 this.
9 ARBITRATOR CROOK: OKAY.
14:01:13 10 ARBITRATOR ANAYA: I mean, I -- I'm
11 simply going to the point that the standard --
12 what that committee is doing is interpreting the
13 standard of discrimination, the context of
14 indigenous peoples and going beyond the language
15 that you've displayed. I mean, that's what it's
16 doing. It doesn't have any power to do anything
17 other than that.
18 Now, whether or not its interpretation
19 applies here, that was another question and that's
14:01:39 20 what we were talking about. I was asking you
21 about, you know, whether or not you were aware of
22 that, and what -- how you saw that applying to

2227

1 as issuing binding interpretations of the CERD.
2 ARBITRATOR ANAYA: Right. But just to
3 be clear, every time you cite a NAFTA decision or
4 a decision by another by NAFTA Tribunal, you don't
5 point out to us that it's not binding. I mean, I
6 don't know why every time --
7 MR. KOVAR: Well --
8 ARBITRATOR ANAYA: -- one of these
9 things is cited, it's pointed out to us that it's
14:03:22 10 not binding. I mean, that goes without saying, I
11 think, that it's not binding, but it is an
12 authoritative interpretation --
13 MR. KOVAR: Okay.
14 ARBITRATOR ANAYA: -- in much the same
15 way as a decision of a NAFTA Tribunal.
16 MR. KOVAR: I think that's a good
17 question. I think one distinction is that -- at
18 least a decision of a NAFTA Tribunal is binding as
19 between the parties.
14:03:36 20 ARBITRATOR ANAYA: Yes, but it's not
21 binding on us.
22 MR. KOVAR: But it's not binding on us.

2226

1 what -- how you were describing the standard of
2 discrimination --
3 MR. KOVAR: Yes.
4 ARBITRATOR ANAYA: -- of the treaty.
5 MR. KOVAR: There -- maybe there's
6 another general determination or in some other
7 document of the CERD Committee that they elaborate
8 more on a particular interpretation of Article 9.
9 At least in my review of General Recommendation
14:02:10 10 23, it doesn't appear it goes that far, but then,
11 again, maybe I'm looking at the wrong document.
12 But in any case, even if we found an
13 interpretation by the CERD Committee that
14 elaborated on Article 9 in a way that's not
15 necessarily clear on the face of the text and
16 along the lines of what you suggested, in our view
17 the cert itself doesn't have the power to issue
18 binding interpretations of Article 9. They
19 certainly play a very important role under the
14:02:49 20 convention, the U.S. has to submit reports to the
21 CERD and respond to them and it takes its
22 recommendation seriously, but we don't view them

2228

1 There's no stare cibus(ph) in that arbitration.
2 That's correct.
3 I mean, your hands, whether you wanted
4 to focus on another document further or whether
5 this explanation is accurate.
6 ARBITRATOR ANAYA: No, no, no, it's
7 fine.
8 MR. KOVAR: Okay.
9 ARBITRATOR ANAYA: I would -- I'm
14:04:02 10 looking at that it now, and it calls upon states
11 to do a series of things.
12 MR. KOVAR: Yes.
13 ARBITRATOR ANAYA: Affirmatively calls
14 upon states, in paragraph four, to recognize and
15 respect different culture, it's very much in line
16 with the sort of affirmative obligation I was
17 talking about.
18 MR. KOVAR: Yes.
19 ARBITRATOR ANAYA: And it may be that
14:04:17 20 it doesn't apply here.
21 My point isn't that it applies or
22 doesn't. It's simply to point out that it's not

2229

1 just the standard in the document, at least as
2 this committee sees it now.
3 MR. KOVAR: YES.
4 ARBITRATOR ANAYA: It's not binding on
5 us either, that interpretation. I accept that.
6 But it is an interpretation of the committee
7 itself.
8 MR. KOVAR: Okay.
9 ARBITRATOR ANAYA: But I'm satisfied --
14:04:38 10 I'm not sure my colleagues are -- with your
11 answer.
12 MR. KOVAR: Yes.
13 PRESIDENT NARIMAN: Okay.
14 MR. KOVAR: Two other pieces of
15 housekeeping, Mr. President. You asked about the
16 letters that make up the -- Amendment 21 to the
17 MSA and the dates. The original letter was sent
18 out in early 2003.
19 PRESIDENT NARIMAN: Amendment is what
14:05:02 20 page? Amendment 21?
21 MR. KOVAR: It's formed with separate
22 letter agreements with each company.

2231

1 yes.
2 PRESIDENT NARIMAN: -- the Federal
3 Court and the original case.
4 MR. KOVAR: Yes. One other piece of
5 housekeeping. Mr. Violi -- we had offered to
6 provide a copy, a full copy, of an e-mail of
7 Mr. Hering's that the Claimants had used that had
8 ellipses in it and so on. Mr. Violi objected,
9 saying that this was discussed during the
14:06:11 10 jurisdictional phase of the Tribunal, and the very
11 question of whether the U.S. would produce that
12 document had been discussed in the jurisdictional
13 --
14 PRESIDENT NARIMAN: The two asterisks.
15 MR. KOVAR: Yes. It's a long
16 transcript. But in our search of the transcript
17 we couldn't find that -- that discussion between
18 Mr. Violi and Mr. Klinefelter. What we found,
19 which was starting around Paragraph 21 going --
14:06:40 20 Line 16 through about paragraph 22, Line 10 was --
21 PRESIDENT NARIMAN: What is
22 Paragraph 21 of what?

2230

1 PRESIDENT NARIMAN: Oh. Oh.
2 MR. KOVAR: And the initial letter that
3 went out to all the companies was in early 2003,
4 and the responses from the company, and I think,
5 if I'm not mistaken -- I can be corrected -- what
6 the Claimants put up on the screen was one of
7 those responses. I think it was Liggett's
8 response. Those came in at different dates.
9 PRESIDENT NARIMAN: Roughly, 2003.
14:05:29 10 MR. KOVAR: Roughly, 2003, and some may
11 have come in as late as 2004.
12 One other point of housekeeping --
13 PRESIDENT NARIMAN: And those other
14 things you'll be giving us later --
15 MR. KOVAR: Yes, yes.
16 PRESIDENT NARIMAN: -- United States V
17 Philip Morris --
18 MR. KOVAR: Yes.
19 PRESIDENT NARIMAN: -- decision of
14:05:41 20 those courts --
21 MR. KOVAR: Yes. You'd like the
22 decisions of the Federal Courts in those cases,

2232

1 MR. KOVAR: The transcript of the
2 Jurisdictional Hearing.
3 PRESIDENT NARIMAN: Oh, of the
4 Jurisdictional Hearing.
5 MR. KOVAR: Yes. We found that
6 Mr. Violi had presented that document and quoted
7 from it, but we couldn't find that there was a
8 discussion of where it came from or whether there
9 was another version of it. Perhaps there's a
14:07:09 10 different area of the transcript. We couldn't
11 find it. So if Mr. Violi has -- oh, the page
12 number is 754, and it's Line 21 through Line 22.
13 PRESIDENT NARIMAN: Okay. Where are we
14 at?
15 MR. KOVAR: It starts on Page 754 of
16 the Jurisdictional Hearing. So if Mr. Violi has a
17 different section of the Jurisdictional Hearing
18 where he and Mr. Klinefelter had specific
19 discussions, perhaps he could give us the page
14:07:37 20 numbers, because we couldn't find it.
21 PRESIDENT NARIMAN: When his turn
22 comes. Not now.

2233

1 MR. KOVAR: Yes, that's fine. With
2 that, I will ask you to invite Mr. Feldman to
3 discuss 1101, the jurisdiction.
4 PRESIDENT NARIMAN: Feldman, yes.
5 MR. FELDMAN: Good afternoon,
6 Mr. President, Members of the Tribunal.
7 I will now address two jurisdictional
8 issues under NAFTA Article 1101(1). The parties
9 in this arbitration agree that under Article 1101
14:08:18 10 this Tribunal has jurisdiction over Claimants'
11 claims only if the Claimants have an investment in
12 the territory of the United States and only if the
13 challenge measures relate to the Claimants.
14 The parties disagree, however, on the
15 following two issues:
16 First, whether the Grand River
17 Claimants, namely, Grand River and its
18 shareholders, Jerry Montour and Kenneth Hill, have
19 an investment in the United States.
14:08:51 20 Second, whether the challenged escrow
21 statutes, either in their original form or as
22 amended, relate to the remaining Claimant Arthur

2235

1 MR. FELDMAN: Yes.
2 ARBITRATOR ANAYA: But what about the
3 complementary legislation?
4 MR. FELDMAN: Yes, thank you, Professor
5 Anaya. Again, we do not -- we agree that the
6 complementary legislation does relate to Arthur
7 Montour. So our challenge under 1101 with respect
8 to Arthur Montour is only that the Escrow Statutes
9 do not relate to him.
14:10:25 10 Article 1101 is the scope and coverage
11 provision of NAFTA Chapter 11. As stated by the
12 Chapter 11 in the Methanex case, Article 1101 is,
13 quote, "The Gateway leading to the dispute
14 resolution provisions of Chapter 11. Hence, the
15 powers of the Tribunal can only come into legal
16 existence if the requirements of Article 1101 are
17 met."
18 Plaintiffs in this case have brought
19 claims under NAFTA Articles 1102, 1103, 1105 and
14:10:56 20 1110. Article 1101(1) permits such claims only to
21 the extent that they relate to, first, investors
22 of another party, or, second, investments of

2234

1 Montour.
2 As I will discuss, Claimants' Grand
3 River Jerry Montour and Kenneth Hill have failed
4 to demonstrate they have an investment in the
5 United States, and thus do not qualify as
6 investors under Article 1101(1). Given that
7 failure to meet fundamental jurisdictional
8 requirements under NAFTA Chapter 11, their claim
9 should be dismissed in their entirety.
14:09:29 10 ARBITRATOR CROOK: Mr. Feldman --
11 MR. FELDMAN: Yes.
12 ARBITRATOR CROOK: -- just to be
13 absolutely clear, you do not dispute that
14 Mr. Arthur Montour has an investment in the United
15 States.
16 MR. FELDMAN: Thank you, Mr. Crook.
17 That's correct. We do not challenge Mr. Arthur
18 Montour's investment in the United States. Thank
19 you.
14:09:50 20 ARBITRATOR ANAYA: Further along those
21 lines, I see that you dispute that the escrow
22 statutes relate to him.

2236

1 another party in the territory of the party.
2 NAFTA Article 1139 defines "investor of
3 a party" as one who, quote, "seeks to make, is
4 making or has made an investment." And under
5 Article 1101 the only investments covered by
6 Chapter 11 are those located in the territory of
7 another NAFTA party.
8 Accordingly, the only investors covered
9 by Chapter 11 are those who are seeking to make,
14:11:44 10 are making or who have made an investment in the
11 territory of another party.
12 ARBITRATOR CROOK: Mr. Feldman, at some
13 point will you address the elements of their claim
14 that seems to include investment in the plant in
15 Ontario as part of their investment, will you --
16 will you be getting to that at some point?
17 MR. FELDMAN: I can address it. I know
18 we have addressed it in our briefs, and I believe
19 we cite the ADM case on this point, and actually
14:12:14 20 Mr. Sharp, in his presentation, will also address
21 it.
22 I can say at this point the ADF case is

2237

1 clear, that the damages under Chapter 11 must flow
 2 from the investment located in the territory of
 3 the host state. So for equipment located in
 4 Canada, that could not give rise to a claim for
 5 damages because it is not located in the territory
 6 of the host state.

7 ARBITRATOR CROOK: Are the Canada
 8 cattleman and Bayview Water District cases
 9 relevant for these purposes?

14:12:47 10 MR. FELDMAN: Thank you, Mr. Crook.
 11 They are directly relevant. In each case the
 12 Chapter 11 Tribunal rejected the claim on
 13 jurisdictional grounds precisely because the
 14 investors had failed to demonstrate any investment
 15 located in the territory of the host state.

16 The Bayview case involved Texas farmers
 17 who had been affected by the failure to receive
 18 water from Mexico, but the Texan farmers had no
 19 investment located in the territory of Mexico.

14:13:19 20 Similarly, in the Canadian cattleman
 21 case there was a border measure that was
 22 contested, and the Canadian cattleman had no

2239

1 allegations is fundamentally flawed and does not
 2 support the existence of a Grand River investment
 3 in the United States.

4 First, Claimants allege the existence
 5 of a Grand River Native Wholesale Supply
 6 Association, which is purportedly constituted
 7 under the Seneca Nation Business Code, and, thus,
 8 according to Claimants, qualifies as an enterprise
 9 under subparagraph A of the Article 1139
 14:14:58 10 Definition of Investment. But, as Professor
 11 Goldberg addressed, the Seneca Nation Business
 12 Code does not provide for the establishment of
 13 business organizations under Seneca Nation law.

14 Second, Claimants allege that Grand
 15 River has a beneficial interest in the Seneca
 16 trademark based only on Arthur Montour's bear
 17 assertion that he holds the Seneca trademark for
 18 the benefit of all Claimants in this arbitration.
 19 But as I will address, that allegation cannot be
 14:15:27 20 reconciled with the plain language of the
 21 manufacturing agreement between Grand River and
 22 the predecessor of Native Wholesale Supply, Native

2238

1 investment in the territory of the United States,
 2 so, again, in that decision the Chapter 11
 3 Tribunal dismissed the case on jurisdictional
 4 grounds for failure to meet Article 1101
 5 requirements.

6 Oh, excuse me. My references to ADF
 7 should have been to the ADM versus Mexico case.

8 Thank you.

9 Claimants assert multiple alternative
 14:13:54 10 theories of a Grand River investment in the United
 11 States. Each of those alternative theories rest
 12 on one of the following three allegations:

13 First, that Grand River and Native
 14 Wholesale Supply have formed an association, which
 15 is constituted under the Seneca Nation Business
 16 Code; second, that Arthur Montour holds the Seneca
 17 trademark for the benefit of Grand River, and,
 18 third, that Grand River has provided, quote, "a
 19 revolving multi-million dollar inventory based
 14:14:28 20 line of credit to NWS," meaning Native Wholesale
 21 Supply.
 22 As I will discuss, each of these three

2240

1 Wholesale Tobacco Direct, which merely grants
 2 Grand River a limited license to manufacture
 3 Seneca cigarettes under certain narrow conditions.

4 And Claimants' own legal expert under
 5 Investment Article 1139, Professor Mendelson, was
 6 unable to determine whether Mr. Montour's bear
 7 assertion that he hold the trademark for the
 8 benefit of Grand River refers to anything more
 9 than a moral obligation.

14:16:03 10 Claimants have provided no documentary
 11 support for the alleged Grand River beneficial
 12 interest in the Seneca trademark.

13 Third, with respect to Grand River's
 14 alleged inventory based line of credit Claimants
 15 have provided no documentary support for such a
 16 line of credit. Moreover, to make such a line of
 17 credit available to Native Wholesale Supply Grand
 18 River would have to retain ownership over the
 19 cigarettes it sells to NWS. But that would be
 14:16:31 20 directly contrary to Grand River's sworn testimony
 21 in other proceedings where the company has made
 22 clear that it sells Seneca's cigarettes to Native

2241

1 Wholesale Supply at all times on an FOB basis,
2 Freight On Board basis, with title and risk of
3 loss transferring to Native Wholesale Supply at
4 Grand River's facility in Oswegan, Canada.

5 I will now discuss in greater detail
6 how each of Claimants' alternative allegations of
7 Grand River investment in the United States does
8 not withstand scrutiny.

9 ARBITRATOR CROOK: Mr. Feldman, again,
14:17:10 10 to interrupt, I think they may have put in some
11 other bits and pieces, and I wonder if you'll be
12 addressing those as well. We've got the truck,
13 the claim that there's \$50 million tied up in
14 escrow deposits, that Arthur Montour went out and
15 did a lot of work to promote the brand, that they
16 paid money to the trademark lawyer, and I was
17 reminded last night that Grand River itself owns
18 the Opal trademark.

19 Will you be addressing those various
14:17:38 20 things?

21 MR. FELDMAN: Yes, particularly with
22 respect to the 50 million in escrow deposits, I

2243

1 trademark.

2 And Professor Mendelson's conclusion
3 was, well, it appears that Grand River may have --
4 or that Arthur Montour may be under some sort of
5 moral obligation to hold the Seneca trademark for
6 the benefit of Grand River, but Professor
7 Mendelson was unable to identify any legal
8 interest that Grand River has in the Seneca
9 trademark.

14:19:08 10 But particularly with respect to the
11 alleged 50 million in escrow deposits, Mr. Crook,
12 I will be discussing that at some length during
13 the presentation.

14 First, with respect to the alleged
15 enterprise under subparagraph A, the alleged Grand
16 River NWS Association constitutes, according to
17 Claimants, an enterprise under subparagraph A of
18 the Article 1139 definition of investment. Under
19 NAFTA Article 201, "enterprise" is defined as,
14:19:42 20 quote, "any entity constituted or organized under
21 applicable law."

22 Thus Claimants assert that their

2242

1 will have a fair amount to say on that.

2 With respect to the truck and the odds
3 and ends, a lot of these different allegations
4 ultimately go to the question of does Grand River
5 have a legal interest in the Seneca trademark, the
6 legal fees, for example, it goes to this interest;
7 does Grand River have a legal interest in the
8 Seneca trademark.

9 And, as I will discuss, Claimants have
14:18:05 10 been unable to show any legal interest, and the
11 fact that Grand River may have spent some legal
12 fees in some court cases that doesn't establish a
13 Grand River legal interest in the Seneca
14 trademark.

15 And the point of the definition of the
16 investment under Article 1139, there are multiple
17 subparagraphs, but all of those subparagraphs
18 concern legal interests, and Professor Mendelson
19 was retained by Claimants to look at this
14:18:36 20 investment issue, and specifically Professor
21 Mendelson looked at the issue of whether or not
22 Grand River has an interest in the Seneca

2244

1 alleged Grand River NWS Association qualifies as
2 an enterprise under the NAFTA Chapter 11
3 definition of investment because, according to
4 Claimant, the association is constituted under the
5 Seneca Nation Business Code.

6 But as addressed by Professor Goldberg
7 in her expert rebuttal report, the Seneca Business
8 Code does not provide for or govern the
9 establishment of business organizations under
14:20:13 10 Seneca Nation law. Rather, quote, "all that the
11 Business Code addresses is permission to do
12 business within Seneca Nation territory for an
13 entity that has already been formed under some
14 other body of law."

15 Native Wholesale Supply, in fact, has
16 been formed under some other body of law, namely,
17 the law of the Sac and Fox Nation. The Sac and
18 Fox Charter for Native Wholesale Supply is set out
19 on the screen.

14:20:45 20 While NWS is constituted under the law
21 of the Sac and Fox Nation, NWS is licensed to do
22 business within Seneca Nation territory under the

2245

1 Seneca Nation Business Code. The Seneca Nation
 2 license for Native Wholesale Supply is set out on
 3 the screen.
 4 As for Grand River, Claimants
 5 themselves assert that the company is constituted
 6 in Canada under Canadian law. No evidence has
 7 been provided by Claimants demonstrating that
 8 Grand River is even licensed to do business, much
 9 less constitute it under Seneca Nation law.
 14:21:22 10 In an attempt to meet the requirements
 11 of Article 1139, Claimants simply assert that
 12 Grand River and Native Wholesale supply have
 13 formed an association together, and that the
 14 association is constituted under Seneca Nation
 15 law, but there is no such evidence in the record.
 16 The fact that Grand River's importer
 17 and distributor, NWS, is licensed to do business
 18 on Seneca Nation territory does not mean that
 19 either NWS or any purported Grand River NWS
 14:21:55 20 Association is constituted or organized under
 21 Seneca Nation law.
 22 The alleged Grand River NWS Association

2247

1 Article 2107 of the Seneca Nation Business Code,
 2 which is entitled Business License Exemptions.
 3 Article 201 sets out six of those
 4 Business License Exemptions. Three of those
 5 exemptions concern businesses which gross less
 6 than \$10,000 annually. A fourth exemption
 7 concerns activities by persons under age 18, which
 8 gross less than \$3,000 annually. A fifth
 9 exemption concerns any entity owned by the Seneca
 14:23:40 10 Nation, and the sixth exemption concerns persons,
 11 quote, "engaged in the ministry of healing by
 12 purely spiritual means or other recognized
 13 religious activity."
 14 Clearly, the Business Code contains no
 15 exemption for entities working in concert with a
 16 Seneca Nation Member who holds a license to do
 17 business on Seneca Nation territory. Claimants
 18 put forward quite elaborate arguments in this
 19 matter in their attempt to establish a Grand River
 14:24:11 20 enterprise in the United States.
 21 But when Grand River makes
 22 representations in U.S. proceedings concerning its

2246

1 does not satisfy the definition of "enterprise"
 2 under NAFTA Article 201, which requires an entity
 3 to be, quote, "constituted or organized," end
 4 quote, under applicable law.
 5 In any event, no such Grand River NWS
 6 Association is, in fact, even licensed to do
 7 business in Seneca Nation territory. Claimants,
 8 therefore, are forced to invent a licensing
 9 exemption to explain why this purported
 14:22:31 10 association has no license.
 11 But Claimants' alleged exemption,
 12 namely, for entities working in concert with a
 13 Seneca Nation Member who holds the license to do
 14 business on Seneca Nation territory does not, in
 15 fact, exist under the Seneca Nation Business Code.
 16 Under Claimants' theory, Grand River is
 17 alleged to be working in concert with a Seneca
 18 Nation Member, Arthur Montour, whose company, NWS,
 19 is licensed to do business on Seneca Nation
 14:23:02 20 territory, but Claimants do not even attempt to
 21 place their alleged exemption within any of the
 22 exemptions that are clearly set forth under

2248

1 U.S. operations, the facts suddenly become far
 2 more straight forward. As stated several months
 3 ago in sworn testimony by the president of Grand
 4 River, Steve Williams, quote, "Grand River does
 5 not maintain any place of business in any state."
 6 Last week Claimants placed a great deal
 7 of emphasis on the inability of MSA states to
 8 obtain personal jurisdiction over Grand River.
 9 There's a clear reason why Grand River has at
 14:25:03 10 times been successful in resisting personal
 11 jurisdiction in the U.S. Court. The company
 12 simply alleges that it has no presence in the
 13 United States, and does not direct its cigarettes
 14 into the United States. But given that position,
 15 Grand River cannot hold itself out in this
 16 arbitration as being part of some U.S.-based
 17 enterprise.
 18 Claimants attempt to establish a Grand
 19 River NWS enterprise under subparagraph A of the
 14:25:31 20 Article 1139 definition of "investment" should be
 21 rejected. Claimants' second attempt to establish
 22 a Grand River investment in the United States

2249

1 relies on the allegation that Grand River has a
2 legal interest in the Seneca trademark, which,
3 according to Claimants --

4 PRESIDENT NARIMAN: In this case, is
5 this one complaints or two complaints in the
6 present proceeding? That means, does Grand River
7 have a separate complaint from Arthur Montour?

8 MR. FELDMAN: Well, the Claimants
9 consistently refer to themselves as --

14:26:12 10 PRESIDENT NARIMAN: No, I just wanted
11 to know, are the complaints the same, or are they
12 --

13 MR. FELDMAN: It's difficult to
14 discern, because without exception the Claimants
15 refer to themselves in this arbitration as
16 Claimants.

17 PRESIDENT NARIMAN: That's what I'm
18 saying. So, collectively, I mean, do we have to
19 distinguish whether so and so has a cause of
14:26:32 20 action and so and so doesn't?

21 MR. FELDMAN: Yes. Thank you,
22 Mr. President. You'll notice in our briefs we are

2251

1 appropriate, to distinguish Grand River from
2 Native Wholesale, particularly under 1101 the
3 differences are critical, and, as we'll walk
4 through the analysis, it should be brought out
5 that Grand River has not shown an investment in
6 the United States.

7 PRESIDENT NARIMAN: I still don't
8 follow. If Arthur Montour does have at least the
9 rudiments of a claim --

14:27:52 10 MR. FELDMAN: Right.

11 PRESIDENT NARIMAN: -- he gets over
12 that initial hurdle --

13 MR. FELDMAN: Yes.

14 PRESIDENT NARIMAN: -- of jurisdiction
15 --

16 MR. FELDMAN: Absolutely.

17 PRESIDENT NARIMAN: -- whether it's an
18 investment or not is later on we'll come to -- if
19 he gets over that, does it make any difference
14:28:06 20 that the others don't? I just want to know from
21 your --

22 MR. FELDMAN: Well, if -- if the

2250

1 careful, where appropriate, to distinguish Grand
2 River from Native Wholesale Supply, or to
3 distinguish the Grand River shareholders, Jerry
4 Montour and Kenneth Hill --

5 PRESIDENT NARIMAN: My point is, isn't
6 this a distinction without a difference, or is
7 that something -- for damages, maybe you are right
8 but, I mean, on the question of liability does it
9 make any difference?

14:26:57 10 MR. FELDMAN: Yes. In terms of
11 jurisdiction, it's a critical difference because
12 we do not challenge -- we do not assert that
13 Arthur Montour does not have an investment in the
14 United States.

15 PRESIDENT NARIMAN: That's what I --
16 that's what you said. That's why I'm asking you.

17 MR. FELDMAN: Yes, so -- yes, so for
18 jurisdictional purposes it is a critical
19 difference because we are challenging -- we are
14:27:16 20 challenging that -- our position is that Grand
21 River has no investment in the United States. And
22 so that is why we are careful in our briefs, where

2252

1 Tribunal does not have jurisdiction over Grand
2 River's claim, then Grand River is no longer a
3 part of the case.

4 ARBITRATOR CROOK: Mr. Feldman, is --
5 is the answer to the president's question the
6 second part of the presentation you're going to
7 give us here, which is, I take it, some of the
8 contested measures do not relate to Mr. Arthur
9 Montour?

14:28:28 10 MR. FELDMAN: That's correct. As we'll
11 discuss in the relating-to portion of the
12 presentation, the challenged Escrow Statutes do
13 not relate to Arthur Montour. So our position
14 under Article 1101 is that Arthur Montour's claim
15 can proceed with respect to the complementary
16 legislation, but that the rest of the claim, Grand
17 River's claim, Jerry Montour's claim, Kenneth
18 Hill's claim, should be dismissed in their
19 entirety, and Arthur Montour's claim, only as it
14:28:58 20 relates to the Escrow Statutes, should also be
21 dismissed.

22 PRESIDENT NARIMAN: That means his

2253

1 claim in respect of the complementary legislation
2 would be legitimate.

3 MR. FELDMAN: Yes. Under Article 1101
4 we raise no objection with respect to Arthur's
5 Montour's challenge to the complementary
6 legislation.

7 PRESIDENT NARIMAN: Okay. Thank you.
8 Continue.

9 MR. FELDMAN: Thank you.

14:29:19 10 Claimants' second attempt to establish
11 a Grand River investment in the United States
12 relies on the allegation that Grand River has a
13 legal interest in the Seneca trademark, which,
14 according to Claimants, constitutes an intangible
15 property right under subparagraph G of the Article
16 1139 definition of "investment."

17 Subparagraph G includes, quote, "Real
18 estate or other property, tangible or intangible,
19 acquired in the expectation or used in the purpose
14:29:45 20 of economic benefit or other business purposes."
21 Again, Claimants' allegation of a Grand
22 River interest in the Seneca trademark is based

2255

1 concerning Grand River's alleged legal interest in
2 the Seneca trademark under subparagraph G should
3 be rejected.

4 PRESIDENT NARIMAN: Do we have in whose
5 name Seneca trademark is registered?
6 MR. FELDMAN: In the record, the Seneca
7 trademark is clearly registered in the name of
8 Native Wholesale Supply.
9 PRESIDENT NARIMAN: That's right,
14:31:14 10 Native Wholesale.
11 MR. FELDMAN: Yes.
12 PRESIDENT NARIMAN: So they -- they
13 have the right to the money.
14 MR. FELDMAN: Yes, Native Wholesale,
15 and Mr. Arthur Montour is the owner of Native
16 Wholesale Supply. And I'll pick up on Mr. Crook's
17 question about that Opal brand.

18 We have addressed in our briefs, in
19 Claimants' initial Notice of Arbitration in their
14:31:27 20 Statement of Claim, in their Amended Statement of
21 Claim, there was never any mention of the Opal
22 brand. The first time we ever saw any mention of

2254

1 solely on Arthur Montour's assertion that he holds
2 the mark for the benefit of all Claimants in this
3 arbitration. Claimants' own legal expert on this
4 issue, Professor Mendelson, does not support
5 Claimants' position that Grand River, Jerry
6 Montour and Kenneth Hill have an intangible
7 property interest in Arthur Montour's Seneca
8 trademark.

9 Specifically, Arthur Montour's
14:30:17 10 assertion is, quote, "simply a statement of moral
11 obligation or something more."
12 Professor Mendelson merely observes if
13 Arthur Montour's assertion regarding the Seneca
14 trademark, in fact, reflects something more than a
15 moral obligation, then such an obligation, quote,
16 "may well be capable," unquote of satisfying the
17 definition of "investment" under subparagraph G,
18 but there is nothing more.

19 Given Arthur Montour's lack of
14:30:49 20 documentary support for his allegation, as well as
21 the failure of Claimants' own legal expert to
22 commit to the argument, Claimants' argument

2256

1 the Opal brand was in their Memorial, and, as we
2 argued in our briefs, we do not consider it to be
3 a valid part of their claim.

4 Furthermore, Arthur Montour's bear
5 allegation cannot be reconciled with the plain
6 language of the cigarette manufacturing agreement
7 between Grand River and the predecessor of NWS,
8 Native Tobacco Direct.

9 The Cigarette Manufacturing Agreement
14:32:04 10 grants Grand River a limited license to use the
11 Seneca brand name, quote, "for the sole purpose of
12 manufacturing and delivery," unquote, of
13 cigarettes under agreement.

14 Moreover, the agreement expressly
15 prohibits Grand River from manufacturing Seneca
16 cigarettes, quote, "except for export from
17 Canada."

18 Furthermore, the Cigarette Production
19 Agreement between Grand River and Tobaccoville
14:32:34 20 imposes even greater restrictions on Grand River's
21 license to manufacture Seneca cigarettes in
22 Canada. Under that agreement, it is Tobaccoville

1 not Grand River that determines not only the
2 quantity and timing of Seneca shipments, but also
3 the particular tobacco blends and packaging that
4 are to be used in those shipments. Specifically
5 under the Cigarette Production Agreement, quote,
6 "GRE shall produce for manufacturer/distributor"
7 -- and that's Tobaccoville -- "the brand" --
8 meaning Seneca brand cigarettes -- "in such
9 versions and packaging and such quantities and at
14:33:13 10 such times as per the written request from
11 manufacturer/distributor" -- again, that's
12 Tobaccoville -- "to do so.

13 "The brand shall be produced using the
14 tobacco blends and packaging as designated by
15 manufacturer/distributor," again as designated by
16 Tobaccoville.

17 The language of Grand River Cigarette
18 Production Agreement with Tobaccoville is
19 consistent with the sworn testimony by the
14:33:44 20 president of Grand River, Steve Williams, with
21 respect to the cigarettes produced by Grand River
22 in Canada and sold by Grand River to Tobaccoville

1 United States.

2 And with respect to Grand River's
3 exports of Seneca cigarettes to Tobaccoville, it
4 is Tobaccoville, not Grand River, which determines
5 not only the quantity and timing of Seneca
6 shipments, but also the particular tobacco blends
7 and packaging to be used with those shipments.

8 Accordingly, Arthur Montour's bear
9 assertion that he holds the Seneca trademark for
14:35:20 10 the benefit of Grand River simply cannot be
11 reconciled with the evidence in the record. Last
12 week, we heard multiple assertions from Claimants
13 concerning a Grand River interest in the Seneca
14 trademark, which not only are unsupported, but, in
15 fact, directly contradicted by this evidence.

16 First, Claimants flatly stated that,
17 quote, "Grand River owns a trademark right to the
18 Seneca name and brand." That is incorrect.

19 Claimants also state that, quote, "This
14:35:46 20 is not a company that merely sells cigarettes. It
21 has the trademark." That is also in correct.

22 Grand River holds a limited license to

1 in Canada. Quote, "Grand River never had any
2 control of how or where these cigarettes were
3 sold."

4 The president of Tobaccoville agrees.
5 In his sworn testimony, Larry Phillips, the
6 president of Tobaccoville, stated unequivocally
7 that, quote, "GRE does not sell any cigarettes in
8 the United States and has no input into where
9 sales are made, to whom, in what volumes, or the
14:34:20 10 pricing."

11 Thus Arthur Montour's bear assertion
12 that he holds the Seneca trademark in the United
13 States for the benefit of Grand River cannot be
14 reconciled with the plain language of Grand
15 River's manufacturing agreements with its U.S.
16 distributors, nor can Arthur Montour's assertion
17 be reconciled with the sworn testimony of the
18 president of Grand River and the president of
19 Tobaccoville. Under those manufacturing
14:34:45 20 agreements and that sworn testimony, Grand River
21 holds a limited license to manufacture Seneca
22 cigarettes in Canada solely for export to the

1 manufacture Seneca cigarettes in Canada for export
2 to the United States. Arthur Montour, not Grand
3 River, owns the Seneca trademark.

4 Second, Claimants assert under Grand
5 River Cigarette Manufacturing Agreement, quote,
6 "Every cigarette sold in the United States must be
7 manufactured by Grand River or with Grand River's
8 permission."

9 To the contrary, NWS does not need
14:36:23 10 Grand River's permission to sell cigarettes in the
11 United States. Under the plain terms of their
12 manufacturing agreement it is NWS, not Grand
13 River, that determines when shipments are to be
14 made and in what quantities.

15 As stated in the agreement, quote,
16 "manufacturer" -- that's Grand River -- "shall
17 manufacture brands in a king-size, hinged-lid box
18 version in such quantities and at such times as
19 per the written request from distributor" -- and
14:36:53 20 the distributor here was Native Tobacco Direct,
21 and now Native Wholesale Supply -- "to do so.

22 "The brand shall be produced using the

2261

1 tobacco blends and packaging as designated by
 2 distributor." So, again, distributor NWS.
 3 With respect to Tobaccoville Grand
 4 River's president, Steve Williams, has made clear
 5 in sworn testimony that Grand River has no control
 6 over how or where Tobaccoville sells cigarettes in
 7 the United States.
 8 Last week, Claimants also
 9 misrepresented our positions with respect to the
 14:37:25 10 Seneca trademark. First, according to Claimants,
 11 it is our position that Arthur Montour's
 12 trademark, quote, "is not asset and not an
 13 investment."
 14 To the contrary, we have made clear in
 15 our briefs that Arthur Montour, not Grand River,
 16 owns the Seneca trademark, and that our challenge
 17 with respect to the existence of a U.S. investment
 18 applies only to three of the four Claimants in
 19 this matter; Grand River, Jerry Montour and
 14:37:54 20 Kenneth Hill. Again, we have not challenged the
 21 existence of Arthur Montour's U.S. investment.
 22 The issue here is not whether Arthur

2263

1 discussed in our written submissions, Claimants
 2 have excluded Grand River's off-Reservation
 3 distributor, Tobaccoville, from their U.S.
 4 investment, and thus have excluded Grand River's
 5 off-Reservation sales from that alleged
 6 investment.
 7 In response, Claimants asserted that
 8 their failure to include Tobaccoville within their
 9 alleged U.S. investment was irrelevant because
 14:39:19 10 Grand River has an intangible property right in
 11 the Seneca trademark, but Claimants ultimately
 12 have provided no evidentiary support for that
 13 alleged property right.
 14 PRESIDENT NARIMAN: I'm going to
 15 interrupt you again. Is this really a
 16 jurisdictional issue, or is this the right to
 17 relief, who is entitled to what relief. I mean,
 18 once you admit that there's jurisdiction over a
 19 claim that Arthur Montour makes, and if all of
 14:39:42 20 them are in one claim, they're all Claimant one,
 21 two, three, four, five, whatever they are, is this
 22 really jurisdictional, or is that something

2262

1 Montour's trademark constitutes an investment in
 2 the United States, but rather whether Grand River
 3 has a legal interest in that trademark, which
 4 Claimants have failed to establish.
 5 Claimants further represent our
 6 position to be that if Arthur Montour does not
 7 hold the trademark for the benefit of all the
 8 Claimants, then, quote, "He does not even have the
 9 asset, the investment of that trademark."
 14:38:25 10 Again, that is incorrect. We do not
 11 contest that Arthur Montour owns the Seneca
 12 trademark.
 13 Accordingly, Claimants' assertion that
 14 Grand River has an intangible property right in
 15 the Seneca trademark under subparagraph G,
 16 Article 1139 definition of the investment should
 17 be rejected.
 18 In addition, Claimants' failure to
 19 establish any interest in the Seneca trademark
 14:38:46 20 beyond its limited license to manufacture Seneca
 21 cigarettes in Canada has larger implication for
 22 their entire off-Reservation claim. As we've

2264

1 ultimately they have no right to relief? You can
 2 say all that. It has nothing to do with
 3 jurisdiction.
 4 Once you admit -- I mean, if you've
 5 disputed that none of them are entitled to come
 6 before a Tribunal, but once you say there is --
 7 once you say that they're entitled, one person, at
 8 least is entitled, then does it make a difference?
 9 Does it become a jurisdictional issue, or is it
 14:40:21 10 the Claimants' right to relief issue?
 11 MR. FELDMAN: Thank you, Mr. President.
 12 Under Article 1101 is the scope and coverage
 13 provision of the chapter, and under Article 1101
 14 only investors -- or investors on behalf of their
 15 investments. You must be an investor to bring a
 16 claim.
 17 PRESIDENT NARIMAN: One of whom may or
 18 may not be an investor, is it possible to join
 19 such claims because you have never objected to the
 14:40:49 20 joinder of claim.
 21 MR. FELDMAN: Under Chapter 11 claims
 22 can only be brought by investors, and in this case

2265

1 there is only one investor. There are not four
2 investors. The claim can only be brought by the
3 one investor.

4 PRESIDENT NARIMAN: Okay. So the claim
5 is brought by one investor, therefore, there's not
6 a jurisdictional issue, it's an issue as to
7 whether the others are not entitled -- have no
8 right to relief. That's what I would have
9 thought.

14:41:12 10 MR. FELDMAN: But, for example,
11 Mr. President, we do have an objection with
12 respect to Mr. Arthur Montour challenge of the
13 Escrow Statutes. So it's our position that the
14 Tribunal does not have jurisdiction to analyze the
15 Escrow Statutes at all. The Tribunal only has
16 jurisdiction to analyze the complementary
17 legislation.

18 PRESIDENT NARIMAN: All right. It's
19 all very complicated for me.

14:41:37 20 MR. FELDMAN: It is for all of us.
21 As we've discussed in our written
22 submissions, Claimants have excluded Grand River's

2267

1 their case, Grand River has an exclusive
2 on-Reservation distributor and an exclusive
3 off-Reservation distributor. Their exclusive
4 on-Reservation distributor is NWS. Their
5 exclusive off-Reservation distributor is
6 Tobaccoville.

7 Grand River includes NWS in their
8 alleged U.S. enterprise. Grand River does not
9 include Tobaccoville in their alleged U.S.
14:42:59 10 enterprise. Under Chapter 11, the question is
11 what is the investment? The claim involves the
12 investment. Claimants have made no attempt to
13 include Tobaccoville, and thus no attempt to
14 include all of Tobaccoville's off-Reservation
15 sales within their investment.

16 Now, the Claimants' response on this
17 point is, well, we don't need to do that because
18 we hold the trademark. It's our Seneca trademark.
19 But, as we've demonstrated, that is just not true.

14:43:26 20 PRESIDENT NARIMAN: Who's this "we"?

21 MR. FELDMAN: I'm sorry. The Claimants
22 argument is Grand River owns the Seneca trademark,

2266

1 off-Reservation distributor, Tobaccoville, from
2 their alleged U.S. investment, and thus have
3 excluded Grand River sales from that alleged
4 investment.

5 ARBITRATOR CROOK: Mr. Feldman, excuse
6 me. Can you run that by me again. I have a
7 little trouble taking that particular argument on
8 board.

9 MR. FELDMAN: Yes.

14:42:04 10 ARBITRATOR CROOK: I understand you're
11 saying that they do not include Tobaccoville,
12 which is a U.S. company in which they have no
13 proprietary interest in investment. They have a
14 contract with Tobaccoville, and Tobaccoville is
15 supposed to do certain things.

16 MR. FELDMAN: Right.

17 ARBITRATOR CROOK: How does that equate
18 to or result in their off-Reservation sales not
19 being part of the investment? Can you run that by
14:42:31 20 again, please?

21 MR. FELDMAN: Yes. Thank you,
22 Mr. Crook. Tobaccoville -- as Claimants framed

2268

1 but, as we've seen by the evidence in the record,
2 that's not the case. Arthur Montour, Native
3 Wholesale Supply, owns the Seneca trademark. So
4 Grand River cannot include -- include these
5 off-Reservation sales on their claim in this
6 Trademark Hearing when they fail to support any
7 legal interest in the Seneca trademark held by
8 Grand River.

9 Does that answer your question?

14:44:00 10 ARBITRATOR CROOK: I'll ponder it.

11 Thank you.

12 MR. FELDMAN: Okay. Okay.

13 Claimants's third allegation is that
14 Grand River has made an inventory based line of
15 credit available to NWS, and that this purported
16 line of credit satisfies three separate
17 subparagraphs under the Article 1139 definition of
18 investment. Specifically, Claimants assert that
19 the alleged Grand River line of credit
14:44:27 20 constitutes, first, a loan to an enterprise under
21 subparagraph D2; second, a commitment of capital
22 in the territory of a party under subparagraph H1,

2269

1 and, third, intangible property under subparagraph
2 G.

3 ARBITRATOR CROOK: Mr. Feldman, can I
4 go back? I think I've got it now. Let me see if
5 I understand you. I'm not saying I agree with it,
6 I just want to see if I understand it.

7 MR. FELDMAN: Yes.

8 ARBITRATOR CROOK: That you are arguing
9 that so far as Tobaccoville is concerned, the --
14:45:01 10 the relationship between Grand River or Grand
11 River and its owners in Canada is simply a
12 relationship of expert and sale, no more.

13 Is that the argument?

14 MR. FELDMAN: That's Claimants' very
15 allegation in this case, yes.

16 ARBITRATOR CROOK: I understand. But
17 then you're saying it is, in essence, just a
18 straight export sales proposition, it is -- it's
19 not an investment.

14:45:30 20 MR. FELDMAN: That's correct.

21 ARBITRATOR CROOK: That's your
22 argument.

2271

1 duration requirement under subparagraph D2,
2 Mr. Montour attempted to revisit that allegation
3 in his second witness statement. In that
4 statement Mr. Montour now asserts that, quote, "It
5 was our expectation that it" -- the line of credit
6 -- "would be necessary for approximately five
7 years."

8 But Mr. Montour's expectation does not
9 create a fixed maturity date. The fact is that
14:46:48 10 the line of credit had no fixed maturity date. In
11 any case, even assuming that Mr. Montour's
12 assertion established the existence of a fixed
13 five-year maturity date, that allegation cannot be
14 reconciled with Mr. Montour's prior testimony in
15 this matter.

16 Mr. Montour cited no documentation in
17 support of his initial assertion concerning the no
18 fixed maturity date of the line of credit, and
19 again cited no documentation in support of his
14:47:14 20 follow-up assertion that the line of credit would
21 be necessary for approximately five years.

22 Claimants have a clear incentive for

2270

1 MR. FELDMAN: Yes.

2 ARBITRATOR CROOK: I understand it.
3 Thank you.

4 MR. FELDMAN: Just to walk through it
5 once more, the Claimants' response on that point
6 is, well, Grand River owns the Seneca trademark so
7 this import export relationship, in fact, isn't an
8 obstacle to us to establish an investment.

9 Our answer to that is, well, there's no
14:45:48 10 evidence in the record that Grand River owns the
11 Seneca trademark.

12 ARBITRATOR CROOK: Okay. Thank you.

13 MR. FELDMAN: First, to qualify as a
14 loan to an enterprise under subparagraph D2, the
15 loan must have an original maturity of at least
16 three years.

17 In his first witness statement, Jerry
18 Montour stated that the alleged inventory based
19 line of credit made available to NTD and NWS had,
14:46:15 20 quote, "no fixed maturity date." Apparently
21 realizing the line of credit with no fixed
22 maturity date would not satisfy the three-year

2272

1 relying on bear assertions of expectations rather
2 than documentation to support their alleged
3 business obligations and relationships, such as
4 the alleged inventory based line of credit. Such
5 lack of documentation enables Claimants by mere
6 say-so to alter the terms of their alleged
7 obligations and relationships in order to arrive
8 at a set of facts that is tailored to their
9 particular legal needs in this arbitration. Such
14:47:49 10 shifting allegations are made possible by
11 Claimants' refusal in this arbitration to provide
12 documentary support for even the most basic aspect
13 of their alleged business relationships and
14 business obligations.

15 Claimants defend that refusal by
16 asserting that their alleged, quote, "association
17 and business arrangement is perhaps more common to
18 Native American social norms than the formalistic
19 rituals of European Western business practice.

14:48:18 20 But there is nothing formalistic about
21 requiring Claimants who are demanding over a
22 quarter of a billion dollars from U.S. taxpayers

2273

1 to provide documentary support for the most basic
2 elements of their alleged business obligations and
3 business relationships, such as the original
4 maturity date of Grand River's alleged inventory
5 based line of credit.
6 Claimants alleged loan to enterprise
7 under subparagraph D2 should be rejected.
8 PRESIDENT NARIMAN: If Grand River had
9 said that they were licensees for the purpose of
14:48:56 10 manufacture of Seneca cigarettes for export from
11 Canada and not that they were the owners of the
12 trademark, then that claim would be in -- if they
13 had said that.
14 MR. FELDMAN: Mr. President --
15 PRESIDENT NARIMAN: I'm asking you.
16 MR. FELDMAN: Mr. President, there's an
17 important distinction for Chapter 11 purposes
18 between an exporter and an investor. An investor
19 must have investment, in this case, in the United
14:49:18 20 States, in the host state. An exporter simply
21 exporting goods does not establish an investment
22 in the host state. And we heard from Claimants

2275

1 terms by the oral testimony or other kind of
2 evidence?
3 MR. FELDMAN: Well, but what we've seen
4 is that when the Claimants have attempted to
5 establish terms through, say, the witness
6 statements, what comes out in the witness
7 statements are inconsistencies.
8 ARBITRATOR ANAYA: But that's a matter
9 of evaluating the evidence on our part. So we can
14:50:48 10 evaluate the evidence, you're just saying in the
11 absence of the documentation?
12 MR. FELDMAN: Right. When Claimants
13 bring a claim for hundreds of millions of dollars
14 against the United States, you expect to see some
15 documentation.
16 ARBITRATOR ANAYA: Right. Okay.
17 MR. FELDMAN: Claimants' alleged
18 inventory based line of credit likewise fails to
19 establish an investment under subparagraph H1 of
14:51:14 20 Article 1139, which includes within the definition
21 of investment a, quote, "commitment of capital in
22 the territory of a party."

2274

1 last week. Claimants agreed that mere trade
2 without more does not establish an investment
3 under Article 1139 so a mere exporter-importer
4 relationship is insufficient, and the parties
5 agree on that point.
6 ARBITRATOR ANAYA: Mr. Feldman?
7 MR. FELDMAN: Yes.
8 ARBITRATOR ANAYA: Just to be clear on
9 this point that you're making, you're saying that
14:49:54 10 there is no loan, but in the absence of any
11 documentation we should not even inquire any
12 further, that we should have a straight rule
13 requiring documentation for any loan?
14 MR. FELDMAN: We're looking for the
15 terms of this loan because, especially with
16 respect to D2, the terms are critical for
17 establishing whether or not there is an
18 investment. If there's no documentation of the
19 terms of the loan, that should be the end of the
14:50:18 20 inquiry.
21 ARBITRATOR ANAYA: Well, why is that
22 necessarily the case? Can't we establish the

2276

1 As you can see on the screen,
2 subparagraph H1 of the Chapter 11 definition of
3 investment includes, quote, "interest arising from
4 the commitment of capital or other resources in
5 the territory of a party to economic activity in
6 such territory, such as under contracts involving
7 the presence of an investor's property and the
8 territory of the party, including turnkey or
9 construction contracts or concessions. Claimants
14:51:50 10 assert that the inventory baseline of credit
11 allegedly made available by Grand River
12 constitutes such a commitment of capital in the
13 territory of the United States."
14 Again, Claimants provide no
15 documentation supporting the existence of their
16 alleged line of credit, and again Claimants
17 exploit that lack of documentation by tailoring
18 their allegations to meet their particular
19 jurisdictional needs in this case.
14:52:11 20 In Jerry Montour's first witness
21 statement, Mr. Montour asserted that Grand River
22 has made available, quote, "financing by providing

1 NTD and later NWS with access to an inventory
2 loan."
3 In his second witness statement,
4 however, Mr. Montour asserts apparently with
5 subparagraph H1 in mind, that the financing made
6 available by Grand River constituted a, quote,
7 "substantial capital commitment in the United
8 States."
9 PRESIDENT NARIMAN: Which Montour?
14:52:41 10 MR. FELDMAN: Right. This is Jerry
11 Montour.
12 PRESIDENT NARIMAN: But you are not
13 cross-examining. You have not asked any
14 questions.
15 MR. FELDMAN: That's correct.
16 PRESIDENT NARIMAN: No, I'm just
17 saying, so this goes virtually unchallenged.
18 MR. FELDMAN: Mr. President, we're
19 pointing out inconsistencies between the
14:52:57 20 statements.
21 PRESIDENT NARIMAN: Right. But if
22 there were inconsistencies, then you could have

1 called for cross-examination.
2 PRESIDENT NARIMAN: Why wasn't Jerry
3 Montour who is a very important witness in this
4 chase? He has been deposed, according to you, in
5 contradictory terms. It's not a question of
6 whether his evidence should be accepted or not
7 accepted since you're commenting on it. I
8 wouldn't have put all this to you. You're saying
9 there are inconsistencies. How can the
14:54:07 10 inconsistencies be reconciled unless you call him?
11 That's a normal rule.
12 MR. FELDMAN: Mr. President, our
13 submission is that this is, in part, a result of
14 -- it is precisely because there's a lack of
15 documentation, that what you get are
16 inconsistencies about the terms of these alleged
17 obligations.
18 PRESIDENT NARIMAN: Okay.
19 MR. FELDMAN: Okay. Grand River's
14:54:30 20 alleged capital commitment in the United States
21 cannot be reconciled --
22 PRESIDENT NARIMAN: This is a

1 called him and pointed all this out, and he may
2 have had an explanation or he may not.
3 MR. FELDMAN: Yes. Mr. President, we
4 submit that the inconsistencies speak for
5 themselves.
6 PRESIDENT NARIMAN: You have to call
7 him. Why didn't you call him? There's no
8 explanation why you didn't call him. I was
9 expecting him to come into the box, and you would
14:53:16 10 cross-examine him at some length. That was my
11 expectation.
12 ARBITRATOR CROOK: So, Mr. Chairman,
13 are we to adopt a rule that any witness who is not
14 cross-examined, their evidence is to be taken as
15 true?
16 PRESIDENT NARIMAN: My question is to
17 Mr. Feldman, not to you. We can discuss it later.
18 My question is for him.
19 MR. FELDMAN: Yes. Mr. President, I
14:53:37 20 would point out that we have a legal expert in
21 this case, Professor Goldberg from UCLA Law
22 School, who put in two expert reports, was not

1 jurisdictional issue. This was an important
2 circumstance for you. It was jurisdictional. You
3 say dismiss the claim at the very start. Don't go
4 into it at all because of this, and yet you don't
5 examine it. There's no explanation why you didn't
6 call him. He was here. He was present all the
7 time last week.
8 MR. FELDMAN: Mr. President, it is the
9 Claimants' burden to establish jurisdiction in the
14:54:57 10 case and to meet the requirements of Article 1101.
11 PRESIDENT NARIMAN: Again, let's not go
12 there. Jurisdiction, you're pointing out
13 inconsistencies, and yet you're not accepting the
14 position that you failed to call him for
15 cross-examination. You're entitled to
16 cross-examine him, to point out inconsistencies,
17 and he has a right to say, if he can, that there
18 are these explanations for these inconsistencies.
19 All right. Okay.
14:55:27 20 MR. FELDMAN: Okay. Thank you.
21 Grand River's alleged capital
22 commitment in the United States cannot be

1 reconciled with its sworn testimony in U.S. Court
 2 proceedings. As the president of Grand River made
 3 clear in those proceedings, Grand River sells
 4 Seneca cigarettes to NWS and Tobaccoville, quote,
 5 "at all times on an FOB basis with title and risk
 6 of loss, transferring to these third parties at
 7 Grand River's facility in Oswegan, Canada."
 8 Claimants' own damages expert,
 9 Mr. Wilson, confirmed this very point last week,
 14:56:01 10 which you can find at Page 586 of the transcript.
 11 Thus, any inventory imported into the
 12 United States by those third parties is owned by
 13 those third parties, not Grand River. Because
 14 Grand River owns no inventory in the United
 15 States, Grand River cannot make any inventory
 16 based line of credit available to NWS.
 17 Grand River has shown no commitment of
 18 capital in the territory of the United States, and
 19 Claimants' allegation of investment under
 14:56:29 20 subparagraph H1 should be rejected.
 21 Finally, Claimants alleged inventory
 22 based line based credit does not constitute

1 \$50 million in escrow deposits in either Professor
 2 Mendelson's report on the investment issue, or in
 3 Mr. Wilson's damages report. That is not
 4 surprising, given that a manufacturer retains
 5 ownership over its escrowed funds and receives
 6 interest on the funds as it is earned.
 7 And in any event, most, if not all, of
 8 the funds would appear from Claimants' allegations
 9 to be the property of Tobaccoville, not Grand
 14:58:05 10 River, nor do Claimants address whether the
 11 alleged \$50 million in escrow deposits have been
 12 made as of 2004 when they filed their claim.
 13 Notably, in their Memorial, which was
 14 filed in 2008, Claimants refer to only 29 million
 15 in escrow deposits, and as we address at page 64
 16 of our counter Memorial, Claimants had asserted
 17 without discussion that Grand River's escrow
 18 deposits would meet the definition of investment
 19 under subparagraphs G and H of Article 1139, but
 14:58:43 20 those subparagraphs do not concern property that
 21 is set aside to comply with the legal obligation
 22 concerning potential future liabilities.

1 intangible property under subparagraph G of
 2 Article 1139.
 3 As I discussed, Claimants have failed
 4 to provide any documentary evidence of such a line
 5 of credit, which in any event could not be
 6 reconciled with the sworn testimony of Grand
 7 River's president in U.S. Court proceedings, that
 8 Grand River sells Seneca cigarettes to Native
 9 Wholesale Supply at all times on an FOB basis with
 14:56:59 10 title and risk of loss transferring in Canada, not
 11 in the United States, and, therefore, has no
 12 inventory in the United States on which to base a
 13 line of credit.
 14 I would briefly note, and in response
 15 to Mr. Crook's question, that Claimants raised yet
 16 another alternative argument last week in their
 17 attempt to establish a Grand River investment in
 18 the United States, namely, that an alleged
 19 \$50 million in escrow deposits constitutes an
 14:57:25 20 investment under Article 1139.
 21 This allegation fails on a number of
 22 levels. No mention is made of this purported

1 Claimants' alternative theory of investment should
 2 be rejected.
 3 For the reasons I have discussed, each
 4 of Claimants -- and before I conclude, I would
 5 refer -- Mr. Crook had asked about the leased
 6 truck. Again, these are odds and ends that the
 7 Claimants are attempting to cobble together. The
 8 truck in no way shows any legal interest of --
 9 again, that Grand River might have in the Seneca
 14:59:21 10 trademark, no enterprise in the United States.
 11 Again, it is a throw-away the Claimants have
 12 included.
 13 PRESIDENT NARIMAN: According to you, a
 14 deposit is not an investment?
 15 MR. FELDMAN: No. In this case, an
 16 escrow deposit -- first of all, the claim under
 17 Chapter 11 -- your damages need to flow from your
 18 investment. And Claimants haven't articulated any
 19 theory of damages with respect to an escrow
 14:59:48 20 deposit account in which funds are sitting
 21 untouched. Grand River owns those funds. There
 22 would be no theory of damages -- setting aside

1 escrowed funds into an account, there's no theory
2 of damages in this case of how those funds were
3 taken from --

4 PRESIDENT NARIMAN: Yes, but those
5 funds can also be diminished if there are claims
6 for health reasons, et cetera, against the state
7 that can be drawn upon, so it's not their money as
8 such.

9 MR. FELDMAN: Right. But,
10 Mr. President, we find it significant that
11 Claimants' damages expert never addressed these
12 escrowed funds. It's not part of their damages
13 claim --

14 PRESIDENT NARIMAN: No, we're dealing
15 with jurisdiction claim. We are not talking o
16 damages. You maybe right, they're not entitled to
17 damages. I'm only asking you on jurisdiction.
18 The escrow amount, whether it's 29 million or 50
19 million, make it as 29 and not as 50, but if it is
15:00:38 20 29 million, that's a substantial sum, which has
21 been set apart by them in a particular country,
22 and you have to tell us why this doesn't satisfy

1 under Chapter 11. The two provisions the
2 Claimants refer to are subparagraph G and
3 subparagraph H. Claimants offer no analysis of
4 why escrowed funds would fit into one of these
5 subparagraphs, and we would submit that for a
6 tobacco manufacturer to be complying with a legal
7 allegation to put funds in an escrow account, that
8 that does not fall within either subparagraph G or
9 subparagraph H. It is -- as Professor Gruber
10 said, it is a form of forced savings. It is
11 completely unrelated to their theory of the case,
12 which involves the impairment to the Seneca brand,
13 impairment to Seneca sales.

14 There's no nexus between their theory
15 of the case and this allegation of an investment
16 based on these escrowed funds, and we don't see it
17 falling under subparagraph G or subparagraph H,
18 and Claimants made no attempt to place it under
19 those subparagraphs.

15:02:15 10 ARBITRATOR ANAYA: So we have to get
21 into the theory of the case in order to determine
22 whether an escrow is an investment. Can we just

1 the definition of investment.

2 MR. FELDMAN: Thank you, Mr. President.
3 Under Chapter 11, there needs to be a nexus
4 between your investment and your damages.

5 PRESIDENT NARIMAN: Oh. Okay.

6 MR. FELDMAN: It's significant to us
7 that if there's no theory of damages with respect
8 to these funds, there's no nexus to the
9 investment.

10 PRESIDENT NARIMAN: Okay.

11 ARBITRATOR ANAYA: Just so I'm clear,
12 you're saying that there's no investment, in
13 addition to saying there's no nexus. Can we find
14 there's an investment and no nexus to the damages?

15 MR. FELDMAN: Our position is that
16 because Claimants have identified Article G and H
17 to Article 1139. And I would say on this point,
18 -- and Professor Mendelson agrees -- Article 1139
19 sets out what is known as an exhaustive list -- an
15:01:34 20 exhaustive list of investments. If a particular
21 set of facts does not fit within one of the sub
22 paragraphs of Article 1139, there is no investment

1 look at that, look at its character, the deposit
2 in the escrow?

3 MR. FELDMAN: I mean, again, Claimants
4 have thrown a lot of alternative theories, but
5 their theory of the case is the Seneca brand, the
6 impairment to the Seneca brand lost profits from
7 that. And if there is no nexus, it simply takes
8 away from the credibility of the argument that
9 funds placed in an escrow account would
10 nevertheless fall within the definition of
11 investment. There needs to be some articulation
12 of how your investment has been harmed, and there
13 is no articulation here in the damages report of
14 how this purported investment of escrow deposits
15 has been harmed by any state action in this case.

16 PRESIDENT NARIMAN: That goes to
17 damages, you're right. That goes to damages.
18 We're just now on the jurisdiction point.

19 MR. FELDMAN: Yes, and the
15:03:11 10 jurisdictional point is --

21 PRESIDENT NARIMAN: And the
22 jurisdictional point is, is it an investment. It

1 says any property tangible, intangible, whatever
2 it is.

3 MR. FELDMAN: RIGHT.

4 PRESIDENT NARIMAN: A deposit deposited
5 for a particular purpose where it may not all be
6 returned. Some of it may be returned due to
7 contingencies that arise. It may or it may not.

8 MR. FELDMAN: Again, we think it's
9 significant that Claimants retained an expert to
15:03:56 10 analyze the investment issue in this case. They
11 retained Professor Mendelson. Professor Mendelson
12 looked at many, many alternative theories of
13 investment. Professor Mendelson never looked at
14 this question of escrow deposits as an investment
15 under Article 1139.

16 PRESIDENT NARIMAN: No, but is that any
17 denial that there was such an escrow deposit,
18 which is attributable to one of the Claimants?

19 MR. FELDMAN: Mr. President, we would
15:04:24 20 also point out that when Claimants were asked this
21 week to what extent do those deposits belong to
22 Tobaccoville versus Grand River, we didn't hear a

1 ARBITRATOR ANAYA: Okay. So you're
2 saying different things here. It seems like now
3 you're saying they haven't shown there was an
4 investment.

5 MR. KOVAR: There's two issues.

6 ARBITRATOR ANAYA: Well, I mean, you're
7 saying different things, and you're avoiding the
8 question of whether or not you think this is an
9 investment by now saying that they haven't shown
15:05:34 10 this as an investment. But before you said this
11 is not an investment.

12 MR. FELDMAN: Right. That's what we
13 argued in our counter Memorial.

14 ARBITRATOR ANAYA: Yes, but when I
15 asked you, please elaborate why do you think it's
16 not an investment, you said because they haven't
17 shown us that it's not an investment.

18 MR. FELDMAN: Thank you. Professor
19 Anaya, the subparagraphs they put forward are
15:05:57 20 subparagraphs G and H.

21 PROFESSOR ANAYA: Okay.

22 MR. FELDMAN: So we can look at --

1 crisp response. We have seen no documentation,
2 again, of these amounts and these escrow deposits,
3 which appear to have been 29 million with the
4 Memorial, now they appear to be 50 million. We
5 don't know when these deposits were made, were
6 they made in 2004 when this claim was filed. We
7 don't have information on these deposits.

8 PRESIDENT NARIMAN: Surely, you can
9 find out from the -- I don't understand.

15:04:56 10 MR. FELDMAN: But, Mr. President, I
11 mean, this is Claimants' claim. They need to
12 establish their investment.

13 PRESIDENT NARIMAN: I'm not on
14 establishment. You said, I don't know. I cannot
15 find out.

16 Of course, you can find out if you want
17 to.

18 MR. KOVAR: Mr. President, these would
19 be bank accounts in the name of Grand River, and
15:05:10 20 they have not put in evidence of these bank
21 accounts. How can they make a claim of escrow
22 without showing us the bank account information?

1 let's look at G, real estate or other property
2 tangible or intangible, acquired in the
3 expectation or used for the purpose of --

4 PRESIDENT NARIMAN: Used.

5 MR. FELDMAN: -- for the purpose of
6 economic benefit or other business purposes.

7 Now, here we have Grand River on their
8 theory complying with a legal obligation to set
9 aside funds to be used for potential future
15:06:28 10 judgments or settlements. They're complying with
11 a legal obligation. We don't see that as falling
12 within subparagraph G.

13 ARBITRATOR ANAYA: Couldn't you say
14 that's for business purposes because it's
15 preconditioned under the statutory scheme for
16 doing business of the kind they want to do?

17 MR. FELDMAN: We see this as -- it's
18 like a payment of tax. It's a compliance with a
19 legal obligation. This isn't investing in a
15:06:52 20 factory.

21 ARBITRATOR ANAYA: But the states have
22 said this is not a tax; am I correct?

2293

1 MR. FELDMAN: That's correct. The
2 point being this is a manufacturer complying with
3 a domestic legal obligation.
4 MR. KOVAR: Mr. -- Professor Anaya,
5 even if you were to find that you thought it
6 complied with the terms, let's look at the record.
7 PROFESSOR ANAYA: Yes.
8 MR. KOVAR: If you have \$50 million on
9 deposit in the United States and you're asking
15:07:22 10 this Tribunal to find jurisdiction on that basis,
11 wouldn't you have put in the banking information?
12 Wouldn't you have shown the documents? Because
13 it's just as likely that Tobaccoville owns this
14 money.
15 ARBITRATOR ANAYA: Now, we understand
16 that point.
17 PRESIDENT NARIMAN: There's nothing in
18 the record. Okay.
19 MR. FELDMAN: For the reasons I've
15:07:48 20 discussed, each of Claimants' alternative
21 allegations of a Grand River investment in the
22 United States is without documentary basis and

2295

1 PRESIDENT NARIMAN: Yes. Yes, I see.
2 You are referring to the letter.
3 MR. FELDMAN: In our counter Memorial
4 we address the textual point of the two
5 subparagraphs.
6 PRESIDENT NARIMAN: But you have not
7 said they deposited 29 million or 50 million.
8 MR. FELDMAN: But, Mr. President, we
9 said again and again a failing to document their
15:09:04 10 claim, and this is, again, another example of
11 failing to document a claim.
12 ARBITRATOR ANAYA: Do you now contest
13 that they deposited this amount? I understand
14 you're saying they didn't document it and they
15 should have, but do you contest now --
16 MR. FELDMAN: Well, i mean, a key
17 question is, to what extent do these funds belong
18 to Grand River, to what extent do they belong to
19 Tobaccoville.
15:09:24 20 PRESIDENT NARIMAN: That's a good
21 point. That's a separate point. But you contest
22 that the group of Claimants, they have not

2294

1 fundamentally flawed.
2 PRESIDENT NARIMAN: I just want to know
3 from the Memorials, have you denied that there was
4 this escrow deposit?
5 MR. FELDMAN: Mr. President, we
6 responded in our counter Memorial on this point.
7 PRESIDENT NARIMAN: And you said that
8 we don't admit that there were such deposits?
9 Have you said that?
15:08:12 10 MR. FELDMAN: No, we simply say that
11 this kind of escrow deposit would not satisfy --
12 PRESIDENT NARIMAN: Ah, that's right.
13 That's not what Mr. Kovar is saying. Did you
14 saying anywhere that we deny or we put them to
15 strict proof that they have deposited because we
16 have no knowledge that they have deposited. Good
17 point. Then Mr. Kovar's point is correct, they
18 don't put anything in the record to satisfy that.
19 MR. FELDMAN: Right. We're approaching
15:08:36 20 -- I mean, there are two points here. One is the
21 textual point, and the other is simply the
22 evidentiary point.

2296

1 contested 29 of 50 million.
2 MR. FELDMAN: We just haven't seen
3 evidence of it.
4 ARBITRATOR ANAYA: So then you contest
5 it.
6 MR. FELDMAN: Yes.
7 PRESIDENT NARIMAN: Yes, that's right.
8 Sorry we took you off.
9 MR. FELDMAN: Okay. That's okay. I'm
15:09:55 10 summing up.
11 For the reasons I've discussed, each of
12 Claimants' alternative allegations of a Grand
13 River investment in the United States is without
14 documentary basis and fundamentally flawed.
15 First, with respect to Claimants' purported Grand
16 River NWS Association, which is alleged to be
17 constituted under the Seneca Nation Business Code,
18 that code does not provide for or govern the
19 establishment of business organizations under
15:10:17 20 Seneca Nation law. Second, with respect to the
21 alleged Grand River interest in the Seneca
22 trademark, that allegation is based on nothing

2297

1 more than Arthur Montour's bear assertions that he
2 holds the Seneca trademark for the benefit of the
3 Claimants in this arbitration.
4 The assertion is plainly inconsistent
5 with the evidence in the record concerning Grand
6 River's limited license to manufacture Seneca
7 cigarettes in Canada. And Claimants' own legal
8 expert is unable to determine whether
9 Mr. Montour's assertion refers to a moral
15:10:46 10 obligation or something more.
11 Third, with respect to Grand River's
12 alleged inventory-based line of credit, Claimants
13 have provided no documentary support for such a
14 line of credit which in any event would be
15 impossible according to the sworn testimony by the
16 President of Grand River in U.S. court
17 proceedings. That testimony makes clear that at
18 all times Grand River sells Seneca cigarettes to
19 Native Wholesale Supply, FOB Ontario, meaning the
15:11:13 20 title and risk of loss transfer in Canada, not the
21 United States.
22 Claimants' Grand River Jerry Montour

2299

1 MR. FELDMAN: As you can see on the
2 screen --
3 ARBITRATOR CROOK: Or perhaps not.
4 PRESIDENT NARIMAN: There's some
5 problem with the screen.
6 Okay, it's coming.
7 MR. FELDMAN: Thank you.
8 NAFTA Chapter 11 applies to measures
9 relating to investors of another party.
15:12:17 10 PRESIDENT NARIMAN: This is the second
11 part of it.
12 MR. FELDMAN: Yes, yes, and this will
13 be brief -- and/or investments of investors of
14 another party in the territory of the party.
15 Deposit obligations under the Escrow
16 Statutes apply only to tobacco product
17 manufacturers, as that term is defined under the
18 Statutes. So long as the manufacturer intends for
19 their cigarettes to be sold in the United States,
15:12:38 20 only the manufacturer and not in a U.S.-based
21 importer, distributor, or reseller qualifies as
22 tobacco product manufacturer under the Escrow

2298

1 and Kenneth Hill have failed to show that they
2 have an investment in the territory of the United
3 States and thus fail to qualify as investors under
4 Article 1101.1. Their claims should be dismissed
5 in their entirety.
6 The remaining Claimant, Arthur Montour,
7 does have an investment in the United States,
8 namely Native Wholesale Supply, as well as the
9 Seneca trademark, but Claimants have failed to
15:11:41 10 show that the Escrow Statutes relate to Arthur
11 Montour --
12 PRESIDENT NARIMAN: I'm sorry. What
13 according to you is Arthur Montour's investment
14 because you admit he has an -- according to you,
15 what is the investment of Arthur Montour?
16 MR. FELDMAN: Arthur Montour has an
17 enterprise, Native Wholesale Supply, and he has
18 intangible property, the Seneca trademark.
19 PRESIDENT NARIMAN: He has -- that's
15:12:00 20 how you put it.
21 MR. FELDMAN: Yes. Yes.
22 PRESIDENT NARIMAN: Okay.

2300

1 Statutes.
2 There is no question in this case --
3 indeed, it is one of Claimants' fundamental
4 allegations, that Grand River intends for its
5 cigarettes to be sold in the United States. Thus
6 there's no question that only Grand River and not
7 any U.S.-based distributor such as Native
8 Wholesale Supply qualifies as a tobacco product
9 manufacturer under the Escrow Statutes.
15:13:09 10 Accordingly, only Grand River and not
11 Native Wholesale Supply is subject to deposit
12 obligations under the Escrow Statutes. The Escrow
13 Statutes therefore do not relate to the owner of
14 Native Wholesale Supply, Arthur Montour, as
15 required under Article 1101.1.
16 In response Claimants' assert that,
17 "Obviously, all of the measures at issue in this
18 case are being applied to all of the Claimants."
19 In support of that representation,
15:13:37 20 Claimants assert that, "Currently, Arthur Montour
21 and NWS are personally facing three active
22 lawsuits under the Escrow Statutes of Idaho, New

2301

1 Mexico, and California." Neither of those
2 statements are correct.

3 The lawsuits brought by the states of
4 Idaho, New Mexico, and California have each been
5 brought under state complementary legislation, not
6 state Escrow Statutes.

7 As you can see, California's lawsuit
8 was brought under its tobacco directory law, which
9 is another name for California's complementary
10 15:14:09 legislation.

11 Idaho's complaint similarly was brought
12 under the state's complimentary act.

13 And New Mexico's lawsuit, likewise, was
14 brought under the state's directory law.

15 Unlike deposit obligations under the
16 Escrow Statutes which apply only to tobacco
17 product manufacturers as that term is defined, the
18 complementary legislation applies to any person
19 holds, owns, possesses, transports, or imports
10 15:14:33 cigarettes that the person knows or should know
21 are intended for distribution or sale in violation
22 of the statute.

2303

1 the states to monitor in this case the flow of
2 cigarettes.

3 PRESIDENT NARIMAN: That's where the
4 states says it stands alone, the complementary
5 legislation is legislation to further put forward
6 the -- what the Statutes wanted to do.

7 MR. FELDMAN: To assist -- to assist in
8 the enforcement.

9 PRESIDENT NARIMAN: To assist in the
10 15:16:04 enforcement. That is what it is inextricably
11 relate. If there was no statute there would be no
12 complementary legislation. That's why the phrase
13 complementary legislation -- that's why I want to
14 know -- if you are disputing that Arthur Montour
15 has no claim whatsoever against the Escrow
16 Statutes. I just want to understand your claim --

17 MR. FELDMAN: Yes, and the reasons for
18 that is that the Escrow Statutes apply only to
19 tobacco product manufacturers.

10 15:16:31 PRESIDENT NARIMAN: And he is not.

21 MR. FELDMAN: And he is not.

22 ARBITRATOR CROOK: Mr. Feldman, I'm

2302

1 As an owner, transporter, and importer
2 of such cigarettes, NWS is subject to the
3 complementary legislation and those measures
4 therefore relate to NWS and its owner, Arthur
5 Montour, but NWS is not subject to deposit
6 obligations under the Escrow Statutes, and thus
7 the Escrow Statutes does not relate to NWS and its
8 owner, Arthur Montour.

9 Accordingly, under Article 1101, the
10 15:15:05 claim of Arthur Montour challenging the Escrow
11 Statutes in either their original or amended form
12 should be dismissed. Arthur Montour's claim
13 should be permitted to go forward only to the
14 extent it challenges the complementary
15 legislation.

16 PRESIDENT NARIMAN: I didn't follow
17 this. The complementary legislation is
18 complimentary to the Escrow Statutes, I thought.

19 MR. FELDMAN: That's correct. We've
10 15:15:26 heard testimony from the state Attorneys General
21 this week that the complementary legislation also
22 stands alone as a public health provision allowing

2304

1 sorry to go back and belabor the issue of the
2 escrow payments, but I just pulled up Claimants'
3 reply going through their rebuttal arguments on
4 jurisdiction, and the only reference I see to the
5 escrow obligations is in Paragraph 98, which says
6 that with Grand River's assistance, Tobaccoville
7 has borrowed approximately \$5 million to fund its
8 post Allocable Share Amendment escrowed
9 obligations as well as an additional \$6 million in
10 15:17:07 2008. And it goes onto explain that Grand River
11 assisted in this by taking a subordinate position
12 in inventory that was held by Tobaccoville, and
13 that the Claimants go on: This may not in and of
14 itself constitute investment in the territory of
15 the United States, I wonder, do you have a
16 judgment on that? Is taking a subsidiary position
17 in inventory held by your distributor -- is that
18 an investment.

19 MR. FELDMAN: According to Claimants,
10 15:17:41 it is not and we would not dispute them on that
21 point.

22 MR. KOVAR: Mr. Crook, just to be

2305

1 clear, that inventory that they're talking about,
 2 they can't take a subordinate position in it
 3 because Grand River doesn't own it anymore they
 4 sold it FOB Ohsweken Ontario. They can't use it
 5 in the way that they're claiming they use it.
 6 Again, they're trying to have it both ways. It's
 7 gone. It's owned by Tobaccoville.
 8 PRESIDENT NARIMAN: Is Tobaccoville a
 9 Claimant?
 10 15:18:17 MR. FELDMAN: No, they're not.
 11 ARBITRATOR ANAYA: If you don't mind I
 12 would like to go back to the point that President
 13 Nariman was raising.
 14 I understand the argument or I
 15 understand that it is not Native Wholesale Supply
 16 that's legally obligated to deposit the escrows,
 17 but are we to equate such a legal obligation with
 18 the phrase related to.
 19 MR. FELDMAN: Thank you Professor
 15:18:52 20 Anaya.
 21 I think the Methanex case is
 22 instructive on them.

2307

1 talking about a relation, or an alleged relation,
 2 that arises from the structure of the market as
 3 opposed to here where the relation arises from the
 4 legal connections within a statutory scheme,
 5 within a single statutory arrangement?
 6 MR. FELDMAN: Right. I think the way
 7 that we would analyze it is that, with respect to
 8 the Escrow Statutes, the question is, who is
 9 subject to the escrow obligation, and in this case
 10 15:20:29 that's Grand River.
 11 ARBITRATOR ANAYA: No, I understand
 12 that. I mean, that's the difference, but I'm not
 13 sure it gets us -- it seems the terms related to
 14 if it was meant to apply so strict terms,
 15 different terminology would have been used.
 16 Relating to, if it's a single statutory scheme or
 17 sufficiently integrated statutory scheme an
 18 investor applies to one part of it and it's
 19 affected by the other, why isn't that related to?
 15:20:54 20 It's not simply by virtue of the structure of the
 21 market itself and business relationships that
 22 arise organically apart from the statutory scheme.

2306

1 In Methanex, the measure at issue was a
 2 ban on a gasoline oxygenate, and the Claimant
 3 manufactured a component of that oxygenate and the
 4 Tribunal found that the challenged machine it not
 5 relate to the Claimant because the ban -- they
 6 were not subject to the banned. They were
 7 certainty affected by it, but the ban was for an
 8 oxygenate. They did not manufacture the
 9 oxygenate; they merely manufactured a component.
 10 15:19:23 So, the NAFTA cases have been helpful
 11 in bringing out that simply being affected by a
 12 measure is not enough. You need tub subject to
 13 the measure, and the Claimants agree with that,
 14 and Claimants have argued, and we have on the
 15 slide here that their position is that all of the
 16 Claimants have -- that all of the challenged
 17 measure have been applied to all of the Claimants
 18 in this case, and in fact, as we discussed, that's
 19 just not the case.
 15:19:50 20 ARBITRATOR ANAYA: I recall your
 21 discussion in the Methanex case in your briefs,
 22 but isn't there a difference that there you're

2308

1 MR. FELDMAN: Right. The Methanex case
 2 is helpful in using terminology of a legally
 3 significant connection, in terms of what is
 4 relating to demand. There need to be a legally
 5 significant connection.
 6 ARBITRATOR ANAYA: That's my point.
 7 The legally significant connection here is in the
 8 relationship between the complimentary statutes
 9 and the Escrow Statutes as opposed to simply
 10 15:21:24 market conditions dictating the relationship.
 11 MR. FELDMAN: Right. And I think the
 12 way we would analyze Escrow Statutes is again,
 13 where are those -- to whom are the escrow
 14 obligation attaching.
 15 ARBITRATOR CROOK: Just in answer to
 16 further thinking about Professor Anaya's question,
 17 which is a very interesting one, isn't that the
 18 Internet case? Wasn't that the issue that was
 19 presented there? Did not the gentleman who was
 20 15:21:48 selling by Internet off the reservation in upstate
 21 New York --
 22 MR. FELDMAN: The Scott Maybee.

2309

1 ARBITRATOR CROOK: Yes, Scott, did he
2 not make essentially this argument, that he could
3 not be subjected to the contraband or
4 complementary legislation because he wasn't
5 subjected to escrow, and what did the court do
6 with that?

7 MR. FELDMAN: Thank you, Mr. Crook.
8 Correct. Recently, in the Scott Maybee
9 decision in Idaho the court was very clear that
10 the complementary legislation stands alone, and so
11 that, certainly while the complementary
12 legislation is assisting in the enforcement of the
13 Escrow Statutes, it does have its own identity
14 separate from them.

15 ARBITRATOR ANAYA: That's an argument
16 on this, but I see that as a very different
17 context. He's being prosecuted under the
18 complimentary statutes.

19 MR. FELDMAN: Yes, and here we have
15:22:44 20 Native Wholesale -- claims being brought by Native
21 Wholesale under the complimentary statutes, as
22 well.

2311

1 Thank you.
2 PRESIDENT NARIMAN: Thanks very much.
3 MR. KOVAR: Mr. President, can I ask if
4 you would invite Mr. Sharp to address you on
5 damages.
6 PRESIDENT NARIMAN: At a convenient
7 time, 15 or 20 minutes, you can stop. We're going
8 to have a tea break.
9 MR. SHARPE: Thank you. That's halfway
10 through.
11 Thank you, Mr. President and members of
12 the Tribunal. I will now address Claimants'
13 failure to prove their damages claim.
14 Yes, and this portion of our
15 presentation addresses confidential business
16 information, although I guess this is
17 Mr. Kaczmarek, our damages expert, in the back,
18 but I don't think there are any members of the
19 public here.
15:24:45 20 (End of open session. Confidential
21 business information redacted.)
22

2310

1 Okay. Thank you.
2 PRESIDENT NARIMAN: Thank you.
3 MR. FELDMAN: For the reasons I
4 discussed, Claimants Grand River, Jerry Montour,
5 and Kenneth have failed to demonstrate that they
6 have an investment in the United States and thus
7 do not qualify as investors under Article 1101.1.
8 Given that failure to meet fundamental
9 jurisdictional requirements under NAFTA Chapter
10 11, their claims should be dismissed in its
11 entirety.
12 With respect to the remaining Claimant,
13 Arthur Montour, Claimants have failed to
14 demonstrate that the Escrow Statutes relate to him
15 as required by Article 1101.1, and thus his claim,
16 to the extent it challenges those measures, should
17 be dismissed.
18 And again, we raise no objection under
19 Article 1101 concerning Arthur Montour's claim
15:23:34 20 with respect to the complementary legislation,
21 although we do of course challenge that claim on
22 the merits.

2312

1 CONFIDENTIAL SESSION
2 MR. SHARPE: In this arbitration,
3 Claimants seek up \$268 million in damages, but
4 they made no serious effort to prove their claim.
5 They dedicated three cursory paragraphs of their
6 reply to damages. They virtually ignored the
7 issues during that merits hearing and as you know,
8 at the last minute they dropped their
9 cross-examination of the United States damages
10 expert who was here and available to testify.
11 PRESIDENT NARIMAN: Who did they drop?
12 MR. SHARPE: Mr. Kaczmarek, the United
13 States damages expert in this case.
14 I plan to discuss what Claimants were
15 required to prove as well as their failure to
16 carry that burden of proof. And let me please
17 begin with the legal standard.
18 Under Articles 1116 and 1117 of the
19 NAFTA, Claimants must prove that their investments
15:25:39 20 have incurred loss or damage by reason of or
21 arising out of a specific breach of the NAFTA.
22 Chapter 11 Tribunals have confirmed

2313

1 that compensable losses must be proximately caused
 2 by the breach complained of and cannot be
 3 excessively speculative.
 4 The S.D. Myers Chapter 11 Tribunal
 5 confirmed that, "The burden is on the Claimant,
 6 SDMI, to prove the quantum losses in respect of
 7 which it puts forward its claims."
 8 It added, "Compensation is payable only
 9 in respect of harm that is proved to have a
 10 sufficient causal link with the specific NAFTA
 11 provision that has been breached." The economic
 12 losses claimed by SDMI must be proved to be those
 13 that have arisen from a breach of the NAFTA and
 14 not from other causes.
 15 The ADM Chapter Eleven Tribunal added,
 16 "Any determination of damages under principles of
 17 international law require a sufficiently clear,
 18 direct link between the wrongful act and the
 19 alleged injury in order to trigger the obligation
 20 to compensate for such injury."
 21 We submit that these points are not
 22 disputed by the parties.

15:26:20
 15:26:53

2315

1 scenario, Mr. Wilson assumed that Grand River and
 2 NWS would double their on-Reservation market in
 3 the first four years of the forecast and then
 4 double it again every eight years, forever, even
 5 overtaking sales of Marlboro and Camel cigarettes.
 6 Based on this "modest growth rate" as Mr. Wilson
 7 calls it, he initially estimated that Claimants
 8 would suffer about \$248,700,000 in damages.
 9 Now, below that is the no-growth
 10 scenario which assumed a steady stream of
 11 cigarette sales forever, despite a declining U.S.
 12 market of cigarettes of 2 to 4 percent every year.
 13 Based on this assumption, Mr. Wilson estimated
 14 that Claimants would suffer about \$173,600,000 in
 15 damages.
 16 MR. VIOLI: Mr. Chairman can, I ask
 17 where in the record the reference is? That's all,
 18 I want to search the reference so I can follow.
 19 The reference to Marlboro and projecting sales
 20 greater than Marlboro or Camel. I just need that
 21 reference.
 22 MR. SHARPE: You can look at Navigant's

15:28:36
 15:29:04

2314

1 Claimants here have failed to prove
 2 that they suffered any damages, let alone that a
 3 breach of the NAFTA clearly and proximately caused
 4 the damages they alleged.
 5 Claimants' valuation methodologies are
 6 inappropriate; their calculations are demonstrably
 7 flawed; and the evidence they presented is
 8 inadequate, unauthenticated, uncorroborated
 9 inconsistent, and even, at times, contradictory.
 10 This is plainly evident, we submit, from the
 11 damages report prepared for the Claimants by
 12 Mr. Wilson.
 13 On the screen is the table from
 14 Navigant's rebuttal report that sets out the
 15 changes in Mr. Wilson's calculations, from his
 16 first to his second report. We saw this table
 17 last week during the cross-examination of
 18 Mr. Wilson.
 19 As you know, Mr. Wilson's primary
 20 damages estimate decreased dramatically from his
 21 first to his Second Expert Reports. At the top of
 22 this table is the growth scenario, and under that

15:27:28
 15:27:53

2316

1 First Report at Paragraph 120.
 2 PRESIDENT WARIMAN: Go on.
 3 MR. SHARPE: Thank you, Mr. President.
 4 In his Second Report, Mr. Wilson
 5 reduced those figures to about \$97.2 million in
 6 the growth scenario and the \$74.9 million in the
 7 no-growth scenario.
 8 And as Mr. Wilson slashed Claimants'
 9 principle damages claim by about 60 percent, or by
 10 \$100 to \$150 million. Why? Because Navigant
 11 pointed out four errors, serious errors, in
 12 Mr. Wilson's damages to calculations.
 13 The flaw number one, Mr. Wilson grossly
 14 misstated the profits Claimants' earned by
 15 ignoring costs of manufacturing and distributing
 16 cigarettes for on-Reservation sales.
 17 This graphic from Navigant's expert
 18 report compares Navigant's on-Reservation profit
 19 estimates under MCI on the left, with Mr. Wilson's
 20 estimates on the right. [REDACTED]
 21 [REDACTED]
 22 [REDACTED]

15:29:32
 15:30:07

2317

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 15:30:49 10 [REDACTED]
 11 [REDACTED]
 12 As he testified last week, it's largely
 13 because Mr. Wilson calculated Claimants' profit
 14 without assuming any costs incurred by NWS.
 15 Mr. Wilson claims he didn't realize NWS would
 16 incur this cost, apparently because NWS told him
 17 as much. He testified "When we talked to NWS
 18 initially, it did not appear that there were
 19 really variable costs of any substance."
 15:31:22 20 We find this inexplicable, given
 21 Mr. Wilson's testimony, that, "The financial
 22 statements we received from NWS included some

2319

1 pointed out that Mr. Wilson had failed to account
 2 for costs totalling \$4.67 per carton. Correcting
 3 for this single error caused Mr. Wilson to reduce
 4 Claimants' damages claim by \$76 million.
 5 As noted, and as you can see in orange,
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 15:33:13 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 So, correcting for this mistake caused
 16 Mr. Wilson to reduce Claimants damages claim by a
 17 further \$36 million.
 18 Flaw number two: Mr. Wilson projected
 19 lost cigarette sales based on GRR's 2005 sales
 15:33:41 20 figures, but as we discussed last week he failed
 21 to account for the usual spike in off-Reservation
 22 cigarette sales in the fourth quarter of 2005.

2318

1 detailed cost breakdowns."
 2 Navigant, of course, didn't have the
 3 advantage of discussing NWS's operations with
 4 management but it was obvious that NWS would incur
 5 costs. What business doesn't incur cost?
 6 Mr. Wilson went on to testify, "We
 7 continued that communication with NWS concerning
 8 costs after we got Mr. Kaczmarek's report and
 9 identified some costs."
 15:31:57 10 Again, it's rather surprising that a
 11 valuation expert would require another valuation
 12 expert to tell him he can't calculate profits
 13 unless you account for the cost of doing business
 14 -- all cost: Variable cost, fixed cost, taxes.
 15 ARBITRATOR CROOK: Mr. Sharp, excuse
 16 me, do I understand correctly then that
 17 Mr. Wilson's First Report left out the cost of the
 18 cigarettes that NWS was then distributing? Is
 19 that one of the variable costs he left out?
 15:32:27 20 MR. SHARPE: He didn't cover any costs
 21 of any sort, direct cost, variable cost.
 22 Now, returning to the graphic, Navigant

2320

1 Towards the end of 2005, purchasers stocked up on
 2 cigarette sales in anticipation of large cost
 3 increases beginning in 2006, and this spike skewed
 4 Mr. Wilson's forecast for off-Reservation sales.
 5 As you can see from the slide prepared
 6 by Navigant, Navigant made a 25 percent reduction
 7 in 2005 sales to account for these accelerated
 8 purchases.
 9 In his Second Report, Mr. Wilson
 15:34:15 10 acknowledged the accelerated purposes but rather
 11 than reducing its forecast by 25 percent, he
 12 reduced it by 18 percent. In any event, even
 13 18 percent reduction caused Mr. Wilson to reduce
 14 Claimants' damages claim.
 15 PRESIDENT NARIMAN: What is the measure
 16 of damages according to you in a case like this?
 17 Forget all this, Wilson said this and he later he
 18 amended it. What should be the measure of
 19 damages?
 15:34:41 20 MR. SHARPE: I think it's very
 21 difficult to say in this case, because of the --
 22 PRESIDENT NARIMAN: No, what is the

2321

1 measure -- the true measure of damages means what
2 you would have sold or earned or -- what is the
3 measure?

4 MR. SHARPE: The measure of damages for
5 the investment is precisely the difficulty of
6 quantifying. This was Navigant's struggle during
7 their First Report. They said, what are we trying
8 to evaluate? You have said that your investment
9 is NWS plus some portion of GRE's sales in the
15:35:06 10 United States, but they're doing it backwards.
11 They've tried to identify losses and then they've
12 constructed their investment around those losses.

13 And as Navigant pointed out, this is
14 totally contrary to the way --as Navigant pointed
15 out, this is very odd, and I think in response to
16 Mr. Crook's question last week to Mr. Wilson, he
17 acknowledged that he's never seen a case like
18 this.

19 ARBITRATOR ANAYA: And specifically
15:35:31 20 refresh me on this, what are the losses
21 attributable to, allegedly?

22 MR. SHARPE: I'm sorry. Could you --

2323

1 forward.

2 Now, we'll get to the two problems with
3 this. One is, the Seneca brand as the investment
4 and the second is the causation issue, but if I'm
5 not mischaracterizing Claimants' arguments, that's
6 my understanding of their essential damages claim.

7 ARBITRATOR ANAYA: Do you -- you will
8 address the causation.

9 MR. SHARPE: Yes. Thank you, Professor
15:37:02 10 Anaya.

11 If we could move on, flaw number three,
12 Mr. Wilson projected lost on-Reservation cigarette
13 sales from 2006 figures, but as he acknowledged
14 last week, in testimony, he failed to account for
15 actual cigarette sales when projecting so-called
16 lost sales.

17 As you can see from the slide, there
18 was significant on-Reservation sales and indeed
19 sales increases in 2007 in Idaho, Nevada, and as
15:37:32 20 we'll see on the following slide, in California.

21 In Nevada, for instance, Mr. Wilson
22 calculated damages over \$31 million for lost sales

2322

1 ARBITRATOR ANAYA: What are the lost
2 profits attributable to allegedly, according to
3 the Claimants, as you understand it.

4 MR. SHARPE: Yes, as I understand
5 Claimants' claim, Claimants are alleging that
6 their investment is the Seneca brand in the United
7 States, and lost profits on their sales is the
8 proxy for the damage to their brand.

9 ARBITRATOR ANAYA: Lost profits as a
15:36:04 10 result of?

11 MR. SHARPE: The challenged measures.

12 ARBITRATOR ANAYA: By what mechanics?

13 I guess I'm trying to understand what the
14 mechanics are, the measures would affect this.
15 You referred to the causation factor so what is
16 the alleged causation as you understand it.

17 MR. SHARPE: As I understand it, the
18 Claimants assert that the challenged measures in
19 this case caused 100 percent of the lasted sales
15:36:28 20 to the Seneca brand, and so the measure of damages
21 for Claimants is all of their lost sales in the
22 United States based on their forecast going

2324

1 from 2003 to 2008, but Claimants' own data shows
2 that sales in Nevada remained reasonably steady
3 during that time. Claimants in fact now no longer
4 seek any damages for so-called lost sales in
5 Nevada from 2003 to 2008.

6 Likewise, as you can see from this
7 slide, which is taken from Mr. Wilson's rebuttal
8 report, Claimants' on-Reservation sales increased
9 in California every year since 2004 from 18
15:38:10 10 million cigarettes to 39 million to 80 million
11 cigarettes to 88 million cigarettes, and then
12 sales -- sorry, Professor.

13 PRESIDENT NARIMAN: Despite the
14 amendments which they complain about --

15 MR. SHARPE: Precisely.

16 PRESIDENT NARIMAN: -- their sales,
17 instead of being reduced, kept an even keel. That
18 means even in terms of that percentage they remain
19 the same.

15:38:32 20 MR. SHARPE: You said despite the
21 amendments but you might even say because of the
22 amendment, right? The effect of the challenged

2325

1 measures increased prices off-Reservation. Why
 2 are people going on-Reservation to buy these
 3 cigarettes? It's precisely because they're
 4 cheaper, and so -- it's not -- you could say it's
 5 not to spite but because of.

6 PRESIDENT NARIMAN: Because.

7 MR. SHARPE: Now, Mr. Wilson hasn't
 8 taken it into account and Navigant hasn't factored
 9 this into its damages analysis but Navigant has
 15:38:58 10 raised this as a concern.

11 Mr. Wilson has acknowledged his mistake
 12 and he dropped Claimants' so-called lost profits
 13 for California and he accounted for actual sales
 14 in Nevada and Arizona and Idaho, and this reduced
 15 Claimants' damages claim by a further \$15 million.

16 Now, you heard last week Mr. Wilson say
 17 that this was a mere oversight. He said that mere
 18 hours before he completed his July 2008 report,
 19 Claimants finally supplied him with historical
 15:39:25 20 on-Reservation sales information. This is what he
 21 said:
 22 "And then, finally, if you actually

2327

1 In addition, I would point you to the
 2 bottom of the page where it says "interviews with
 3 NWS, GRE, and Tobaccoville personnel." Our
 4 question is, did Mr. Wilson fail to ask Claimants
 5 in Tobaccoville about on-Reservation sales before
 6 submitting its report and, even more curiously,
 7 did Claimants fail to read Mr. Wilson's report
 8 before submitting it and claiming these are
 9 improper claiming for the sales.

15:40:55 10 Second, Mr. Wilson submitted a revised
 11 version of his First Report, one month after he
 12 submitted his initial report. On the screen is a
 13 letter from Claimants' counsel to the United
 14 States --

15 PRESIDENT NARIMAN: Was that after your
 16 report?

17 MR. SHARPE: One month after his own
 18 report.

19 PRESIDENT NARIMAN: His own report?

15:41:12 20 MR. SHARPE: Yes, he says, we received
 21 this information in the last hours and we would
 22 have incorporated it and we intended to

2326

1 look through the text of the original report, when
 2 we discuss the on-Reservation sales, there is a
 3 line at the end of the paragraph that indicates
 4 they're offset by actual sales that occurred. Due
 5 to a last hour change we did not do that offset,
 6 so there's significant change because of something
 7 we intend to do and ended up not getting done,
 8 because we didn't get the data at the time to be
 9 able to do it."

15:39:56 10 This explanation we submit is
 11 demonstrably false for two reasons.

12 First, it contradicts Mr. Wilson's own
 13 report. I put appendix B on the screen to
 14 Mr. Wilson's First Report which lists the
 15 documents he reviewed in preparation of his
 16 report. The six bullet points states, "NWS sales
 17 reports, 2000 to 2007." Note that this is the
 18 precise data that Navigant looked at but Navigant
 19 observed there --

15:40:28 20 PRESIDENT NARIMAN: So he had that data
 21 with him.
 22 MR. SHARPE: Yes.

2328

1 incorporate it but unfortunately, apparently, we
 2 didn't have time.

3 So here's a letter from August 7, 2008,
 4 or about one month after Mr. Wilson submitted his
 5 July 10th expert report.

6 It states: "Dear Mark, I enclose three
 7 disks that contain the following: Materials for
 8 Gordius Consulting" -- that's Mr. Wilson's
 9 then-employer, as he acknowledged -- "two,
 15:41:40 10 materials from Micra, and three, revised expert
 11 report of Gordius Consulting. The revised Gordius
 12 report reflects the correction of any calculation
 13 errors discovered by Gordius during the process of
 14 post submission quality control. Any changes made
 15 in the numbers are reflected in the relevant
 16 tables and carried through the report."

17 If you then look at Exhibit 7, revised
 18 to Mr. Wilson's First Report, we see that
 19 Mr. Wilson continued to claim more than \$123
 15:42:11 20 million dollars for so-called lost profits
 21 on-Reservation, including in California and
 22 Nevada.

2329

1 So, even if Mr. Wilson actually
 2 received Claimants' on-Reservation sales
 3 information mere hours before he submitted his
 4 first report, we find it in excusable for him not
 5 to have corrected that in his Second Report one
 6 month later.
 7 Even more extraordinary, we find, is
 8 Mr. Wilson's explanation last week for his failure
 9 to make this correction. He testified, "And we
 10 would have accounted for actual sales in the
 11 revision but we knew we would have a rebuttal so
 12 there was very little point in just providing more
 13 documents that we knew would likely change when we
 14 had to respond to Mr. Kaczmarek's evaluations of
 15 our damages.
 16 Consider the implications of this
 17 statement. Mr. Wilson knew that there was error
 18 in excess of \$50 million in his damages
 19 calculation which he had every opportunity to
 20 correct in his revised first report but he
 21 consciously chose not to make the correction
 22 because, in his words, there was very little

15:42:41
15:43:08

2331

1 for investments in the territory of the host
 2 state.
 3 Mr. Feldman also noted the ADM Case,
 4 which in the award at Paragraph 273, states as
 5 follows:
 6 "Under Article 1101.1" --
 7 PRESIDENT NARIMAN: Your point 3 is
 8 very significant. You have said they failed to
 9 consider actual sales figures when projecting lost
 10 sales; that's very significant.
 11 MR. SHARPE: That's correct. We
 12 consider it very significant, yes.
 13 ADM. "Under Article 11 1011 of the
 14 NAFTA the only investments covered by Chapter
 15 Eleven are investments made in the territory of
 16 the host state, and Chapter 11 Tribunals have
 17 rejected claims for damages to investments made
 18 outside of the territory of the host state even if
 19 those investments were designed to serve markets
 20 in the host state. This means that the protection
 21 applies to measures relating to investments of
 22 investors of one party that are in the territory

15:44:33
15:45:03

2330

1 point.
 2 PRESIDENT NARIMAN: He would do it in
 3 rebuttal.
 4 MR. SHARPE: He would do it in
 5 rebuttal.
 6 In our opinion, this submission casts
 7 serious doubt on Mr. Wilson's credibility as a
 8 damages's expert.
 9 Mr. Wilson's testimony last week also
 10 highlighted problems with the Claimants' so-called
 11 investment in markets claim. As you will recall,
 12 Claimants initially sought \$38 million dollars for
 13 equipment in Canada which they purchased to serve
 14 the U.S. market solely.
 15 As initial matters, Mr. Crook observed
 16 last week a Claimant can't claim for last profits
 17 and for the equipment used to generate those lost
 18 profits, as that constitutes double accounting.
 19 Mr. Crook also identified today this is
 20 inconsistent with the Bayview and Canadian
 21 cattlemen cases which established that under NAFTA
 22 Chapter 11, Claimants can only recover for damages

15:43:31
15:44:00

2332

1 of the party that has adopted or maintained such
 2 measures."
 3 "In a case such as the one at bar.
 4 This would exclude investments of ADM and TLIA
 5 located outside of Mexico, even if such
 6 investments are destined to promote fructose sales
 7 in Mexico."
 8 But even if we set aside these two
 9 fundamental problems that Mr. Crook identified,
 10 Claimants failed to demonstrate that the equipment
 11 was purchased solely to serve the U.S. market and
 12 that it couldn't be used for other markets.
 13 PRESIDENT NARIMAN: I want to know,
 14 what does this mean, failed to consider actual
 15 sales figures when projecting lost sales?
 16 According to you, what does that show?
 17 MR. SHARPE: Mr. Wilson initially
 18 projected lost sales --
 19 PRESIDENT NARIMAN: I know, but what
 20 does it show? If he failed to consider actual
 21 sales figures and put lost sales without
 22 considering actual sales figures what would you

15:45:36
15:46:01

2333

1 say so such a report?
 2 MR. SHARPE: If you're calculating
 3 damages for lost sales in California, for
 4 instance, but you haven't actually suffered any
 5 lost sales, then you have -- you're whole damages
 6 report is intrinsically flawed. You have to look
 7 at whether you've made sales. Mr. Wilson assumed
 8 zero sales on the assumption -- because he
 9 believed that there were no sales in those states,
 15:46:32 10 yet his report says he looked at NWS sales
 11 information 2000 to 2007. How could he not have
 12 observed, as Navigant did, that there were sales
 13 in California, Nevada, and other states during
 14 that time? This is a very serious flaw in his
 15 report.
 16 PRESIDENT NARIMAN: Yes it is.
 17 MR. SHARPE: Returning to the
 18 investment in markets, on the screen is an e-mail
 19 to Grand River from Sandra Weisbrod, a senior
 15:47:01 20 manager at Mr. Wilson's firm. She states, quote
 21 --
 22 PRESIDENT NARIMAN: Whose Seneca

2335

1 quickly in talking to the accountants that the
 2 train had gone off the tracks and that their
 3 understanding of what incremental costs were not
 4 what I needed it to be."
 5 So apparently --
 6 PRESIDENT NARIMAN: That maybe a
 7 characterization of his report, also, gone off the
 8 track.
 9 MR. SHARPE: We believe that's the
 15:48:33 10 case.
 11 Apparently, Mr. Wilson learned very
 12 quickly that Claimants had erroneously sought to
 13 recover millions of dollars which they were not
 14 entitled. He thus reduced this portion of
 15 Claimants' damages claim from \$38 million to \$24
 16 million. But despite Mr. Wilson's claims to have
 17 received additional, justifying this \$24 million
 18 claim, Claimants still haven't introduced any
 19 evidence showing that this equipment was purchased
 15:48:57 20 solely to serve the U.S. market.
 21 PRESIDENT NARIMAN: Is it convenient or
 22 are you going to finish?

2334

1 trademark is this?
 2 MR. SHARPE: Ms. Weisbrod is a
 3 colleague of Mr. Wilson from his firm. She is
 4 sending an e-mail to the Claimants:
 5 "We are still waiting on the discussion
 6 on the 2002 invoices not yet found for the
 7 equipment listed below. I need to know whether
 8 this equipment was purchased solely to meet the
 9 needs of the U.S. market or if GRE would have
 15:47:30 10 purchased said equipment for plant efficiency,
 11 economies of scale, normal non-U.S. growth, et
 12 cetera."
 13 In Second Report, Mr. Wilson states,
 14 "Upon further investigation and having received
 15 additional data, I concur that the appropriate
 16 investment value of the incremental fixed asset
 17 cost is lower just above USD 24 million. Now,
 18 during cross-examination, here's how Mr. Wilson
 19 described the process: "It was simply a matter we
 15:48:04 20 had additional conversations more or less
 21 confirming that that 38 million was what we
 22 expected it to be and it became clear to me very

2336

1 MR. SHARPE: If you could give me a
 2 couple of --
 3 PRESIDENT NARIMAN: No, no problem.
 4 Five minutes more.
 5 MR. SHARPE: Just a couple more minute
 6 and then we'll be at a convenient spot, just about
 7 halfway.
 8 Mr. Wilson, in fact, acknowledged last
 9 week that there is no such evidence in the record.
 15:49:21 10 I'll quote this exchange.
 11 "QUESTION: Did you produce evidence
 12 that would allow the Tribunal independently to
 13 determine the \$24 million claimed for this
 14 equipment is solely to serve the U.S. market?"
 15 "ANSWER: I'm not sure how I would do
 16 that. You know, that's a nice theory."
 17 "QUESTION: So in theory it would be
 18 nice if there were documents that showed that this
 19 equipment exclusively served the U.S. market but
 15:49:44 20 to your knowledge there are no documents that
 21 demonstrate that this equipment exclusively serves
 22 the U.S. market."

2337

1 "ANSWER: I don't think there would
2 ever be that kind of information for any asset. I
3 don't have that piece of information because in
4 fact there would never be that piece of
5 information unless someone saw fit to create it
6 and say, we need to buy this for the U.S. market."
7 "QUESTION: Did someone see fit in this
8 case, to your knowledge, to put in a report
9 saying, I met with Mr. Wilson, I work for GRE, and
15:50:10 10 I can attest that this equipment exclusively
11 serves the U.S. market for the following reasons."
12 "ANSWER: I don't know the answer to
13 that question."
14 There is, in fact, nothing in the
15 record whether testimonial or documentary evidence
16 showing that this equipment exclusively serves the
17 U.S. market, nor have Claimants introduced any
18 evidence demonstrating they couldn't sell this
19 equipment or use it for their other markets,
15:50:35 20 including for those U.S. states in which their
21 sales are flourishing, such as California and New
22 York.

2339

1 establish the \$24 million claim, why did he
2 advance it? And he answered as follows: "The
3 first and easiest answer is I was instructed by
4 counsel that they needed that number, that that
5 was part of the legal claim that I referred to
6 probably quite inarticulately as being their
7 personal investment and I can't really take it
8 beyond."
9 It's surprising that an independent
15:52:11 10 expert would support a damages claim that he knew
11 couldn't be supported by evidence simply because
12 he had been instructed by counsel to produce a
13 number.
14 PRESIDENT NARIMAN: This is an answer
15 to what question?
16 MR. SHARPE: This was answer to a
17 question put to Mr.
18 PRESIDENT NARIMAN: No, the question.
19 Have you got that?
15:52:37 20 MR. SHARPE: Yes, I have.
21 PRESIDENT NARIMAN: 635.
22 MR. SHARPE: Okay. Thank you.

2338

1 In fact, during Mr. Wilson's testimony,
2 he highlighted this very flaw in Claimants' case.
3 He said, "And I would go so far as to say I think
4 the Arbitration Tribunal should probably look at
5 that \$24 million roughly and evaluate what amount
6 that you feel is relevant to what they don't have
7 anymore. In other words, relevant to the markets
8 that they lost. It's virtually impossible for me
9 to do that because, for instance, the 100s maker
15:51:11 10 that I talked about earlier makes 100s cigarettes.
11 You sell those in New York but you also sell them
12 in Arizona. Clearly, you can't sell them in
13 Arizona anymore, but you can still sell them in
14 New York. So, some portion of that asset probably
15 hasn't been lost, and it's just impossible because
16 I can't evaluate from the Tribunal's standpoint
17 what percentage of that value is relevant to the
18 loss of the Arizona market, of the Nevada Market,
19 of the Idaho market, of the five original states
15:51:39 20 off-Reservation."
21 Given Mr. Wilson's acknowledgement that
22 it was impossible for him as a valuation expert to

2340

1 The specific question was by Mr. Crook,
2 and this goes to the investments in market and the
3 double counting of why he put forward this claim.
4 He said, Mr. Crook stated -- "Now, I have always
5 been taught by experts like you that you can't do
6 that, that you can either claim for the discounted
7 value of lost profits or you can claim for the
8 loss of investment, but to do otherwise is double
9 counting. Now, can you explain to me why it's not
15:53:17 10 double counting here?"
11 PRESIDENT NARIMAN: Okay. Are you
12 halfway?
13 MR. SHARPE: I think we can stop here
14 and I'll take it up after the break.
15 PRESIDENT NARIMAN: 10 past 4:00.
16 (Whereupon, at 3:53 p.m., the hearing
17 was adjourned until 4:10 p.m., the same day.)
18 MR. SHARPE: Thank you, Mr. President.
19 I just wanted to quickly summarize the
16:11:09 20 main errors that Mr. Wilson acknowledge in his
21 second report before I get to the principle
22 problems of his report.

2341

1 As you can see from the next slide,
2 after Navigant pointed out these four errors that
3 Mr. Wilson made he had to reduce the Claimants'
4 damages claim by 61 percent in the growth scenario
5 and 57 percent in the no-growth scenario or by
6 about \$100 to \$150 million.

7 PRESIDENT NARIMAN: This second report
8 was within one month, you say?

9 MR. SHARPE: No, no. That was the
16:11:45 10 revision to Mr. Wilson's first report.

11 PRESIDENT NARIMAN: The revision. So,
12 when was the second report, after your --

13 MR. SHARPE: Yes, after Navigant
14 submitted its first report, Mr. Wilson --

15 PRESIDENT NARIMAN: Can you give us a
16 date of first report.

17 MR. SHARPE: Mr. Wilson's first report
18 was July 10, 2008.

19 PRESIDENT NARIMAN: July, 2008. And
16:12:05 20 second report, roughly?

21 MR. SHARPE: His second report was
22 March 3, 2009.

2343

1 errors, including overstating so-called lost
2 sales, understating actual sales, miscalculating
3 the discount rate, and misallocating costs between
4 their U.S. and Canadian operations.

5 Navigant's supporting evident maintains
6 unchallenged and thus unrebutted in this case.

7 Correcting for these additional
8 problems reduced Mr. Wilson's revised damages
9 estimate from \$97 million to zero dollars.

16:13:59 10 Claimant simply had not demonstrated that they
11 suffered any damages as a direct result of the
12 challenged measures in this arbitration.

13 This should, perhaps, come as no
14 surprise, given Mr. Wilson acknowledge last week
15 that Claimants are "competing favorably" in states
16 in which they claim to have been shut out of and
17 have repositioned their business as, he said. And
18 that's at Page 638 of the transcript.

19 But even if the challenged measures
16:14:28 20 actually caused the damages that Claimants allege,
21 they couldn't recover for those damages based on
22 Mr. Wilson's calculations, because there's a

2342

1 PRESIDENT NARIMAN: And your report of
2 your witness, your witness which was in between --

3 MR. SHARPE: Yes, Navigant's first
4 report December 22, 2008.

5 PRESIDENT NARIMAN: Navigant's first is
6 December.

7 MR. SHARPE: December 22, 2008.

8 PRESIDENT NARIMAN: And second?

9 MR. SHARPE: May 13, 2009.

16:12:48 10 This next slide highlights the
11 sequential impact of these changes that Mr. Wilson
12 had to make in his second report, based on
13 Navigant's criticisms, its failure to account for
14 any of NWS costs; its failure to account for GRE's
15 indirect cost; its failure to account for the
16 spike in 2005 sales; its failure to look at NWS's
17 actual sales data; and its failure to exclude
18 claims for equipment in Canada that he
19 acknowledged didn't solely serve the U.S. market.

16:13:25 20 As we noted, Mr. Wilson corrected some
21 of his most glaring errors, but as Navigant
22 observed, Mr. Wilson made a number of other

2344

1 fundamental problem with his valuation approach.

2 As I suggested earlier, Mr. Wilson
3 purports to value the damage to Claimants'
4 investments by measuring the diminished value of
5 the Seneca and Opal brands in certain markets in
6 the United States, but he never establishes that
7 the Seneca and Opal brands have value to begin
8 with, and he never proves any damages to the
9 brands themselves. Instead, Mr. Wilson assumes
16:15:08 10 that the Seneca and Opal brands have value simply
11 because people buy products with the Seneca and
12 Opal labels on them. In fact, Mr. Wilson assumes
13 that the brands are so valuable as to represent
14 100 percent of the value of the Claimants'
15 enterprise in the United States.

16 Navigant pressed Mr. Wilson to provide
17 evidence of the Opal cigarettes actually have
18 brand value but he declined to do so. He said,
19 "It seems rather mundane to be asking whether a
16:15:39 20 brand of cigarettes with millions of dollars in
21 sales has value and whether it enhances the value
22 of Claimants' other brands and products." But

1 then Mr. Wilson acknowledged the critical point
 2 stating, "The better measurement using this
 3 inappropriate logic would be to compare the
 4 premium charged for the Seneca brand cigarette
 5 over generic cigarettes. This provides at least
 6 some measurement of the value of the brand,
 7 however inadequate."
 8 Mr. Wilson then dismisses this
 9 suggestion. He states, "however the very question
 16:16:11 10 is not particularly insightful or helpful since it
 11 questions the obvious," but it's far from obvious
 12 that the Seneca brands has any value that's
 13 separate from the Claimants' underlying product.
 14 In fact Navigant established that Claimants'
 15 discount cigarettes are very similar to generic
 16 cigarettes, as they have minimal brand loyalty and
 17 compete almost exclusively on the basis of price.
 18 Mr. Wilson himself concedes this very
 19 point. As you can see from the slide, he
 16:16:41 20 acknowledged that "market shares for discount and
 21 deep discount cigarettes are three or more times
 22 as responsive to own price changes, price movement

1 to those companies, there's still a fundamental
 2 problem with Mr. Wilson's analysis: He simply
 3 assumes that the challenged measures caused
 4 100 percent of the reduction in sales that the
 5 Claimants' complain of.
 6 Mr. Wilson never considers that other
 7 factors beyond the challenged matters have
 8 contributed to Claimants' alleged lost sales and
 9 thus lost profits.
 16:18:24 10 Even Claimants themselves acknowledge
 11 that many other factors may be responsible for
 12 reduction in sales.
 13 As you can see from the slide,
 14 Claimants state in their reply, "There is simply
 15 no means of accurately assessing which of the
 16 following factors in any given state contributed
 17 in what specific amount to the overall mean
 18 reduction in tobacco use nationally. Local and
 19 state smoking bans or usage restrictions, changes
 16:18:50 20 in consumer tests and preferences, public advisory
 21 campaigns, availability of cessation therapy
 22 programs, and the price-setting aspects of the MSA

1 not covered by external factors such as taxes as
 2 our premium market shares."
 3 Even when we look at companies whose
 4 brands are less responsive to own price changes,
 5 which is indication of brand value, we see that
 6 brand represent only a fraction of the value of
 7 the company. You can see from the slide according
 8 to industry sources, even world-famous brands like
 9 Coke and Disney represent about two thirds of the
 16:17:23 10 value of the those companies. Marlboro,
 11 McDonalds, and Nike represent about half the value
 12 of those companies. Even the Apple brand
 13 represent barely a fifth of the value of that
 14 company, and Apple, of course, has spent hundreds
 15 of millions of dollars over the few decades
 16 establishing its brand value in the United States.
 17 The notion that the Seneca and Opal
 18 cigarettes constitute 100 percent of the value of
 19 the Seneca and Opal products in the United States
 16:17:52 20 is simply not credible. But even if we assumed
 21 that the Seneca and Opal brands are more valuable
 22 to Claimants than the Coke and Marlboro brands are

1 in a given state, as well as the various tax
 2 changes that will have been made in various
 3 jurisdictions over the same period."
 4 Claimants themselves thus reject
 5 Mr. Wilson's assumptions that the ASA measures
 6 necessarily caused all the Claimants' lost sales
 7 and lost profits.
 8 But again, let's assume that Claimants
 9 are wrong and that Mr. Wilson is right and that
 16:19:27 10 the challenge measures caused all of the alleged
 11 reductions in Claimants' sales, the Tribunal still
 12 should reject Mr. Wilson's damages calculations
 13 for two reasons.
 14 First, the evidence on which he relies
 15 is wholly inadequate.
 16 And second, he made serious errors in
 17 calculating those damages.
 18 Let me say a few words about the
 19 inadequacy of the Claimants' evidence. Navigant
 16:19:50 20 has summarized the state of the evidence that
 21 Mr. Wilson has relied on in Navigant's rejoinder
 22 report: "Nearly every data element of

2349

1 Mr. Wilson's analysis, sales volumes, sales price,
 2 unit cost, et cetera, is internally inconsistent,
 3 is in conflict with other data, or has changed
 4 dramatically often without explanation since
 5 Mr. Wilson's first report."
 6 Navigant offers three illustrations --
 7 problem with Claimants' data.
 8 Problem number one, there are large
 9 discrepancies between the sales volumes that
 16:20:23 10 Mr. Wilson used for his damages analysis and those
 11 reported by the Claimants to the states for
 12 purposes of making their escrow deposits.
 13 Navigant prepared the comparison on
 14 this slide from Claimants' own data. In the left
 15 column after the states is the sales volume
 16 information that Mr. Wilson used for purposes of
 17 this arbitration. In the middle column, it's the
 18 sales volume information that Claimants provided
 19 to the various states for purposes of making
 16:20:51 20 escrow payments.
 21 As you can see, for use in this
 22 arbitration, Mr. Wilson overstated the sales

2351

1 and more accurate Tobaccoville sales date at that
 2 which had the convenient effect of increasing
 3 Claimants' damages claim, but as Navigant stated
 4 in its rejoinder report, "We examined this
 5 so-called new data and found that it is not new or
 6 more accurate in any sense. Whoever provided the
 7 data, Mr. Wilson, Claimant, or Tobaccoville,
 8 appears to have simply taken the old data and made
 9 ad hoc modifications with no explanation."
 16:22:29 10 In fact, Mr. Wilson seems to have
 11 modified his old data in order decrease the volume
 12 of actual sales in the five original states by
 13 79.4 million cigarettes in 2007, and this had the
 14 effect of increasing so-called lost sales and
 15 inflating Claimants' alleged damages.
 16 I would note Navigant's testimony in
 17 this regard remains unrebutted.
 18 Problem number three, there are huge
 19 discrepancies between the sales from Grand River
 16:22:56 20 to Tobaccoville and from Tobaccoville to its
 21 customers. As you would expect, there will always
 22 be some discrepancies depending on whether

2350

1 volume in 2005 by 14 percent; apparently, to
 2 exaggerate the revenue that Claimant supposedly
 3 generated that year.
 4 Mr. Wilson also understated the sales
 5 volume in 2006 by 15 percent, apparently to
 6 exaggerate the impact of the challenged measures
 7 on Claimants' sales. In total, Mr. Wilson
 8 distorted the Claimants' alleged lost sales by
 9 31 percent. And note that this figure is based on
 16:21:21 10 Claimants' own evidence.
 11 In his testimony, Mr. Wilson said,
 12 outside of an amazing coincidence, I can't imagine
 13 that the numbers would be exactly equal. You're
 14 by definition going to have delays that occur
 15 between GRE and its distributors. That may be
 16 true, but it's irrelevant here because the source
 17 of the data in both columns is the same: It's
 18 Tobaccoville. Thus, no reporting delay could
 19 account for the discrepancies. It's clear one or
 16:21:52 20 both of the data sets is simply not correct.
 21 Problem number two, in Mr. Wilson's
 22 rebuttal report he claimed to have obtained new

2352

1 Tobaccoville is building up or drawing down its
 2 inventory, but as you can see from this slide,
 3 Navigant found discrepancies millions of cartons
 4 and cigarettes.
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 16:23:31 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 Tobaccoville's President, Mr. Phillips,
 16 testified in this case that Tobaccoville did not
 17 even exist until 2002 and did not begin selling
 18 Seneca cigarettes until the summer of 2002.
 19 If you look at the data from 2005 to
 16:24:05 20 2007, you see the opposite problem. Grand River
 21 reportedly sold vastly more cigarettes to
 22 Tobaccoville than Tobaccoville sold to its

2357

1 that we received from NWS included some detailed
2 cost breakdowns but -- and we have looked at --
3 some of them are audited, some of them are viewed"
4 --- he goes on --
5 MR. VIOLI: Are you sure those haven't
6 been produced, Jeremy?
7 MR. SHARPE: Yes, they have not been
8 produced. Years ending 2006, 2007, 2008.
9 MR. VIOLI: There's only 2006.
16:28:19 10 MR. SHARPE: Sorry?
11 MR. VIOLI: There's no 2007. We
12 produced every audited financial statement.
13 MR. SHARPE: I'm just quoting
14 Mr. Wilson's testimony.
15 MR. VIOLI: Well, you completed it now
16 (off microphone.)
17 PRESIDENT NARIMAN: No, no. According
18 to you, have they produced audited financial
19 statements on record for 2006, 2007 and 2008?
16:28:38 20 MR. SHARPE: No.
21 MR. VIOLI: For 2006, we did.
22 MR. SHARPE: Years ending -- financial

2359

1 financial statements that we received from NWS
2 included some detailed cost breakdowns." We would
3 submit that's already an acknowledgement of one
4 benefit of audited financial statements: They can
5 provide detailed cost breakdowns.
6 Mr. Wilson highlighted other benefits
7 last week. He testified, "I think audited
8 financial statements would represent that the
9 controls in place were better. It would represent
16:29:51 10 that the accounting for the revenues were
11 according to generally accepted accounting
12 principles, or GAAP."
13 He added, "Essentially the difference
14 between audited and unaudited financial
15 statements, if we are speaking about United States
16 GAAP and it generally applies across countries, is
17 that an independent auditor comes in and reviews
18 the financial statements and in performing that
19 review, they perform statistical testing to make
16:30:22 20 sure that the numbers are 'correct,' and they sign
21 off on the statements as being correct."
22 Thus, according to Mr. Wilson's

2358

1 --
2 MR. VIOLI: Mr. President, you asked
3 NWS --
4 MR. SHARPE: That's correct.
5 MR. VIOLI: You said 2006.
6 MR. SHARPE: No, there are no audited
7 financials --
8 PRESIDENT NARIMAN: Okay take it down
9 and I'll look at it later, if you want.
16:28:58 10 ARBITRATOR CROOK: It's a fact question
11 the Tribunal can determine.
12 PRESIDENT NARIMAN: 2006, 2007, and
13 2008, no audited financial statements filed.
14 MR. SHARPE: No years ending 2006,
15 2007, or 2008, that's correct.
16 PRESIDENT NARIMAN: Although, according
17 to you, Mr. Wilson -- it was produced before
18 Mr. Wilson and he saw them -- he reviewed them.
19 MR. SHARPE: That's his testimony.
16:29:23 20 That's his testimony.
21 I'll just read this again. He
22 answered, "We did and we reviewed them. The

2360

1 testimony, a company's audited financials should
2 be more reliable because they're independently
3 reviewed, corroborated through statistical
4 testing, and conform to established accounting
5 principles generally accepted in the United States
6 and around the world.
7 Interestingly, Mr. Wilson also noted
8 last week, "The only reason NWS has financial
9 statements is because they have a loan and the
16:30:49 10 bank requires them to file the financial
11 statements." So, apparently NWS's bank requires
12 audited financial statements as a condition of
13 lending it money, and yet Claimants here demand a
14 quarter of a billion dollars from the United
15 States --
16 PRESIDENT NARIMAN: Without financials
17 --
18 MR. SHARPE: Correct.
19 The United States submits that, based
16:31:08 20 on the quality of the evidence in the record and
21 the absence of audited financial statements, there
22 is no way for this Tribunal fairly to award

2361

1 Claimants any damages.
 2 I'll just say a few final words about
 3 Mr. Wilson's alternative damages theory, which
 4 purports to calculate the present value of
 5 Claimants' increased escrow deposits under the
 6 Allocable Share Amendments.
 7 Like Mr. Wilson's principal valuation
 8 theory, his alternative valuation theory seeks to
 9 capture damage allegedly caused to Claimants' U.S.
 16:31:38 10 investment. As you well know, the use of
 11 alternative valuation approaches is common. It
 12 allows appraisers to test their methodologies and
 13 data. When different valuation approaches produce
 14 similar results, the appraiser can be confident of
 15 his or her results, and by contrast wildly
 16 divergent valuations indicate problems with the
 17 appraiser's valuation methodologies or data.
 18 Mr. Wilson's alternative valuation
 19 produced results 550 percent greater than his
 16:32:07 20 principal valuation. The notion that two methods
 21 that purport to quantify damages resulting from
 22 the same disputed measures can diverge 550 percent

2363

1 raise prices and thus lose significant market
 2 share, damaging Claimants through lost sales."
 3 Claimants injury, Mr. Wilson suggests,
 4 stems from Tobaccoville's need to raise prices on
 5 Claimants' product. Mr. Wilson thus assumes that
 6 the challenged measures is it not proximately
 7 cause Claimants' injury. As such, as we
 8 established at the beginning of this presentation,
 9 they're not compensable under the NAFTA.
 16:33:58 10 Third, Mr. Wilson estimates the value
 11 of the so-called volumetric exemption by
 12 calculating the present value of the increased
 13 escrow costs that Tobaccoville could avoid rather
 14 than calculating the profit, the present value of
 15 the incremental profits, that Tobaccoville could
 16 earn as a result of the exemption.
 17 As Navigant testified, the incremental
 18 cost is not reasonable proxy for the incremental
 19 profits that Claimants could generate.
 16:34:26 20 The challenged measures increase the
 21 costs of producing cigarettes which cause
 22 Claimants to raise their prices which may be

2362

1 is not supportable. But even if Mr. Wilson's
 2 alternate damages theory actually corroborated his
 3 primary damages theory, the Tribunal cannot rely
 4 on it, as we believe it's seriously flawed.
 5 According to Mr. Wilson, Claimants are
 6 entitled to recover the difference between the
 7 amounts they're required to pay under the
 8 Allocable Share Amendments and the amounts they
 9 claim they would have paid in escrow to the five
 16:32:42 10 original states had they been afforded so-called
 11 volumetric exemptions.
 12 There are three main flaws with
 13 Mr. Wilson's alternative valuation theory.
 14 First, it assumes that Tobaccoville,
 15 not Grand River, is responsible for making escrow
 16 deposits. As you just heard from Mr. Feldman,
 17 Tobaccoville is not a party in this arbitration
 18 and Claimants cannot claim damages on its behalf.
 19 Second, under Mr. Wilson's theory, the
 16:33:14 20 Allocable Share Amendments damage Claimants
 21 indirectly. As you can see from the slide,
 22 Mr. Wilson states, "The ASA forces Tobaccoville to

2364

1 passed on to their customers. Much of the impact
 2 of the challenged measures, therefore, is borne by
 3 the Claimants' customers and not by the Claimants
 4 themselves.
 5 The value of the exemption the
 6 Claimants claim is not the cost that might be
 7 imposed on Claimants' cigarettes, it's the profits
 8 the Claimants allegedly would lose if they were
 9 not accorded the exemption. So, Mr. Wilson's
 16:34:57 10 alternative valuation theory from an economic
 11 standpoint is completely nonsense.
 12 Mr. President and Members of the
 13 Tribunal, Mr. Wilson's damages calculations are on
 14 their face unsound. United States tax payers are
 15 being asked to pay hundreds of millions of dollars
 16 for demonstrably erroneous claims based on
 17 evidence that has not been made available and that
 18 is unauthenticated, uncorroborated, inconsistent,
 19 and, as noted, even contradictory. Claimants have
 16:35:28 20 failed to meet their burden of proving damages and
 21 we submit their claim should be dismissed.
 22 If there are no further questions from

2365

1 the Tribunal, I would ask that you call on
2 Mr. Kovar.

3 PRESIDENT NARIMAN: Thank you. Okay.

4 Mr. Kovar, now what?

5 MR. KOVAR: Documents.

6 Mr. President and Members of the
7 Tribunal, we tried to make a concerted effort to
8 put our presentation into the truncated schedule
9 that the elements have given us, and we're now at
10 the end.

11 Last week, Mr. President, you requested
12 both parties to address certain questions raised
13 by the Claimants about three categories of
14 documents that the Claimants assert have been
15 wrongfully withheld from them in this proceeding.

16 These categories are, first, documents
17 being generated in connection with arbitration
18 proceedings between various tobacco companies and
19 the states.

16:36:45 20 Second, documents that have been
21 produced in litigation brought by Grand River
22 against originally 31, I think, now 30 states

2367

1 By contrast, Claimants' document
2 requests in this arbitration were sweeping, not
3 narrow and specific, and there were 27 of them.

4 Examples included, all documents
5 concerning the negotiation drafting implementation
6 or enforcement of the MSA's provisions that relate
7 to SPMs or NPMs; that was Request Number 1. And
8 all documents concerning analyses or descriptions
9 of sales or sales levels of OPMs, SPMs, and NPMs
10 for the period 1997 through the present. That was
11 Request Number 9.

12 Now, Claimants represented to the
13 Tribunal last week that they had requested
14 documents relating to the GRE working group; this
15 is not true. The document request highlighted by
16 Claimants, Request Number 6, sought "all documents
17 analyzing, comparing, or summarizing the
18 operation, effect, and enforcement of the Escrow
19 Statutes as amended by the Allocable Share
16:39:06 20 Amendment either in respect of Claimants' in
21 particular or concerning other tobacco industry
22 members both as a class or as a whole."

2366

1 Attorneys General that have allegedly not been
2 made available in this proceeding.

3 And three, unknown documents relating
4 to what has been described as NAAG's Grand River
5 working group, which are believed by Claimants to
6 exist and be relevant and material to this
7 proceeding.

8 I would like to address these points in
9 order, and to do so it's necessary first, if I
10 may, review how the production of documents was
11 handled in this case.

12 I'll start at the beginning. At first,
13 the parties agree that the IBA rules on the
14 talking of evidence in international arbitration
15 would govern questions of discovery in this case.
16 Article 3 of the IBA rules requires that any
17 request for the production of documents include a
18 "Description of a requested document sufficient to
19 identify it," or "a description in insufficient
16:37:53 20 detail, including subject matter, of a narrow and
21 specific requested category of documents that are
22 reasonably believed to exist."

2368

1 Now, the United States objected to
2 Claimants' document requests on several grounds,
3 including the grounds the questions were
4 insufficiently specific, that they were overly
5 broad, and that they were unduly burdensome. The
6 Tribunal agreed and rejected the Claimants'
7 document requests as not being in conformity with
8 the IBA rules.

9 The Tribunal directed the United States
10 to produce, within 30 days, documents within our
11 possession or control that the United States
12 considered to be relevant and material to the
13 outcome of the case and that the United States
14 considered should not be excluded under one of the
15 grounds listed in Article 9.2 of the IBA rules.

16 PRESIDENT NARIMAN: I just want to know
17 that those documents which were mentioned by
18 Mr. Luddy in his opening which are tab documents
19 mentioned in Tab 9, 10, 12, et cetera, by whom
16:40:22 20 were they produced, by you or by them?

21 MR. KOVAR: Which documents?

22 PRESIDENT NARIMAN: Tab 9, 10 and 12,

2369

1 the earlier document and so on.
 2 MR. KOVAR: You mean from the --
 3 PRESIDENT NARIMAN: From the Claimants'
 4 documents.
 5 MR. FELDMAN: From the core bundle.
 6 PRESIDENT NARIMAN: Core bundle, core
 7 bundle. Sorry. Core Bundle Tab 9, 10, 11, 12 who
 8 produced them? I just want to know.
 9 MR. LUDDY: I think it's Tabs 4, 5, 6,
 16:40:53 10 and 7 if we're talking about the NPM adjustment
 11 proceedings?
 12 PRESIDENT NARIMAN: No, no, no those
 13 NAAG things. The NAAG minutes, et cetera, the
 14 earlier things, 9, 10, 11, 12.
 15 MR. KOVAR: Do you want to answer that,
 16 Mark, now or do you want to take a minute?
 17 PRESIDENT NARIMAN: Yes, if you can
 18 just tell us who produced, whether you produced it
 19 or they themselves produced it.
 16:41:14 20 MR. FELDMAN: Thank you, Mr. President
 21 the documents we produced had certain Bates
 22 numbers on them that--

2371

1 were relevant, because some part of the case --
 2 why were they not -- my question is, why were they
 3 not produced by you, because that was the order
 4 which you consider -- consider means reasonably
 5 consider relevant and material. They are relevant
 6 and material, in my view.
 7 MR. KOVAR: If I may, I'll answer the
 8 question.
 9 The Tribunal's order on document
 16:42:17 10 production placed the United States in a somewhat
 11 unusual position of having to produce documents
 12 without the guidance of any particularized
 13 requests that would, as required by Article 3 of
 14 the IBA rules, either identify specific documents
 15 or at least provide a sufficiently detailed
 16 description of a narrow and specific category of
 17 documents.
 18 PRESIDENT NARIMAN: That's the order.
 19 Our order is clear.
 16:42:44 20 You may be right that it may not be in
 21 conformity with something or the other, but it
 22 said, which the Respondent considers -- this is

2370

1 PRESIDENT NARIMAN: Just tell us.
 2 We'll accept what you're saying. Who produced
 3 this?
 4 MR. FELDMAN: Looking at the documents,
 5 it does not appear we produced the document.
 6 PRESIDENT NARIMAN: Oh, you didn't
 7 produce this.
 8 MR. FELDMAN: But based on the --I
 9 don't see the Bates number that was on our
 16:41:29 10 document production on the documents.
 11 PRESIDENT NARIMAN: None of them 9, 10,
 12 11, 12, they were all produced by the Claimants.
 13 MR. LUDDY: Yes.
 14 MR. VIOLI: That's right.
 15 MR. FELDMAN: Yes that's correct.
 16 MR. KOVAR: As far as we can tell.
 17 PRESIDENT NARIMAN: But they were
 18 relevant documents. Why didn't you produce them?
 19 They were certainly relevant.
 16:41:51 20 MR. KOVAR: Well, this is what we're
 21 addressing now, Mr. Chairman.
 22 PRESIDENT NARIMAN: No, I'm saying they

2372

1 your own highlight -- relevant and material to the
 2 outcome of the case.
 3 MR. KOVAR: That's right.
 4 PRESIDENT NARIMAN: You just tell us
 5 that 9, 10, 11 and 12 are not at all relevant or
 6 material to the outcome of the case or they are
 7 just, as you may have described them, correctly or
 8 incorrectly, picking up out of millions of
 9 documents a few, three or four, like that. That
 16:43:16 10 was your characterization of these documents.
 11 MR. KOVAR: Mr. President, there's no
 12 way we could have represented that we would find
 13 every potentially relevant documents, particularly
 14 since the Claimants claims have changed so often
 15 --
 16 PRESIDENT NARIMAN: And there's no
 17 compliance. I'm sorry, Mr. Kovar.
 18 MR. KOVAR: No, no, let me continue, if
 19 I would, Mr. Chairman.
 16:43:34 20 Given that we were producing documents
 21 without the guidance required by Article 3, we
 22 made it a point to be completely transparent with

2373

1 the Tribunal and with the Claimants about how we
2 had gone about gathering the documents we produced
3 in 30 days.
4 We made clear that the documents we
5 produced were from NAAG and that they had formerly
6 been produced in U.S. litigation in response to
7 documents request that were similar to those put
8 forward by Claimant in this arbitration.
9 We also indicated that we were
16:44:05 10 withholding certain documents on confidentiality
11 grounds, certain other documents on privilege
12 grounds.
13 We further indicated --
14 PRESIDENT NARIMAN: That doesn't answer
15 my question, I'm sorry.
16 I want to make it very specific, which
17 the Respondent considers relevant and material to
18 the outcome of the case. Now, they have produced,
19 from where, we don't know, and would you -- is it
16:44:26 20 your contention that they're not all relevant, not
21 at all material, and that you could not have
22 considered them relevant or material when they

2375

1 Why aren't they produced?
2 MR. KOVAR: Mr. Chairman, there could
3 have been a huge number of potentially even
4 indirectly relevant documents.
5 PRESIDENT NARIMAN: Did you produce any
6 NAAG documents?
7 MR. KOVAR: Yes, we did I'm about to
8 explain that, if I would.
9 PRESIDENT NARIMAN: Yes, but then why
16:45:39 10 not this? This is my point.
11 MR. KOVAR: Mr. -- Tribunal, we further
12 indicated to the Tribunal and to the parties, and
13 to the other party that the confidential documents
14 included sensitive business information --
15 PRESIDENT NARIMAN: These are not
16 confidential.
17 MR. KOVAR: No, no, I'm just trying to
18 give a full picture of what we did. We were as
19 transparent as we could be, Mr. Chairman. Their
16:45:59 20 document request did not comply with the IBA
21 rules.
22 PRESIDENT NARIMAN: I'm only asking one

2374

1 refer to NAAG and about the amendments and so on?
2 MR. KOVAR: Mr. Chairman, on the basis
3 of your order, I don't know that we would have
4 found the documents.
5 PRESIDENT NARIMAN: With what?
6 MR. KOVAR: On the basis of the
7 Tribunal's order, I don't know that we would have
8 found those documents; that's the point I'm trying
9 to make. There could be hundreds of thousands of
10 potential documents out there that bear some
11 relevance to some issue.
12 And as we've seen --
13 PRESIDENT NARIMAN: Then perhaps we
14 should have ordered from 1 to 22 to be disclosed
15 --
16 MR. KOVAR: Mr. Chairman --
17 PRESIDENT NARIMAN: We didn't
18 deliberately because we thought that American style
19 -- discovery does not apply to these proceedings
16:45:12 20 therefore we said, leave it to you and your good
21 sense as to what you consider material. Now, NAAG
22 documents are certainly material and relevant.

2376

1 question, and if you want to answer it, answer it
2 -- no, please --
3 MR. KOVAR: I'm trying to.
4 PRESIDENT NARIMAN: Yes, please. Yes,
5 try to answer it if you can. If you can't, it's
6 all right.
7 MR. KOVAR: I don't mean to argue.
8 PRESIDENT NARIMAN: Did you not
9 consider these documents which are tab numbers
16:46:13 10 whatever they are which were produced by Luddy,
11 are relevant to the outcome of the case? Are they
12 totally relevant?
13 MR. KOVAR: Well, Mr. Chairman, if you
14 look at them today, they may be relevant, but I'm
15 not making representation that we saw those
16 documents in the 30 days that we produced the
17 documents that we -- in compliance with the
18 Tribunal's order.
19 ARBITRATOR ANAYA: Are you saying you
16:46:36 20 didn't know these specific documents existed? Is
21 that --
22 MR. KOVAR: I don't know. I can't

1 answer that question.
 2 PRESIDENT NARIMAN: That's very
 3 troublesome.
 4 ARBITRATOR ANAYA: Can anybody answer
 5 that question in the government?
 6 PRESIDENT NARIMAN: Somebody has to
 7 answer.
 8 MR. VIOLI: They've been in this
 9 proceeding before.
 16:46:53 10 MR. FELDMAN: I can say I -- I've seen
 11 Document 11 I believe that we did produce
 12 Document 11 in our production, although the Bates
 13 number from our production is not reflected in
 14 this particular document --
 15 PRESIDENT NARIMAN: That's why I asked
 16 you first before I asked --
 17 MR. FELDMAN: Right. And again, I'm
 18 relying -- I'm looking for the Bates number. So,
 19 I don't see our Bates number.
 16:47:12 20 MR. KOVAR: They could have gotten the
 21 same document from some --
 22 PRESIDENT NARIMAN: If you can have

1 states?
 2 MR. KOVAR: Not to the Claimants, no.
 3 PRESIDENT NARIMAN: Not the Claimants?
 4 MR. KOVAR: They had been produced in
 5 two other domestic lawsuits where the discovery
 6 requests had been similar to the Claimants.
 7 We made all that clear in our
 8 production so that the Tribunal and the party
 9 could see how we had gotten the documents, how we
 16:48:36 10 had collected them in 30 days as we had been
 11 ordered to do and which is a very fast time.
 12 PRESIDENT NARIMAN: Please, Mr. Kovar,
 13 the allegation is not against you or any of the
 14 members of your team.
 15 We are dealing with a corporate entity.
 16 We are dealing with the United States of America
 17 as a Respondent, and the direction is what it is,
 18 as you find it.
 19 Now, you have disclosed which you
 16:49:02 20 considered relevant and material, what you call
 21 NAAG documents broadly. Now, there are other NAAG
 22 documents which were produced by them which were

1 someone answer the question.
 2 MR. KOVAR: They could have gotten the
 3 document from some other source and not used the
 4 Bates numbered document.
 5 But in any case, because of the unusual
 6 aspect of this discovery, we provided this level
 7 of detail about how we got the documents, because
 8 we wanted --
 9 PRESIDENT NARIMAN: The problem is some
 16:47:33 10 NAAG documents are disclosed, some NAAG documents
 11 are not disclosed. I mean, there is no -- either
 12 you say no NAAG documents should not be disclosed
 13 because they are not relevant, I understand that,
 14 but if some NAAG documents which you yourself
 15 disclosed are relevant, these are certainly
 16 relevant and material. That's my view.
 17 ARBITRATOR CROOK: Well, Mr. Kovar, do
 18 I understand that your document production, which,
 19 as I recall, was about so, was, if not at all, at
 16:48:08 20 least a significant volume of material that had
 21 previously been disclosed to the Claimants in
 22 various of their civil litigations against the

1 not disclosed.
 2 I only want to know whether you
 3 consider those documents as not relevant or
 4 material. Simple question.
 5 MR. KOVAR: I don't know the answer to
 6 that, Mr. Chairman.
 7 PRESIDENT NARIMAN: Okay. That's all.
 8 All right.
 9 MR. KOVAR: We provided the details
 16:49:29 10 because we wanted you to know exactly how we were
 11 complying with the Tribunal's order.
 12 Now, the Claimants objected to our
 13 document request -- to our document production and
 14 they proposed a new production order. They argued
 15 among other points that our production ignored --
 16 and I'll quote them, "ignored significant
 17 categories of relevant and material documents
 18 requested by Claimants."
 19 In response, we noted that Claimants
 16:49:53 20 had continued to make no effort to scale back
 21 their sweeping document requests and instead were
 22 simply trying to revive those same requests that

2381

1 were inconsistent with the IBA rules by raising
2 objections to our document production.

3 We further noted that Claimants
4 themselves had identified NAAG as the most likely
5 source for documents responsive to their requests,
6 and that was the source of these documents we
7 produced. We also emphasized in our response that
8 the Tribunal had ordered the United States to
9 produce documents that the United States
16:50:24 10 considered relevant and material to the outcome of
11 the case and not excluded by Article 9.2 of the
12 rules.

13 PRESIDENT NARIMAN: That only compels
14 me to ask you -- I can't ask the United States of
15 America. I have to ask you, because you are
16 appearing for the United States.

17 MR. KOVAR: I understand that.

18 PRESIDENT NARIMAN: If Mr. Koh was
19 appearing, I'd have asked him.

16:50:45 20 MR. KOVAR: We pointed out in our
21 response, Mr. President, that the Tribunal did not
22 require the U.S., in the short time provided to

2383

1 MR. KOVAR: Well, one of the things we
2 pointed out, Mr. President, is that it was the
3 Claimants' refusal to scale back the request that
4 resulted in the rejection of their request by the
5 Tribunal.

6 PRESIDENT NARIMAN: We rejected it but
7 we made an order which you may consider erroneous,
8 but we did make an order.

9 MR. FELDMAN: Mr. President, I would
16:52:10 10 emphasize as Mr. Kovar was pointing out, we had a
11 general order from the Tribunal to produce
12 documents that we considered relevant and material
13 to the outcome of the case.

14 Looking at Article 3 of the IBA rules,
15 this was not the amount of guidance that is
16 required under the IBA rules. And so we found
17 ourselves, as Mr. Kovar addressed, in the unusual
18 situation of having to respond to an even more
19 general request. And it was precisely because we
16:52:43 20 didn't have the guidance that we required that we
21 were completely transparent with the Tribunal and
22 with the parties about precisely what we had done.

2382

1 comply, to conduct searches for documents
2 corresponding to "issues" put forward by the
3 Claimants and that Claimants believed to be
4 relevant and material to the outcome of the case.
5 That would have been another way to direct us to
6 do this, but it the wasn't the way the Tribunal
7 directed us to do it.

8 PRESIDENT NARIMAN: We will rely on
9 your good faith. You're a massive entity, very
16:51:11 10 respected entity and we rely upon you to give
11 whatever is relevant and material.

12 You can say, yes, we forgot, or we
13 didn't do it or we didn't see it, but short of
14 that if you have disclosed NAAG documents, then
15 you should have said we have all the NAAG
16 documents, come and inspect them if you like.
17 They may be relevant material some of them may be
18 material or relevant. These according to you,
19 that's why I asked you, and you said I can't
16:51:43 20 answer it whether these are relevant and material
21 because if they are relevant and material, then
22 you have not disclosed them. Sorry.

2384

1 We had approached NAAG, the Claimants
2 indicated that NAAG would be the most likely
3 source for relevant documents. We approached
4 NAAG, conferred and learned from NAAG that they
5 had recently produced two set of documents in
6 domestic litigation in response to requests
7 similar to those put forward by the Claimants in
8 this matter.

9 Given that we were completely
16:53:14 10 transparent with the Tribunal about precisely what
11 we had done, and we were transparent precisely
12 because we didn't have the guidance, we didn't
13 have particular requests to act upon. And that's
14 why we were transparent to let everyone know
15 precisely what had been done. And then Claimants
16 then offered objections and we had back and forth
17 on their objections. Ultimately, their objections
18 were rejected by the Tribunal but the point is
19 that we wanted all the parties and we wanted the
16:53:40 20 Tribunal to be fully aware of precisely what we
21 had done in response to an order that when you
22 look at Article 3 placed us in the kind of

2385

1 situation that's not contemplated by Article 3 of
2 the IBA rules.

3 PRESIDENT NARIMAN: My question remains
4 unanswered, I'm sorry. I must tell you that I'm
5 quite outspoken. But I feel you have not
6 answered, I tell you it's not answered.

7 MR. KOVAR: We understand that,
8 Mr. President. This is our explanation about why
9 and we don't know which of the documents we did
16:54:20 10 not produced, but if there's any of the four
11 documents not produced in the production, this is
12 the reason we didn't produce it. It was not in
13 the set of documents produced to explain as to why
14 we produced it. Unfortunately, we didn't get the
15 guidance as required by the IBA rules.

16 PRESIDENT NARIMAN: You never asked us
17 for guidance on the order. You're right, IBA
18 rules don't provide. It could have been a wrong
19 order or a right order, but you didn't say, look,
16:54:48 20 it's not possible for us to tell you what is
21 relevant and material. In fact, pursuant to this
22 order, you proceeded what you thought was relevant

2387

1 MR. KOVAR: One of the four is not a
2 NAAG document and one of the four we clearly
3 produced. The other two we're not sure about.

4 MR. VIOLI: Nine was not produced. It
5 was in the federal case. Do you want to hear
6 this?

7 PRESIDENT NARIMAN: Yes.

8 MR. VIOLI: Nine was not produced in
9 this case. It was produced in the federal case by
16:56:04 10 the New York Attorney General.

11 Number 10 was not produced in this
12 case. Number 11 had been previously produced, so
13 they produced a copy in this case and it doesn't
14 have the attachments. Number 12 was not produced
15 in this case.

16 ARBITRATOR CROOK: Mr. Violi, you had
17 the documents to the previous litigation.

18 MR. VIOLI: No, I had the copies from
19 another lawyer. They obtained it. I don't know
16:56:33 20 from where. The other e-mails were not produced
21 between Michael Hering and the Oklahoma Attorney
22 General.

2386

1 and material, which was NAAG correspondence. But
2 this correspondence, communication are not
3 produced. There's no explanation why.

4 MR. KOVAR: I'll just finish describing
5 what happened.

6 ARBITRATOR CROOK: Let me clarify one
7 point. Mr. Kovar.

8 Mr. Feldman, you think that at least
9 one of these documents may have been in your
16:55:19 10 production. Has anybody gone back and trolled
11 through the massive documents to see whether the
12 others were.

13 MR. FELDMAN: Thank you, Mr. Crook. We
14 would need to check but just glancing at
15 Document 11, it does appear that that was one of
16 the documents we produced.

17 PRESIDENT NARIMAN: For this
18 litigation?

19 MR. FELDMAN: For this arbitration,
16:55:37 20 yes.

21 And I'm informed that number ten is not
22 a NAAG document.

2388

1 ARBITRATOR CROOK: You can explain this
2 all tomorrow.

3 MR. VIOLI: Or tonight?

4 ARBITRATOR CROOK: If you want to begin
5 your final presentation tonight?

6 MR. VIOLI: No, I won't speak to it. I
7 don't think I need to.

8 MR. KOVAR: I'll get back to -- this is
9 the history, how the document discovery
16:57:03 10 proceeding.

11 Tribunal rejected the Claimants' demand
12 for additional discovery, based on their new
13 order, proposed order. And accepted our offer to
14 provide a privilege log, which we did.

15 We subsequently learned that the
16 documents we were holding on privilege grounds
17 recently were produced to Grand River in the New
18 York litigation. So given that development we
19 produced the documents in this arbitration.

16:57:23 20 Claimants later attempted to reopen
21 discovery issues a few more times and each attempt
22 was rejected by the Tribunal. We can recall -- I

2389

1 recall the dates for you, the Tribunal letter is
 2 dated January 28, 2008, where the Tribunal said it
 3 closes the question of production of documents.
 4 February 4, 2008, and then April 18, 2008, and
 5 finally on February 4, 2008, Tribunal said the
 6 same thing in response to request to reopen.
 7 Request of production of documents is closed.
 8 Now, Claimants assert that the United
 9 States prevented them from access to documents
 10 that would prove their case. Given their
 11 inability to demonstrate the legal and factual
 12 basis for their claims on the voluminous record in
 13 this case, and their other litigation involving
 14 the MSA regime, we think that's not surprising.
 15 Rather than building a case on evidence, we think
 16 they're now attempting to build it on simple
 17 assertions. The hint the Tribunal should draw
 18 adverse inference proving their allegations of
 19 conspiracy and discriminatory conduct.
 16:58:32 20 Claimants are wrong about the three
 21 categories of documents the Tribunal asked the
 22 parties to address. They have misstated what

2391

1 business confidential and other documents are
 2 subject to confidentiality agreement in this
 3 arbitration, it's not at all unusual in American
 4 litigation for the parties to agree to treat
 5 certain categories of documents and information as
 6 confidential in the litigation.
 7 In fact, Rule 26 C 7 of the Federal
 8 Rules of Civil Procedure specifically provide for
 9 a party to seek from the court a protective order
 10 providing that a trade secret or other
 11 confidential research development or commercial
 12 information not be revealed or be revealed only in
 13 a designated way.
 14 Often the parties stipulate to such a
 15 protective order or confidentiality order which is
 16 then entered by the court and enforced throughout
 17 the litigation. Indeed, Claimants have designated
 18 large portions of their evidence, including
 19 documents and entire witness statements, in this
 17:00:09 20 arbitration as confidential, and the parties have
 21 entered into a confidential agreement to govern
 22 the use of that confidential evidence in the

2390

1 actually occurred with respect to these documents
 2 and they've wildly mischaracterized what's in
 3 them. Moreover, the Tribunal has repeatedly
 4 rejected similar requests by the Claimants in the
 5 past and declared discovery closed. Astonishingly
 6 Claimants have feigned in this proceeding surprise
 7 about NAAG's GRE working group.
 8 In order to suggest the documents were
 9 wrongfully withhold, despite the fact that
 10 Claimants' attorneys have known about the working
 11 group since at least September 28, 2007, and they
 12 never previously brought it up in this litigation
 13 and never previously brought it up in their
 14 discovery requests. Never.
 15 But here they pretended that they had
 16 never heard of it before. There's accordingly no
 17 legitimate basis for any adverse inference against
 18 the U.S. which has simply complied in good faith
 19 of the Tribunal's orders in a transparent way.
 16:59:37 20 The first two categories of documents
 21 the Tribunal requested us to address are covered
 22 by confidentiality orders. Just a certain

2392

1 arbitration.
 2 This information is, therefore, not
 3 available to the parties in litigation in other
 4 courts involving Claimants. Claimants opposed
 5 discovery very strongly in other courts. Now, let
 6 me start with the litigation in federal court in
 7 New York you asked about, which originally was
 8 commenced in 2002 by Grand River, at that time 31
 9 state attorneys general, challenging the escrow
 10 statute on various constitutional grounds and
 11 federal Antitrust laws.
 12 PRESIDENT NARIMAN: Say again.
 13 MR. KOVAR: New York litigation Grand
 14 River versus Pryor. That lawsuit is currently
 15 pending on parties cross-motion for summary
 16 judgment. I understand the court has scheduled
 17 hearing on the motions for March 5th is my
 18 understanding.
 19 PRESIDENT NARIMAN: There's one
 17:01:10 20 judgment in this?
 21 MR. KOVAR: There are also Court of
 22 Appeals decisions.

1 PRESIDENT NARIMAN: Against Grand
2 River, no?
3 MR. KOVAR: I would have to defer on
4 the details to my colleagues.
5 MR. FELDMAN: Certain claims thrown
6 out. Two claims survive in the New York action.
7 PRESIDENT NARIMAN: For Grand River?
8 MR. KOVAR: Yes, this is Grand River's
9 case against the states.
17:02:01 10 PRESIDENT NARIMAN: What is the claim?
11 MR. FELDMAN: Surviving claims I
12 understand it there's U.S. antitrust claim and
13 there is a commerce clause claim under the U.S.
14 Constitution.
15 PRESIDENT NARIMAN: What was thrown
16 out?
17 MR. FELDMAN: There was an Indian
18 commerce clause thrown out. A number of others,
19 I'd have to go back and check.
17:02:21 20 PRESIDENT NARIMAN: That's in your
21 counter Memorial Tab 121?
22 MR. FELDMAN: Yes.

1 MR. KOVAR: Now, the confidentiality
2 order under the Federal Rules of Civil Procedure
3 protects evidence produced by both parties. The
4 states have been subjected to extensive discovery
5 in that litigation. I've been informed that
6 they've produced 53,790 pages of documents.
7 In addition, Grand River's attorneys
8 including our friends here, have deposed at least
9 six assistant attorneys general. MSA independent
17:03:49 10 auditor and the chief counsel of the NAAG tobacco
11 project in that litigation.
12 PRESIDENT NARIMAN: Who asked for the
13 confidentiality order?
14 MR. KOVAR: Both sides. The states
15 produced vast majority of this material without
16 any claim of confidentiality. The two principle
17 exceptions are the notices of the MSA independent
18 auditor, which contains sales data from
19 participating manufacturers, PMS and they're
17:04:14 20 required by Section 11 A 1 of the MSA be kept
21 confidential. And certain documents relating to
22 the significant factor arbitration proceedings

1 PRESIDENT NARIMAN: Let me note this,
2 if you don't mind.
3 (Pause in the Proceedings.)
4 PRESIDENT NARIMAN: Sorry, go ahead.
5 MR. KOVAR: There's been confidential
6 order in place since the New York lawsuit.
7 PRESIDENT NARIMAN: This one?
8 MR. KOVAR: Yes. It protects evidence
9 produced by Grand River, as well as evidence
17:02:59 10 produced by the states.
11 PRESIDENT NARIMAN: Evidence but the
12 order isn't confidential, is it?
13 MR. KOVAR: Yes.
14 PRESIDENT NARIMAN: The order passed in
15 this suit, the claim?
16 MR. KOVAR: The actual decision of the
17 court.
18 PRESIDENT NARIMAN: The decision.
19 MR. KOVAR: As far as I'm aware, it's
17:03:15 20 public.
21 PRESIDENT NARIMAN: Which is in volume
22 eight of Page 121. Okay.

1 which I will discuss in a moment.
2 Claimants have also had access to the
3 auditor notices under the confidentiality
4 agreement in our Chapter 11 arbitration, so
5 they're on the record in this case.
6 Tribunal should also know, plaintiff
7 Grand River claimed confidentiality for major
8 portion of the documents it produced in the New
9 York Federal Court, as well as for the greater
17:04:43 10 part of the deposition transcripts of its
11 officers, Arthur Montour and Tobacoville's
12 president.
13 Next, there is the arbitration
14 proceeding called the significant factor
15 proceeding, as Mr. Hering and Professor Gruber
16 explained this arbitration is between the original
17 participating manufacturers, the OPMs and the
18 states and it occurs pursuant to the MSA when
19 there's an OPM market share lost.
17:05:10 20 Under the terms of the MSA an economics
21 firm is appointed to determine whether the MSA
22 was, quote, significant factor contributing to the

2397

1 market share lost, unquote. As we've heard this
 2 involves econometric modeling in which the
 3 economics firm compared the world as it would have
 4 been without the MSA, as the world exists with the
 5 MSA. Very highly technical economics modeling.
 6 There have been contested proceedings
 7 each year under this provision in 2003, 2004, 2005
 8 and 2006, and in each one of those the OPMs have
 9 prevailed over the MSA states. The parties have
 17:05:49 10 agreed not to contest the issues for the years
 11 2007 through 2009. The states and OPMs agreed in
 12 2002 to have identical confidentiality orders
 13 covering this significant factor proceeding
 14 entered into five State courts to govern the
 15 treatment of sensitive commercial information used
 16 in those proceedings.
 17 Those orders were entered in 2005 just
 18 before the first contested proceedings began. We
 19 can provide a copy of those orders, if you thought
 17:06:22 20 it was necessary. The orders define as, quote,
 21 confidential information any information,
 22 documents or materials that a party reasonably and

2399

1 confidential information is treated even more
 2 restrictively than confidential information. The
 3 sensitive information that these orders protect
 4 are exclusively those of the OPMs and they have a
 5 strong interest in keeping it confidential. They
 6 would not have disclosed it but for its use in
 7 that significant factor set of proceedings.
 8 If we turn back to the New York federal
 9 case against the states brought by Grand River,
 17:07:50 10 Grand River versus Pryor, Claimant Grand River
 11 demanded that the defendant states produce
 12 discovery in the New York court what the
 13 magistrate judge in that court described as,
 14 quote, voluminous documents from the significant
 15 factor arbitrations.
 16 The states as required by the
 17 significant factor confidentiality orders notified
 18 the OPMs of this request which then appeared and
 19 they then all appeared before the magistrate, the
 17:08:18 20 OPMs opposing that production. The magistrate
 21 eventually ordered the production of large numbers
 22 of significant factor documents. Certain

2398

1 in good faith believes constitute or contain
 2 proprietary and competitively sensitive
 3 information, disclosure of which can cause
 4 competitive injury.
 5 The orders provide that information
 6 designated as confidential by a party may be
 7 disclosed only to a limited set of persons, may be
 8 used only for significant factor proceedings and
 9 that any person disclosing such information in a
 17:06:56 10 manner not authorized by the orders will be
 11 subject to sanctions for contempt of court.
 12 PRESIDENT NARIMAN: Any of these
 13 significant factor proceedings, have they
 14 proceeded to an award by the --
 15 MR. KOVAR: Yes, they were, and I'll
 16 get to it.
 17 PRESIDENT NARIMAN: Sorry.
 18 MR. KOVAR: There's also a category of,
 19 quote, highly confidential information which is
 17:07:18 20 information is so proprietary or competitively
 21 sensitive the disclosure would likely cause
 22 irreparable competitive injury. Highly

2400

1 proprietary data, as well as the economics firms
 2 final determinations, this is what you had asked
 3 about, for 2003, 2004 and 2005.
 4 Naturally, almost all of this
 5 information was produced subject to a
 6 confidentiality order in the New York case. In
 7 early 2008, Dana Bieberman, an attorney in the New
 8 York Attorney General's office, wrote to Mr.
 9 DeHong, who's an attorney in Mr. Luddy's firm,
 17:08:57 10 transmitting in several batches significant
 11 factors documents to Grand River's counsel. We
 12 have copies of these letters. Documents produced
 13 to Claimants' attorneys including the economic
 14 firms determinations for 2003, 2004, 2005 in
 15 unredacted form. Subject to the confidentiality
 16 requirements of the significant factor proceeding,
 17 which are enforceable by the U.S. District Court.
 18 At the same time the redacted, i.e.
 19 with confidentiality removed, redacted 2004 and
 17:09:29 20 2005 determinations were also produced to Grand
 21 River free of any confidentiality restrictions.
 22 In fact, the 2003 final determination has been

1 public and freely available in redacted form since
2 2006 much earlier than this production in 2008.
3 Now, what has been redacted from these
4 determinations is proprietary and commercially
5 sensitive information of the OPMs, but even
6 without that information, the redacted
7 determinations clearly layout what issues the
8 economics firm considered. What the parties's
9 contentions were and how the firm resolved those
17:10:06 10 issues. For reasons I cannot understand,
11 Claimants' counsel suggested they had never
12 received these documents.
13 Here's an excerpt on the screen from
14 last Thursday's transcript during Claimants'
15 cross-examination of Professor Gruber. You asked
16 Mr. Nariman, I think all of this is pretty useless
17 for us, at least for me for this reason. We're
18 deprived of knowing what the arbitrators decided.
19 I mean, what's the use of your opinion of a but
17:10:33 20 for world, what you say, what ultimately was the
21 decision in the case may have had some relevance
22 to us, but since that is closed to us, all this is

1 Moreover, with respect to the
2 unredacted documents and information from the
3 significant factor proceedings that were produced
4 to Grand River's counsel in the New York case in
5 2008. Subject to the confidentiality order in
6 that case, they contain or constitute highly
7 sensitive competitive information such as data on
8 pricing and sales volume.
9 As you can imagine, Claimants' Grand
17:12:04 10 River and NWS would not want similar information
11 about their businesses to be made available
12 without confidentiality protections. However,
13 even though this material is subject to
14 confidentiality protections in U.S. District Court
15 in New York, Grand River has had the opportunity
16 since 2008 to petition the court to submit such
17 documents or portions thereof as part of their
18 evidence in this arbitration.
19 PRESIDENT NARIMAN: Therefore, they
17:12:30 20 must have concluded that this is irrelevant for
21 these proceedings. That's your point.
22 MR. KOVAR: I cannot speak for the

1 pretty useless, at least in my view.
2 I then interjected and said,
3 "Mr. Chairman, just to clarify the decision of the
4 arbitrator is a public document with certain
5 econometric data redacted. Thank you, but it's
6 never been introduced by the Claimants."
7 Mr. Violi then said "I don't think the
8 2004 document has ever been redacted or
9 unredacted."
17:11:00 10 Now, if the Tribunal wishes to review
11 any of the determinations or other redacted
12 significant factor documents, we'd be happy to
13 provide them, even though, as I will discuss in a
14 moment, we don't believe they're relevant or
15 material to the issues before the Tribunal.
16 In short, Grand River has been free
17 since 2006 to use the redacted 2003 determination.
18 And since March of 2008, to seek arrangements to
19 use the redacted -- since March 2008 to use
17:11:36 20 redacted 2003, 2004, 2005 determinations in this
21 arbitrations and they should not be suggesting
22 otherwise.

1 Claimant. You could draw that inference.
2 PRESIDENT NARIMAN: Draw that
3 inference.
4 MR. KOVAR: It was not until
5 February 2009, eight months after receiving the
6 significant factors materials that Mr. Luddy began
7 proceedings in the New York Federal Court to amend
8 the confidentiality order to allow him to
9 introduce certain excerpts from Professor Gruber's
17:13:01 10 significant factor report for use in this hearing.
11 Now, now the OPMs and the states in
12 that case and the Respondent United States in this
13 proceeding, we all worked out an arrangement with
14 Claimants' counsel to permit that to happen,
15 provided the excerpts were given appropriate
16 confidentiality treatment in this arbitration.
17 In this respect, it's important to note
18 that the significant factor excerpts initially
19 proposed by Grand River's counsel for use in this
17:13:26 20 arbitration were even narrower than the four
21 documents that are now included in the Claimants'
22 core bundle from the significant factor

1 proceedings related to Professor Gruber.
2 It was the states that pressed for
3 broader significant factor excerpts to be used in
4 this arbitration, so the Tribunal could have a
5 better sense of the context in which Professor
6 Gruber's statements were made.

7 We were informed by the New York
8 Attorney General's office that this one time that
9 I've just identified is the only time in this
10 17:13:57 Federal Court case that Grand River sought
11 permission to use any confidential significant
12 factor documents or information in this
13 arbitration, and on that occasion the states
14 agreed to it and we helped facilitate it.

15 So there simply is no basis whatsoever
16 for Claimants to cast aspersions on the states or
17 on Respondent United States in this Chapter 11
18 proceeding with respect to those documents from
19 the significant factor arbitration and the federal
10 17:14:28 lawsuit and we ask the Tribunal to take note of
21 this fact.

22 PRESIDENT NARIMAN: That's why you

1 determinations, I'm talking about the supporting
2 documents from the states. Please don't
3 mischaracterize me. You said I misrepresented to
4 the Tribunal, now you're saying wild and reckless
5 allegations. Let's keep it civil.

6 MR. KOVAR: Mr. Tribunal, I just quoted
7 what I said the other day.

8 First, the significant factors
9 proceedings had nothing to do with the
10 17:15:53 complementary legislation. Second, they had
11 nothing to do with Grand River or its behavior or
12 how the state applied the measures to Grand River
13 or whether the challenged measures were needed.
14 As I've already mentioned and as Dr. Gruber
15 testified, significant factor arbitrations
16 involved econometric analyses which the parties in
17 the economics firm created artificial models.

18 What the world would have liked look
19 liked without the MSA and compared it with the
10 17:16:19 world it existed with the MSA to calculate how
21 much difference was explained by the MSA. To
22 explain the Escrow Statute and entered into the

1 described it as wild and reckless allegations in
2 previous --

3 MR. KOVAR: Yes, sir.

4 In any case, if the Tribunal were to
5 review redacted significant factor determinations
6 which have been readily available to the Claimants
7 to submit as evidence since 2006 and 2008, you'd
8 readily see why nothing in the significant factor
9 proceedings sheds important light on the claims
10 17:14:54 now before the Tribunal.

11 This is where you just stole my
12 language. Mr. Violi makes what I called wild
13 allegations that those proceedings would have
14 materially affected your decision on whether
15 competition was affected by these measures,
16 whether we Claimants were harmed by these
17 measures, and third, whether they were truly
18 needed.

19 We submit that's not so. If it had
10 17:15:21 been so, why didn't they submit the redacted
21 versions to start.

22 MR. VIOLI: It does not say the

1 analysis, it was at high level of generality. And
2 involved the calculation of the marginal costs of
3 different classes of manufacturers.

4 Claimants have tried to use Professor
5 Gruber's reports to impeach his testimony in this
6 arbitration, but we would submit his
7 cross-examination showed that Claimants failed in
8 this effort perhaps because they didn't understand
9 what Professor Gruber's significant factor report
10 17:16:53 was all about.

11 In sum, we believe there's no reason
12 for the Tribunal to draw any inference adverse to
13 the respondent from the fact that the unredacted
14 significant factors determinations or other
15 documents from those proceedings have not been
16 placed in evidence in this arbitration.

17 Last, I would like now to turn to the
18 question whether there should have been documents
19 related to the Grand River working group produced
10 17:17:18 in this case. Claimants' counsel represented they
21 only just learned during this proceeding there was
22 a Grand River working group coordinated by NAAG.

2409

1 And they would have the Tribunal believe there's
 2 something secret and underhanded about NAAG, about
 3 NAAG members forming a working group to coordinate
 4 common issues. In fact, Claimants' counsel stated
 5 last week that if he had known about the existence
 6 of a working group, he would have specifically
 7 requested documents about it. This is from the
 8 transcript.
 9 Mr. Violi said, "Now I submit we did
 17:17:56 10 not know it was called the Grand River working
 11 group, so I did not ask for all documents of the
 12 Grand River." You can't ask for that which you
 13 don't know. But we know there was a working
 14 group. Wouldn't the Respondent have seen it if
 15 they knew there was a Grand River working group to
 16 produce those in good faith to the other side.
 17 They have not even, absent our request because we
 18 didn't know working group existed, even absent
 19 that didn't they have an obligation to produce
 17:18:22 20 that to the Tribunal and us.
 21 Last week is not the first time
 22 Claimants have heard of the GRE working group.

2411

1 was received by Claimants' counsel by
 2 September 28th, 2007. The next document which was
 3 the Levine deposition taken by Mr. Violi is dated
 4 May 2008.
 5 Now, Respondent cannot certainly
 6 account for why Claimants would have stated last
 7 week more than once they never heard of the GRE
 8 working group and yesterday produced a document
 9 they received on September 28, 2007, with many
 17:20:14 10 references to the GRE working group and the
 11 transcript of the deposition dated May 2008 where
 12 Claimants' counsel asked specifically about the
 13 GRE working group.
 14 Moreover, let us recall that there's
 15 nothing mysterious about this working group,
 16 Mr. Hering and Mr. DeLange testified that NAAG has
 17 many such working groups, including on specific
 18 common issues and sometimes focused on specific
 19 companies such as Grand River, Philip Morris and
 17:20:47 20 so on. Mr. DeLange stated his recollection was
 21 formed relating to Claimant Grand River after
 22 Grand River led a lawsuit against the 31 state

2410

1 And these are some other quotes where they said
 2 this. Mr. Weiler said, we didn't know there was a
 3 working group, so I would agree with you,
 4 Mr. Crook, it was definitely not in our statement
 5 of claim because we didn't find out about it until
 6 yesterday. And Mr. Violi said and these are not
 7 all at the same time obviously, and now we find
 8 out there's a working group. And Mr. Violi said
 9 in his cross-examination, are you familiar with
 17:18:58 10 the GRE working group, and he also said I will
 11 make representation to the Tribunal that I have
 12 seen document called the Grand River working group
 13 and it has a list of attorneys general.
 14 Let's look at the facts. Claimants
 15 documents produced yesterday for the first time in
 16 this proceeding are dated 2007, and 2008. And
 17 they proved that Claimants knew about the working
 18 group at least as early as September 28th, 2007.
 19 That is before they filed their Memorial and their
 17:19:31 20 reply in this case.
 21 As you can see, the privilege log from
 22 the state of Nebraska which was produced yesterday

2412

1 attorneys general in 2002. Such coordinator
 2 response was necessary to defend the state's
 3 interest. Because the Federal Court wanted to
 4 receive single coordinated response from the
 5 defendants, rather than 31 different responses.
 6 Claimant's counsel suggest the working
 7 group may have discussed issues beyond the New
 8 York lawsuit and Claimants' 2007 document suggests
 9 the state of Nebraska suggest the working group to
 17:21:25 10 have begun on a smaller scale the previous year,
 11 2001.
 12 Assuming this is true, what does it
 13 prove. Idaho assistant Attorney General Brett
 14 DeLange testified given the multiple states in
 15 which Grand River has failed to pay escrow
 16 obligations and NWS is involved in selling Seneca
 17 cigarettes not on state directories which escrow
 18 sometimes have not been paid. It would be natural
 19 for the state attorney's general to coordinate
 17:21:51 20 through the NAAG how they're dealing with illegal
 21 sales of Senecas. Indeed, assistant attorneys
 22 general Eckhart, Thomson and DeLange all testified

1 that they spoke to their counterparts in other
2 states on such or similar matters, and coordinated
3 common legal issues through the NAAG.

4 What adverse inference may the Tribunal
5 draw from this?

6 Claimants claim the documents related
7 to Grand River working group will show, and I
8 quote, over zealous prosecution of them by this
9 group in support of abuse of right claim. The
10 17:22:24 Claimants did not put forward any abuse of right
11 claim as of June 2007 when the parties made their
12 document productions.

13 Given that fact, together with the
14 Tribunal's rejection of Claimants' sweepingly
15 overbroad document request and the fact later when
16 Claimants brought five additional requests for
17 document productions, they never specifically
18 mention that they wanted documents related to the
19 GRE working group. Never.

10 17:22:50 The United States simply had no
21 guidance, much less an obligation, in our view,
22 under the IBA rules to search for documents

1 seemed like a new claim. Mr. Weiler first claimed
2 there was an entire section of their Memorial
3 addressing their abuse of right. Then he admitted
4 the term was mentioned in Claimants' pleadings at
5 most a few times.

6 In justification, he claimed that
7 Claimants learned the previous day that
8 Mr. Eckhart, this is his term, freelancing in his
9 correspondence with the Nevada foreign trade zone
10 17:24:27 and there was a state working group focusing on
11 Grand River that they didn't know about.

12 With all due respect, Claimants cannot
13 retroactively enlarge Respondent's discovery
14 obligation by raising new claims and then seek to
15 have adverse inference drawn against the U.S. by
16 not having documents to fit those new claim.

17 The United States complied openly and
18 transparently and we believe in good faith with
19 the Tribunal's order which gave significant
10 17:24:55 direction to us, the U.S., to determine which
21 documents were material and relevant to the
22 outcome of Claimants' case as it was then

1 related to any alleged effort on the part of the
2 state to coordinate the prosecution of Grand
3 River. Such documents would not have been
4 material to the outcome of the case as it existed
5 in June 2007.

6 The absence of particularized abuse of
7 right claim in June 2007 is confirmed by the
8 proposed order submitted by the Claimants when
9 they objected to our production of documents in
10 17:23:23 October of 2007. That proposed order included
11 sweeping categories of documents. The proposed
12 order made no mention of abuse of right and it
13 made no mention of the GRE working group even
14 though they had known since the previous month
15 that the GRE working group existed, but they never
16 mentioned it.

17 It is precisely this kind of fishing
18 expedition that the IBA rules do not permit and
19 the Claimants' objections and proposed order were
10 17:23:52 rejected by the Tribunal. Indeed, when Mr. Weiler
21 spoke about the abuse of right last Thursday,
22 Members of the Tribunal pointed out that that

1 formulated.

2 It would not be reasonable or just to
3 apply adverse inferences based on Claimants'
4 entirely hypothetical and we would submit it's
5 conspiratorial case.

6 Now, the Tribunal will be able to come
7 to its own conclusions on this issue after
8 reviewing the record and hearing the testimony of
9 the three state officials who made some of the key
10 17:25:25 decisions that Claimants question. If the states
11 were acting in good faith and enforcing the
12 statutes, the fact that some of them exchanged
13 ideas relating to enforcement doesn't convert
14 their good faith into bad faith.

15 In fact, any reasonable person would
16 expect law enforcement authorities would cooperate
17 when confronting what they viewed as systematic
18 violations of their statutes. I'll finish. To
19 sum up.

10 17:25:52 To sum up, our document production in
21 this case was carried out within the 30 day period
22 and without guidance from Claimants, required by

1 Article 3 of the IBA rules. Given our lack of
2 guidance we made a particular point to be
3 transparent with the Tribunal and Claimants how we
4 complied with the Tribunal's order.

5 Claimants' objected on several occasion
6 to our document production and the Tribunal
7 rejected those objections in each instance. We
8 ask no adverse inference should be drawn here.
9 Thank you very much.

17:26:22 10 PRESIDENT NARIMAN: Thank you. Have
11 you got those cases that you mentioned, United
12 States versus Philip Morris? I want them.

13 MR. FELDMAN: Mr. President, I'm
14 informed the decisions are quite long. We can
15 point them out. We can have them made available
16 for you in the morning.

17 PRESIDENT NARIMAN: Morning, don't
18 forget. Two sets.

19 MR. FELDMAN: Yes.

17:26:52 20 PRESIDENT NARIMAN: Both of them.

21 MR. KOVAR: Mr. President, that
22 concludes our case, if you don't have any

1 CERTIFICATE OF REPORTER

2
3 I, John Phelps, RPR, CRR, Court
4 Reporter, do hereby certify that the foregoing
5 proceedings were stenographically recorded by me
6 and thereafter reduced to typewritten form by
7 computer-assisted transcription under my direction
8 and supervision; and that the foregoing transcript
9 is a true and accurate record of the proceedings.

10 I further certify that I am neither
11 counsel for, related to, nor employed by an of the
12 parties to this action in this proceeding, nor
13 financially or otherwise interested in the outcome
14 of this litigation.

15
16
17 JOHN PHELPS, CSR, RPR, CRR
18
19
20
21
22

1 additional questions to ask.

2 PRESIDENT NARIMAN: Thank you very
3 much. 8:00 o'clock tomorrow. Thanks very much.

4 (Whereupon, at 5:27 p.m., the hearing
5 was adjourned until 8:00 a.m., the following day.)
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22