NAFTA/UNCITRAL ARBITRATION RULES PROCEEDING

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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. 7

HEARING ON THE MERITS

Sunday, February 14, 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 8:00 a.m. before:

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PROF. JAMES ANAYA, Arbitrator

MR. JOHN R. CROOK, Arbitrator

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C O N T E N T S

CLOSING ARGUMENT	PAGE
ON BEHALF OF THE CLAIMANTS:	
By Mr. Luddy	2426
By Mr. Weiler	2446
By Mr. Violi	2502
ON BEHALF OF THE RESPONDENTS:	
By Mr. Kovar	2547
By Mr. Feldman	2572
By Ms. Morris	2581
By Ms. Thornton	2609
By Mr. Sharpe	2638
REBUTTAL	
ON BEHALF OF CLAIMANTS:	
By Mr. Luddy	2666
ON BEHALF OF RESPONDENTS:	
By Mr. Kovar	2698

P R O C E E D I N G S

MR. LUDDY: Good morning, members of the Tribunal, counsel.

I'm going to address a few of the issues pertaining to damages.

PRESIDENT NARIMAN: Damages?

MR. LUDDY: Damages.

First, a few comments on Mr. Sharpe's presentation yesterday. I think Mr. Sharpe spent
07:59:08 approximately 60 percent of his presentation addressing problems with Mr. Wilson's First Report. There was no doubt that the First Report was imperfect and that Mr. Wilson encountered difficulties getting complete downstream distribution data from GRE's importers in a form that could be used to build an appropriate damages model.

It is also clear, and I think Mr. Wilson himself rather candidly admitted this
07:59:50 last week, that he made a mistake that he probably should not have made at the last minute in processing his report by failing to get the actual

sales -- the actual sales into his lost sales calculations.

But while Mr. Sharp certainly had some good points to make about that First Report, and he did, the fact is that the damages that we seek at this hearing are based upon the numbers reported by Mr. Wilson in his rebuttal report and the significant additional work primarily in the form of additional data from the down stream
08:00:31 importers that form the basis of our damages in this action.

And also, I think it is significant that it is largely undisputed that Mr. Wilson's rebuttal report remedies each of the four primary criticisms of the First Report discussed by Mr. Sharpe yesterday. Indeed, I believe Mr. Wilson acknowledged just that in his testimony last week.

Significantly, Mr. Sharpe has
08:01:04 substantially less criticism of Mr. Wilson's Rebuttal Report, the operative report, for our damages claim here today and much of that

criticism concerned the reliability of data used by Mr. Wilson and focussed on the absence of audited financial reports.

In regard to the subject of audited financial reports, I urge the Tribunal to review Pages 573 through 593 of Mr. Wilson's testimony. There he addresses at great length the subject of audited financials, including why many companies have no commercial need for audited financials and
08:01:56 why audited financials would not have helped the Tribunal determine Claimants' damages in this action. I've given you a copy of the entirety of that testimony, and while I will not read it all, I would like to read a few passages from that testimony, because I do not believe the truncated portions read by Mr. Sharpe yesterday fairly represent Mr. Wilson's testimony as a whole on the subject. I'll begin on Page 573 -- 573.

"QUESTION: So, to the extent they are
08:03:04 applicable -- so, if you were looking at combined profits for GRE and NWS, you would need to look at NWS's costs to the extent, dot dot dot, not all

costs. You would specifically look at the incremental costs that were relevant to the state. So, when you tried to identify incremental costs in accounting term, we use the phrase accounting; we use the phrase variable costs, fixed costs and now, this phrase, incremental costs. And I know Mr. Kaczmarek refers a lot to the audited financial statements. Well, GRE has no requirements to file financial statements."

08:03:56 The only reason NWS has any financial statements is because they have a loan and the bank requires them to file financial statements. They require them at one point in time. So, there is no legal reason why GRE would ever have audited financial statements. And audited financial statements would simply have variable costs and overhead costs which would not be useful for this analysis because it would be total variable cost independent of which market it was in. And in

08:04:36 fact, the variable costs are different for different markets. You have different raw materials; you have different sizes; you have

different equipment that may be more efficient because it's more modern; you also have different labor costs, because everyone on the floor is paid a different salary. So, whoever runs that machine is going to be the relative cost.

And then, you have to look at overhead and the question with overhead is which of these costs change incrementally with an investment decision.

08:05:11 So, as an example, Mr. Jerry Montour runs, owns, and is employed by GRE. Do you need another Jerry Montour, because you go into the United States market? No, that's not an incremental cost.

Second of three passages, 578, commencing Line 3, again, by Mr. Sharpe.

"QUESTION: Given that the evidence in the record, massive discrepancies in the numbers, it's your testimony that an audited financial

08:05:54 statement would not help make sense of these, the financials, in this case."

"I'm not sure what you mean by -- you

said 'huge discrepancies in the data.' So, first, I want to -- you're talking about the changes in our damages numbers?"

"No, no. I'm talking about the discrepancies in the data that Navigant identified. For instance, sales to tobacco, which I think is probably Tobaccoville, the amount of the escrow deposits that were notified to the states versus that were notified to the Tribunal

08:06:27 for purposes of this case. There are discrepancies in the data. My question is, would audited financial statements help clear these or not?"

"Well, the discrepancies you talk about -- it's fascinating you ask that question because audited financial statements, if you're looking at audited financial statements for GRE -- it's going to talk about GRE's operations, not Tobaccoville sales, not NWS sales, not sales that were reported

08:06:59 by retailers to individual states, which are all -- which is where all the information comes by. And ultimately, I was a little memorized by this

discussion by Mr. Kaczmarek, because when I read through this, my first thought was, outside of an amazing coincidence, I can't imagine that the numbers would be exactly equal, because outside of the ability to produce a cigarette and instantaneously put that cigarette up for sale in Arizona, you're by definition going to have delays that occur between GRE and its distributors, so that NWS and Tobaccoville in between those,

08:07:43 between Tobaccoville and the retailers, where the eventual numbers get reported to the state."

Final passage, Page 581, Line 5.

"QUESTION: Let me ask a more simple question. Do you think that audited financial statements would assist the Tribunal in deciding any damages that might be appropriate to award to Claimants."

"Absolutely not. I can't imagine how you would be able to glean the relevant

08:08:22 information in order to evaluate the impact of the U.S. market."

"The first thing you would have to do

is assume that the audited financial statements would provide detailed geographic segmental breakdown for you to even know what percentage of sales were actually made in the U.S. in general by GRE of Seneca branded cigarettes, because it would combine the Seneca brand as well as the private label brands into one volume in the U.S.; that's problem number one."

"Problem number two, the only damages that are relevant in this discussion are the damages in the states where these actions took place. We're not talking about offsetting the damages that are incurred on-Reservation, in Arizona, with the benefit that the fact that the State of New York hasn't decided to -- based on counsel's explanation -- incorrectly apply the MSA to on-Reservation sales."

In sum, the Claimants are privately held companies based on Indian land with no bank loans in recent years. There are no public shareholders or regulators to whom they are required to provide audited financial reports.

As Mr. Wilson testified, there was no ordinary course -- business reasons for Claimants to have audited financials for the years in question.

In addition, and perhaps more importantly still, Mr. Wilson's testimony also makes clear that audited financials would have been useless for the appropriate damages analysis in this matter. And in the process of doing that, making that explanation, he highlighted two fundamental issues that were largely ignored by Mr. Sharpe yesterday, and which, when taken together, account for much of the remaining differences between Mr. Wilson and Mr. Kaczmarek.

First, audited financials do not break out revenue by state. Philip Morris' financials would not break out revenue by state, neither would RJR's. Indeed, it is difficult to imagine any company's audited financials which conclude only aggregated data, difficult to imagine any companies audited financials that would do so, and neither would the Claimants.

Revenue by state and, by extension, lost profits in a particular state market can only be determined from the ground up by tracing GRE's sales through NWS or Tobaccoville to individual wholesalers, in particular states or reservation markets. That is hard work that Mr. Wilson ultimately accomplished by the time of his Rebuttal Report. And the aggregated date reported in audited financials would have been useless in that regard. Indeed, it is physically impossible to determine revenue on the level of individual state markets from the top down, starting with the company's audited financial statements.

Now, Mr. Kaczmarek is undeterred by that impossibility because he doesn't want to talk about state-level revenue. He wants to talk about total U.S. revenue from the Seneca brand. Why? Because he wants the damages sustained off-reserve, and in some on-reserve states, to be set off by the increased revenues in states like New York, which did not violate Claimants' rights, in states such as California, where NWS has, to

date, been successful in defeating Mr. Eckhart's attempts to cut off sales to Big Sandy.

And it is worth noting in this regard that neither Mr. Kaczmarek nor Ms. Morris nor Mr. Sharpe have any trouble relying upon Claimants' financial data when convenient for them to argue how well Seneca brand has done in those market. They can't have it both ways.

And in this regard, the record here should be clear that Claimants are not at all bashful about trumpeting their success in those two markets. Claimants are proud of that success, and Respondents should be happy for it, too, at least in states such as California, where NWS's vigorous defense of the California's AG's repeated efforts to shut down its business on-reserve has actually mitigated the damages that Claimants seek in this action, and materially so.

In any event, the arguments that success elsewhere should set off damages sustained where states have succeeded in their efforts to harm Claimants' brand is frivolous.

Respondent itself argues in this matter that the states have acted independently through their own legislature and in their policies towards commerce on Indian land. Respondent is therefore separately answer be for those independent actions. They cannot come here through the Respondent and hide behind Claimants' success in other markets. The sales in those particular markets increased just as we saw they increased from the charts showing sales in Canada during the same period. They increased because GRE makes a quality product. They increased because New York did not try to improperly apply its complimentary act. And because would have been so far unable to defeat California's -- defeat, in California's own courts, California's effort to improperly apply its complimentary act to NWS's sales to Big Sandy.

And that brings me to the second reason, that audited financials offer nothing to the appropriate damages analysis in this matter. Audited financials do not permit an incremental

cost analysis of the New York market. You'll recall Mr. Wilson's discussion on this subject.

Before entering the U.S. market, GRE owned a fully operational tobacco company in Canada that served the Canadian market. They did not have to recreate that infrastructure to enter the U.S. market.

The example that Mr. Wilson gave was an obvious one, the salary of Jerry Montour. You don't need another Jerry Montour when you enter the U.S. market; therefore, under an incremental cost damages analysis, none of Jerry Montour's salary is attributable to the U.S. operations.

Here, again, Mr. Wilson had to do the hard work of determining the incremental cost of the U.S. operation from the ground up by identifying which costs, variable or fixed, were incurred or increased as a result of the U.S. operations. And again, after some initial problems in the First Report in some limited areas, he did that, just that, in his Rebuttal Report. And again, it would be physically

impossible to do that from the top down, starting with companywide financials.

True to form, Mr. Kaczmarek is again undeterred by that impossibility because he refuses to perform an incremental cost analysis. Instead, he just wants to take North American expenses and divide it by total U.S. and Canadian stick counts to arrive at an average cost for sticks in North America.

Something approaching that could probably be done from the top down starting with financials or from the bottom up, so, he hasn't been prevented from doing it but it is a uniquely irrelevant exercise for determining damages in this action because it does not speak at all -- at all -- to the marginal cost of producing cigarettes for the U.S. market.

And that is particularly obvious when you look at some of the things that are different in the U.S. and Canada, most notably the distribution system. GRE ships to two importers here. At the border, they take it and they bear

no cost beyond that. In Canada, they have their distribution system; it's enormous costs. That's just one example of the differences between Mr. Kaczmarek's approach and Mr. Wilson's approach, and that is it not even address the incremental cost issue that I talked about earlier with respect to items -- certain costs that you just don't have to replicate because you go into a new market. And when you go into a new market, the analysis that a company always undertake is marginal cost. I mean, that's a basic economic principle. Where can additional resources be best applied. They can be best applied where they can return the highest marginal revenue over costs.

So, they made that analysis by looking at incremental costs of going into a new market, in this case the U.S. market -- incremental cost and what incremental revenue they can derive. It's the only appropriate way to look at this case where GRE had an existing capacity, an existing tobacco company, in Canada that provided a lot of the services.

One final point on audited financials. At the end of his presentation, Mr. Sharpe cited a portion of Mr. Wilson's testimony and seemed to suggest that Mr. Wilson had reviewed audited financials for the years '06 through '07. I asked Mr. Sharpe at the time whether audited financials for those years had been produced, and he said no.

Last night, I reviewed our production and determined that the final financial statements that we had produced for NWS were in the year '06. I believe '06 was reviewed as opposed to audited -- audited through September, but those had been produced and I believe had even been relied upon by or referenced by Mr. Kaczmarek.

I also reviewed, more importantly, the entirety of Mr. Wilson's testimony on the subject, and that's Page 591 Through 592, which you gentlemen have before you, as does this counsel.

And it's plain. I don't even know that this was a primary point that Mr. Sharpe was addressing when he will got into this, so, I'm not suggesting it was an intentionally truncated

quotation, but if you read the next page and-a-half that followed the Report, the passage that was on the board, it's clear that Mr. Wilson ultimately testified that he doesn't recall which years he was provided and which were audited or reviewed or internal and that, in any event, whatever he did rely on was provided to the attorneys, so he assumes it was produced.

And in that particular case, the attorney he's referring to is me and I can represent to the Tribunal that any financials that Mr. Wilson reviewed have been produced and, in fact, had been produced in our earlier production, I think at Tab 21 of Claimant's Memorial, evidentiary submission, and that there are no financials beyond 2006 that had been withheld.

Finally, I want to look briefly at our recap of damages on Exhibit 1 of the expert Rebuttal Report, and I think I've also provided a copy of that. It's -- for the record, it is Exhibit 1 of the Rebuttal Report which I believe is 44 in our Core Documents.

Let me address the investment in market element first. Correct.

That's the 24 million in equipment at the Canadian plant. There was a lot -- not a lot but, actually a fairly brief discussion between Mr. Crook and Mr. Wilson last week, and I would like to indicate that I agree with the scope of that discussion. We agree that in a simple damages case involving a single Claimant and an undisputed measure of damages, including inclusion of both the equipment and the lost profits would be a double dip or a double counting.

As Mr. Wilson testified last week, counsel had originally asked him to identify that item, the 24 million in equipment, purchased and installed in Canada, as a measure of damages. We did that because of the complexities presented here because of the involvement of various Claimants in disputed capacities and the possibility that GRE might ultimately have to pursue that element of damages individually in its own right and apart from any loss of profits. We

have since determined not to pursue that theory.

We also agree that, as a matter of presentation on Exhibit 1, that had we pursued that separately on behalf of GRE, it would have been as an alternative to, rather than in addition to, lost profits.

At this point, and to be clear, the Tribunal does not need to address the 24 million dollar investment in equipment at the Canadian plant as a separate and distinct measure of damages.

The balance of the damages identified as lost sales, 40 to 50 million off-reserve and 10 to 22 million on-reserve, represents the impairment of Claimants' brands as measured by lost profits occasioned by the allocable share appeal in the five off-reserve states and the improper application of complementary legislation in three on-reserve states.

The final measure of damaged, the alternative measure of damages referred to as the exemption, is Mr. Wilson's calculation of the

value of an exemption for Claimants of the type granted, the exempt SPM, the last time there was a major change in the regulatory environment for tobacco in the U.S.

The size of that measure, it ranges from 238 million to 267 million, the size of that measure and the fact that it was calculated on the same metrics underlying the exemptions granted to the exempt SPMs, we think, is compelling evidence of the magnitude of the advantage that the exempt SPMs have enjoyed over Claimants and other NPMS in the market over the last ten years.

Further, we think that one of the ways of looking at the differences between these two measures of damages, the lost profits based on lost sales and the exemption -- one of the ways of looking at the difference between those two measures is a testament to Claimants' ongoing efforts to mitigate the damages imposed by the outrageous treatment they have received from the various states.

And in assessing these two measures of

damages and deciding which is the appropriate measure of damages, we ask the Tribunal to consider whether Claimants will likely be able to continue those efforts of mitigation or whether the states will ultimately succeed in their unambiguous goal of driving the Claimants from the U.S. market altogether.

And I thank you.

PRESIDENT NARIMAN: Thank you.

Yes?

MR. WEILER: Thanks for your indulgence.

I'm going to address you from a seated position because that computer would be too difficult to bring up here.

Good morning. I have a lot of slides for you today and I think, in the interest of time, I've tried to make the slides complete enough that I don't actually have to speak to all of them, and I've noticed that the Tribunal has already taken a quick glance at some of them, so I won't belabor the point. So, I'll do my best to

get through this quickly because I think a lot of -- pretty much, we've said all -- I think both sides have already said what we needed to say. We've had 15 hours of your time, both of us, so I don't want to take too much more of it.

This is, essentially -- this list here you see is how I would break up this presentation. This presentation would be primarily focussed on the law, and essentially is a rebuttal to the 15-hour presentation that we had from the Claimants -- well, it probably wasn't 15 hours, from the Respondent, seven hours.

So, hopefully, you haven't heard all of this too much before. Hopefully some of it is new, so to speak. I tried to make it pretty much just a rebuttal. I do attach, as much as I can, the relevant citation to the evidence that you'd like to be connected -- that law -- but Mr. Violi will obviously be addressing a lot of the evidence and law when his turn comes up.

So, first with respect to Article 1101, I just wanted to make a note that we've seen in

this hearing repeatedly a theme that the Respondent has tried to hit often, that the Claimants have a moving target and that they keep changing their positions and that their arguments are always different. I don't think that's fair and I think it's primarily posturing, but if we wanted to play that game, I suppose we could. We have an example here where the states's original position at the jurisdictional hearing was that the complementary legislation was part and parcel, it was a hand-in-glove sort of creation with respect to the Escrow Statutes, but now all of a sudden we find out they're independent.

So, I would just like to note that and I've given you the Memorial reference to the jurisdictional Memorial that shows that. I think that we're happy that the Respondent now agrees with us, our jurisdictional position, that they were separate pleasures. We still believe that are separate measures. They are complimentary, though; they serve a dual purpose, obviously. We don't think that they should be applied on-reserve

and certainly not if there are no escrow obligations owing, but they are separate measures.

With that, I'll move on quickly to the Claimants and their investments. What I've tried to do here is summarize for you the highlights in terms of the investment findings that you might make.

You'll see that, in the lighter blue, I've placed a reference to Subparagraphs D, G, and H so you can have a quick look at them again.

08:29:56

The important thing to note, though, as we go down the list of GRE's investments -- so, this is just GRE. The first one we see is that multimillion dollar loan. Ranging roughly between one and six million over the seven years. You'll notice that it was unchallenged in cross-examination. It wasn't challenged with Arthur Montour, who was here, and it wasn't challenged with Jerry Montour, who was here, but

08:30:25

didn't get a chance to speak to you. I might add he really wanted to speak to you and I would remind the Tribunal that we actually wanted -- we

were so interested in giving our Claimant a chance to speak we were willing to take up our own time and have him come as our own witness, but the Respondent refused. They just didn't want that.

And as you know, Mr. Arthur Montour had some difficulties with respect to the potential criminal liability with respect to his testimony, and so on occasions we offered Jerry Montour again, and on those three occasions the

08:31:01

Respondents said, no, we don't need to speak to Jerry Montour. So, we would suggest that, given that the Respondent has had more than enough opportunity to cross-examine Jerry Montour, that they chose not to and that they should suffer the consequences when it comes to finding facts like the loan. We have no challenge in cross-examination even to the man who was here who spoke to it in his witness statement.

The next one that I would like to talk

08:31:36

about briefly --

PRESIDENT NARIMAN: Excuse me. Sorry to interrupt.

MR. WEILER: Yes.

PRESIDENT NARIMAN: You said on three occasions you told them that you wanted to call him yourself.

MR. WEILER: No, on one occasion we wanted --

PRESIDENT NARIMAN: Anyway, is that on record?

MR. WEILER: It would be in the

08:31:50

correspondence between --

PRESIDENT NARIMAN: No, not would be, is it or is it not.

MR. WEILER: Yes, yes. It's in the correspondence with the parties.

PRESIDENT NARIMAN: Which correspondence? You haven't put it in your list.

MR. WEILER: Oh, well, I can get you the reference. It would --

PRESIDENT NARIMAN: If you want to give

08:32:00

it, give it. That's all I'm asking you. It's not there.

MR. WEILER: It looks like my slide has

a little error. If you see where it says 29 million, there is supposed to be a 2; it seems to have disappeared. So 2 is a $29 million escrow deposit as of July 9, 2008.

We don't have evidence in the record that says the exact amount it is today, though we do have evidence in the record that, clearly, it continues to accrue. So we do know that an amount does exist and it continues to accrue.

08:32:44

And it's important to note here that we have the Respondent twice, both yesterday and the day before, spontaneously uttering what we believe to be the truth of the matter. Grand River owns these funds and that an NPM such as Grand River retains ownership over its escrow deposits we agree and we are thankful for the admission.

ARBITRATOR ANAYA: Mr. Weiler.

MR. WEILER: Yes.

ARBITRATOR ANAYA: The evidence in the

08:33:11

record of the escrow deposits is what exactly?

MR. WEILER: The evidence of the record -- the primary evidence is Jerry Montour's

statement, which you see there at Core Book 8 of the Respondent.

ARBITRATOR ANAYA: Is this the sum total of the evidence?

MR. WEILER: No, we also have the Respondent actually confirming that there are escrow deposits.

PRESIDENT NARIMAN: It's not here. No point in giving this if you don't have everything together.

MR. WEILER: But we do have a $29 million unchallenged statement.

ARBITRATOR ANAYA: This is your evidence?

MR. WEILER: Yes.

PRESIDENT NARIMAN: There is no document about this, 29 million, or any other, or is there?

MR. VIOLI: Yes.

MR. WEILER: Yes, there are, attached to the witness statement.

ARBITRATOR ANAYA: In the record?

PRESIDENT NARIMAN: No point saying they are. When you are closing your argument, give it to us, if you want to; otherwise there is no point in pursuing like this.

MR. WEILER: Sure.

PRESIDENT NARIMAN: This is not a closing argument.

ARBITRATOR ANAYA: They say there's no evidence and you say there is and I'm asking, is this it?

PRESIDENT NARIMAN: That's right. Is this it? They made a very important point yesterday and you heard it.

ARBITRATOR ANAYA: They said there's no evidence in the record of an escrow deposit, as I understood it, and you're saying there is evidence in the record of an escrow deposit?

MR. WEILER: Jerry Montour's statement --

PRESIDENT NARIMAN: Yes, yes, you told us that document on record.

ARBITRATOR ANAYA: This is it.

MR. WEILER: Yes, this is it, and we have confirmation from the other side there is indeed an escrow deposit.

PRESIDENT NARIMAN: Where is this confirmation?

MR. WEILER: Well they didn't -- they didn't deny it in the reply.

PRESIDENT NARIMAN: Besides, Mr. Weiler, please, if you don't mind --

MR. LUDDY: If there's something else we'll get it to you before we finish.

MR. WEILER: Yes.

PRESIDENT NARIMAN: We don't want to interrupt you as far as possible, but please, if you don't mind, be a little precise. Give us a reference. If you're giving us this, tell us this is at page so and so and so and so.

MR. WEILER: Yes, the reference is there at Core Book 8, Jerry Montour's first statement.

PRESIDENT NARIMAN: That you've told us.

MR. WEILER: Okay.

And then, finally, there's the Opal registered trademarks. The place you will find the registered trademarks is Memorial Tab 18.

With respect to the three investors, the individual investors, we have the beneficial ownership of the Seneca trademarks and control of the Opal trademarks, again, unchallenged by cross-examination. So, we have both Arthur Montour, and we have the page reference there to his statement, and Jerry Montour, with a page reference there to his statement both saying that there is a beneficial ownership of these marks. We had no challenge, obviously, of Jerry Montour and we also had no challenge of Arthur Montour's evidence when he was before the Tribunal.

We would -- yes, Mr. --

PRESIDENT NARIMAN: Does Canadian law recognize beneficial ownership of trademarks?

MR. WEILER: Yes, though, in this case I would say this would be Seneca law that would apply, because the association they had taking

place was in Seneca territory. But yes, there is a concept of beneficial ownership in Canadian law, and from what we've been able to find out, though of course, Seneca Nation is a small Nation, they haven't had a lot of court cases, but it appears that they also would recognize a beneficial interest.

ARBITRATOR ANAYA: You say it appears. Is that an argument --

08:36:47 MR. WEILER: Well this goes back -- this goes back --

ARBITRATOR ANAYA: Excuse me, have you made that argument before? Do you have any -- what's the grounding for saying that Seneca law recognizes the beneficial interest in trademarks? I don't remember that specific thing being in your pleadings. In any case, what is the grounding for that?

MR. WEILER: This goes back to the --

08:37:13 it was either the first or the second day when we had a discussion about the elders and going to speak to them about the law. So --

ARBITRATOR ANAYA: And you said there wasn't anything, because they couldn't get a --

MR. WEILER: We said they wouldn't --

ARBITRATOR ANAYA: Okay. So, what is your grounding for it?

I know why you couldn't get a statement from the elders, but what is the grounding for saying that the Seneca law recognizes beneficial trademark.

08:37:37 PRESIDENT NARIMAN: Nothing.

MR. WEILER: I do not have anything.

The second point would be the working in association, which I think we've covered in a fair amount of detail. I don't think we need to go over it again unless the Tribunal wants us to. It was both in our statements and in my argument, I believe, on the third day.

The only point I would make is that Mr. Feldman made a fairly strong statement that

08:38:13 the Claimants made no attempt to refer to an exemption that might apply with respect to the licensing requirement in the Business Code. I

would just draw your attention to the fact that not only did we make that statement in the Reply Memorial but that we also had discussed it earlier in the hearing just a week before he made that allegation; so it is in the record. We didn't have to hide from it; it's there.

With respect to Professor Mendelson's,

08:38:55 I would note again that we offered to have Professor Mendelson appear and the decision was made that it was unnecessary on the part of the Respondent, and so, his witness statement does stand as an expert opinion on this area of law. We do note, though, that the Respondent does seem to enjoy citing him. We found five occasions yesterday when he was cited and we would submit that if one is going to cite the opinion of a learned expert that one chooses not to cross-examine, then we would suggest that the remainder of the opinion is just as valid and

08:39:29 therefore should be drawn to your attention.

ARBITRATOR CROOK: Professor Weiler, I'm sorry. I hate to do this to you, but are you

then taking the position that any witness who is called not to be cross-examined their testimony stands? I mean, does Professor Goldberg's testimony.

MR. LUDDY: No, we're not.

MR. WEILER: No, we're not taking that position.

ARBITRATOR CROOK: Thank you.

MR. WEILER: I hope I didn't mislead

08:39:55 you in that regard. I'm trying very much to explain the circumstances as to why I think in each case it may be relevant, but I'm not proposing any hard and fast bright line rule with secretary to that. I don't think that's appropriate in arbitration.

Now, with respect to professor Mendelson, I've highlighted some blue points here which I think are useful.

In this case, he does certainly say

08:40:20 that he's not an expert on Seneca Nation law, but he is an expert on international law, and he looks through the various ways in which these people are

cooperating and he thinks this certainly, to him, looks like an association. The question that remains after that is whether or not Seneca law does provide for the establishment of an enterprise such as an association. The Claimant says that the statute specifically refers to its purpose as including establishment.

It doesn't have a long, detailed incorporation statute as some other native
08:41:07 organizations do, but we would submit to you that that doesn't mean that the statute doesn't say -- doesn't mean what it says. It says the Business Code says it's for establishment. And so, the fact that it's not in as much detail doesn't mean that it's not in establishment law.

So, we think that, on the face it have the statutes -- that we clearly do have an association which clearly is established under Seneca law.

08:41:39 PRESIDENT NARIMAN: What is this opposition to Claimants' attempt to have Professor Mendelson appear as a witness? What does that

mean? We don't know -- what is the letter? What is the -- we don't know whether they opposed, whether you attempted.

MR. WEILER: Well, actually, I will get you the correspondence before this two hours is up when Mr. Violi is speaking, but this is correspondence that was exchanged with the Tribunal. It was a matter of debate with the Tribunal.

08:42:04 PRESIDENT NARIMAN: You must get it to us because --

ARBITRATOR CROOK: I'm sorry. With the Tribunal, I don't recall having seen that.

MR. WEILER: Yes, there -- I will show you them.

PRESIDENT NARIMAN: But that should be here. That should be here. There's no point in now saying you will give it to me. That should be here. Just as you said transcript day so and so.
08:42:23 Here's, there's nothing.

MR. WEILER: We also want to draw your attention to Professor Mendelson's conclusion,

which we believe is important.

He says, "But at this juncture I should refer again to the points I made above, namely that the various subparagraphs" -- he's referring, of course, to the subparagraphs of Article 1139 -- "are not mutually exclusive and provisions in question do not -- that they have to be read in good faith in light of the object and purpose of the agreement."

08:43:00 And he takes the position that it's necessary to take a holistic view as well as thomistic -- I can never say that word -- thomistic view of the law and, in his conclusion, whether one goes about it in a piecemeal way or whether one goes about it in a holistic way, he thinks there's an investment and Professor Mendelson is an acknowledged expert in the field, and we would submit that his opinion should be of some weight to the Tribunal.

08:43:36 PRESIDENT NARIMAN: I would like to have an answer from both of you on this later, after -- when he begins, that, what is the

position -- you have said that, merely because you don't call the witness for cross-examination doesn't mean you admit everything that he says. Both of you have taken that case. But what is this position which I have not understood, that when you say, I want to call him as my witness and they oppose, where is that procedure? Is that in your code or is that in your recognized American practice or what?

08:44:12 That I want to call this person as my witness if you don't want to cross-examine him, then what's the consequence? Then does it mean you accept his evidence?

MR. WEILER: There are no hard and fast rules; it's an ad hoc procedure. So, I cannot point to any rule under NAFTA/UNCITRAL arbitration system that would suggest that there is or isn't a rule. We would suggest that it's simply persuasive in the context.

08:44:39 PRESIDENT NARIMAN: Who prevents you from calling him? How can they say they won't agree?

MR. WEILER: Well, in this context, Mr. Chairman, what happened was, when we discussed --

PRESIDENT NARIMAN: This applies also to Jerry Montour.

MR. WEILER: Yes, yes.

When we were discussing the hearing, which was cancelled, the Claimants proposed that they would like to -- we had a discussion with the other side, the other side said who they wanted and who they didn't want. We said that we would like to have Mr. Montour and Mr. Mendelson speak. They said they didn't need to speak. They didn't need to hear from them. We still wanted to put them before the Tribunal and give the Tribunal a chance.

PRESIDENT NARIMAN: We never prevented you. Who prevented you from calling them?

MR. WEILER: It was a decision of the Tribunal.

PRESIDENT NARIMAN: No, we never said don't come, not at all.

How can we tell you will not to? It's your choice. That's why I asked you whether there's any procedural rule about this.

In my jurisprudence, I do not -- but in American jurisprudence, there may be. So, that's why I want to know.

MR. LUDDY: There certainly isn't in -- can I address this for two minutes?

There's certainly no rule in American jurisprudence in American jurisprudence, you call whoever you want to call and the other side calls whoever they want.

The protocol for this proceeding, which was agreed to was that, each side would identify which of the other side's witnesses they wanted to cross, and then the understanding was that. Prior to that witness testifying -- and I think that's the way we conducted ourselves this week -- there would be a few introductory hellos and that was it, and you were not allowed to do direct, nor were you allowed to call your own witnesses.

PRESIDENT NARIMAN: That's an agreed

position.

MR. LUDDY: That was the agreed position.

When Arthur Montour -- when Arthur Montour confronted his problems in Seattle, one of the remedies that we had proposed at that time to the State Department was that, look, if it turns out that his attorney does not let him testify, we would be happy to give you Jerry Montour, because we want Jerry Montour to testify, even though you have not selected him for cross-examination. That's the real point, and I think it's heightened here for the reason that Mr. Weiler has noted, that Mr. Montour is accused of making inconsistent statements in his deposition or in his statement.

PRESIDENT NARIMAN: You're missing the point, please. We are not on Arthur Montour. We are only on Jerry Montour.

MR. LUDDY: Jerry Montour, that's who I was talking -- I was talking about Jerry Montour. If I misspoke, I misspoke.

I think the argument, really, here, is

more in the context of Jerry Montour than the various witnesses.

Look, we chose not to cross-examine Mr. Kaczmarek because we felt we could deal with damages that we had in the record. They chose not to cross-examine Dr. Eisenstadt on the economics because they chose -- there was only 15 hours. But Jerry Montour I think is a special case because they're accusing him of making --

PRESIDENT NARIMAN: Nobody prevented you from calling him. He was present. You never put him in the box to say I want to examine him as my witness. No one can say you can't examine him unless you agreed you would not examine him as your witness.

MR. LUDDY: That was the protocol. You're right, the Tribunal did not prevent us. That was the protocol that we reached with counsel. We tried to change that when Arthur became unavailable and the invitation was rejected.

PRESIDENT NARIMAN: I have not

understood this procedure of yours.

ARBITRATOR CROOK: Mr. Chairman, just a reminder here.

As I recall, there was considerable correspondence, some of which we saw here in the period of about June 2009 where we were at one point, I think, invited to rule on the format of the hearing, whether it should be predominantly cross-examination, and Mr. Weiler wrote us a very vigorous letter suggesting that the manner of presentation followed by the Respondent here was somehow inappropriate. And as I recall, the Commission determined simply to take no action and to let each party proceed as it saw fit, but I think we need to go back and we can -- if there's doubt here, we can go back and examine that correspondence of early June of last year.

MR. LUDDY: Okay. Continue.

MR. WEILER: Katia, how much time do we have?

SECRETARY YANNACA-SMALL: Sorry?

MR. WEILER: How much time do we have?

SECRETARY YANNACA-SMALL: How much time do you have? You've used 34 minutes.

MR. WEILER: Thank you.

With respect to Article 1102, we're in your hands if you want to go into a lot of detail about it, though if you don't we'll skip fairly quickly through this.

I've tried to get to the heart of the question and we think this is the heart of the question, that the Claimant should have continued to receive treatment no less favorable than the exempt SPMs, after the ASR mechanisms have been removed. And we note that Professor Gruber, though he has considerably inconsistent testimony as between --

ARBITRATOR ANAYA: Mr. Weiler, I don't want to throw you off track, but are you finished with your jurisdictional presentation?

MR. WEILER: Yes, if you have any questions...

ARBITRATOR ANAYA: No. I just want to make sure, because that's something that concerns

me.

MR. WEILER: But if it concerns you and if you have questions, then...

ARBITRATOR ANAYA: No. I don't want to take away from your time.

MR. WEILER: I don't mind going back.

ARBITRATOR ANAYA: No, you -- just proceed. I just want to make sure I understand where you're going with your argument and where you are in it and so forth.

MR. WEILER: Okay.

So, with respect to Article 1102, we think that Professor Gruber is, at least in one respect, consistent with our expert, Dr. Eisenstadt and also consistent with the fact witnesses, Mr. Wesley and Mr. Phillips, as well as the Kentucky Attorney General, who, in litigation with an exempt SPM, made the same points.

The same points are really straightforward: After the ASR mechanisms are taken out, more favorable treatment is available. Doctor Gruber calls it a windfall. He makes the

point -- he stresses the point that, in his mind, it's not necessary for Liggett to take the money it saves, the windfall, and put it back into competition. He says they could disburse it out to shareholders. That doesn't take away from the fact that he agrees that there is a windfall, and here's the statement we have that cements that.

So, exempt SPMs gets windfall under the MSA and the NPMs don't; right?

Well, exempt SPMs get a windfall relative to if they paid the full amount. NPMs got a different windfall which was the allocable share loophole.

His words maybe somewhat inelegant, but we would suggest that that's the nub of it, that the status quo ante before the allocable share mechanisms were changed was that everybody had their windfall; everyone had their loophole. Whatever odd word we want to use to describe favorable treatment, everyone had a balance, and then afterwards that balance was changed.

I'm sorry, Professor Anaya, you have

your light on. No questions? Okay.

ARBITRATOR CROOK: The mike, Joe, turn it off.

MR. WEILER: One question that did come up yesterday which I thought would be important to cover is the question of treatment for whom.

The Respondent takes the position that it's about a de facto class of investors, Canadians, that its treatment to Canadians as opposed to treatment to the investor, and I would refer you to the Pope & Talbot Tribunal's very lengthy consideration, very detailed consideration, 37 paragraphs, thinking about this particular issue, and I think its conclusions are very powerful. The NAFTA plainly contemplates a single investors invoking the national treatment requirements to obtain damages from a party where particular governmental measures have accorded its investment less favorable treatment.

The Canadian Government took a position in that case very similar to the Respondent in this case. That position is, again, that it's

somehow a weighing of groups of investors, that it is all Canadian investors or it's all foreign investors. We would submit that that's not the test, and we would submit that there's good reason for that.

We think that Paragraph 72 of the Pope & Talbot Tribunal is right on spot, simply to state this approach is to show how unwieldy it would be and how it would hamstring foreign-owned investments seeking to vindicate their 1102 rights.

It's interesting, because in the Pope & Talbot case you have a softwood lumber regime which is essentially this large quota system which is going to prevent lumber or slow down lumber coming across the border from Canada into the U.S. there were hundreds and hundreds and hundreds of suppliers. The Canadian Government took the position that one would have to look at all American-owned investors who may have some softwood lumber mill in Canada. It wasn't a matter whether Pope & Talbot was getting less

favorable treatment, and the Tribunal said that would be unwieldy, that that would simply be impossible to do the analysis and actually give any sort of protection to the investor, and we would submit that the same applies in this case. It's actually a very similar case in that respect.

This was a question that the President had and we certainly invite your questions to see what you think of them. We have suggested four alternatives that we think would be less restrictive than the measures we saw. And to be clear, the measure we're talking about is the allocable share release change. We're not talking about the Escrow Statutes on the whole, we're talking about the change to that Escrow Statute in those five states.

Professor Gruber very plainly admits that we're really talking about some sort of tax. It's not a tax in the legal sense; otherwise, we'd be in a different chapter of the NAFTA and all of that, but as a health professional, he's getting to the point. He understands that essentially

what you want to do if you want to curtail tobacco use is raise the price and you don't want to raise the price piecemeal, you want to raise it across the board. The higher the tax, the lower the consumption. Professor Gruber stated that and it's very accurate.

For the life of us, we don't understand why this simple option wasn't taken in this case. And again, I'm not talking about the existing Escrow Statutes. If there really was a health concern and a need to raise prices for health concerns, the states could have agreed to impose a tax which would have raised the prices for everybody. That would have accrued revenue for the states which is obviously something that they thought was important, and it would have improved the healthcare concerns because you have lower consumption. So, why didn't the states just put a tax -- just agreed and put a tax on it? It would have been very nondiscriminatory, it would have been very level, everyone would have had to pay it. They didn't do that.

Option two, price controls.

ARBITRATOR ANAYA: I'm not quite sure I understand the relevance of these alternatives. Are you saying if we -- say we agree that there are alternatives. Does that, then -- you win on 1102?

MR. WEILER: Well, we're -- we were answering a question --

ARBITRATOR ANAYA: Does that render --

08:57:46 I know, but where does the answer of your question fit within the analysis, the real analysis?

MR. WEILER: It does fit within the --

ARBITRATOR ANAYA: No, please. I mean, does that mean that, by finding other alternatives, that the scheme is outrageous or whatever the wording was that you were using, shocking, and so forth.

MR. WEILER: The test that you're referring to, Professor Anaya, is the Article 1105

08:58:08 test of minimum standard of treatment and that doesn't apply --

ARBITRATOR ANAYA: Okay. All right.

All right. Okay. I'm getting it confused. So, how is it this fit in the 1102, now?

MR. WEILER: The national treatment test, the 1102 test, is essentially an equal opportunity test. The question is whether or not an individual who qualifies by nature of nationality to be able to ask for the test, to ask for the treatment, that national says, I deserve the best treatment that someone else is getting.

08:58:36 ARBITRATOR ANAYA: I understand that part of it. If you could relate this.

MR. WEILER: The next step after that is, since we know that they're getting better treatment -- the test ends up becoming a balancing requirement -- or you can call it balancing proportionality, you can call it a rule of reason, whatever language you want to use -- we see it in constitutional law and we see it in trade law, we see it in many places. Its's balancing test which

08:59:07 gives a margin of appreciation to --

ARBITRATOR ANAYA: But that's very different than a less restrictive alternative

test. That's usually with a very high level of scrutiny, where you have to find that they -- that because there are other alternatives, what they did was unreasonable; is that what you're saying? ? I mean, that's a very high level of scrutiny. That's not one where -- associated typically with reasonable basis test or a marginal appreciation test --

MR. WEILER: Well, with respect,

08:59:32 Professor Anaya, the text of the NAFTA, the text of Article 1102, doesn't actually specify a rule of reason.

ARBITRATOR ANAYA: That's what you said.

MR. WEILER: I know, but the point I'm making is --

ARBITRATOR ANAYA: So, it is a high scrutiny.

MR. WEILER: This rule of reason is

08:59:44 imported into the test as a sign of deference to the sovereign. How strong that test should be has not been definitively determined because there's

only been a handful of cases.

ARBITRATOR ANAYA: So, how strong should it be? Is it a strict scrutiny -- something like that -- you said you made an analogy to constitutional law. Is that --

MR. WEILER: In an article I've written on the subject, my opinion, and it will be -- it's also the Claimants' opinion -- is that it depends on nature of the measure.

09:00:12 If it is -- if it's a tax measure, let's say, a simple revenue measure, less deference. If it's a health measure, more deference. If it's an SPS measure, more deference. So the test -- this rule of reason test really is -- it's a moving target, to use a term of art. It's a moving target.

We would submit in this case that we have provided you with four methods in which the Respondent could have proceeded and we would

09:00:47 suggest that, because there are ample ways in which they could have done this better, in which they could have not proceeded in a way that ended

up in an arbitrary and discriminatory result, that we have satisfied that rule of reason test, that proportionality test.

It also has to do, though, with your factual determination concerning the real reason behind this measure; that's part and parcel of it. We can't just take out the law part and not put the fact part in there, too.

So, I can tell you the test is
09:01:25 essentially a rule of reason; it's a shifting, sliding scale.

I can show you four different ways in which they could have done it better, and I can show you, and we believe we have shown you, that this really wasn't a health goal in the first place. We think the balance of the evidence and the law, and with the alternatives we've given you, does prove our case and we do win as a result of that.

09:01:48 Does that answer your question sufficiently?

ARBITRATOR ANAYA: Sort of.

MR. WEILER: Sort of.

ARBITRATOR ANAYA: Go ahead. Go ahead. I don't want to interrupt you. Go ahead.

MR. WEILER: So, price control is another option. I'm not going to speak to it. If you have a question about that, I have a competition law expert right here who can talk about price controls. I will simply note it, and if you have questions, he's here.

09:02:12 Another option Federal Government regulation. Again, I won't go into much detail because my friend Mr. Violi is actually going to be talking about that to a certain degree.

And with respect to the Federal Regulation, the point to note simply is there is now a federal law, it's just come into force, and it is going to apply on Indian land, as well as off Indian land. It's going to restrict certain ways of selling cigarettes. It's going to change
09:02:45 prices. It's going to regulate the content. So, there is a federal law now and we would submit the federal law was always a perfectly good option.

It was an option from the beginning.

The final option, though, is probably the best option, which would have been to do nothing. And we say that because, if you look at the evidence on the record here, there simply is no way that one can find that this really was necessary to improve the health of the Americans in each of these states.

PRESIDENT NARIMAN: But that would
09:03:25 require second-guessing legislation of all these 46 states. That's the problem.

MR. WEILER: Well, but I would submit, Mr. President, that with respect to Article 1105, you don't want to second-guess, but with respect to Article 1102, look at the text of it.

There's no reason to say that you cannot -- your job, we submit, as the international Tribunal holding the feet to the fire of the Respondent who agreed beforehand to
09:03:51 surrender its sovereignty to the extent that it will obey these rules, it promised to give treatment no less favorable. That means that you

are entitled to second-guess their decision if you find they haven't provided that treatment.

PRESIDENT NARIMAN: On the facts of this case, what is your case -- less favorable treatment as compared to whom?

MR. WEILER: As compared to the exempt SPMs.

PRESIDENT NARIMAN: That's your case.

MR. WEILER: That's our case.

09:04:19 PRESIDENT NARIMAN: Yes, please. Sorry.

MR. WEILER: With that, I'll turn to Article 1105. I have some interpretive points just to note. Here, I put the Claimants' position forward. We did discuss it at length, so I won't go over it again.

I have also put what we think seems to be what the Respondent's position boils down to, which is a quote from the transcript from day six.

09:04:53 The United States of America is only obliged to answer claims where a, quote, established customary international law norm that

the Claimants have allege has been violated that we recognize has happened.

There really is something to that, the notion that we recognize, because it really seems as if there's a certain element of caprice when it comes to what does or doesn't qualify as a rule that gets through the filter that the Respondent puts up. We would submit if that if you simply look at the language of Article 1131, Article 1105, and the Vienna Convention Law of Treaties, you have the proper tools at your disposal to do that.

PRESIDENT NARIMAN: There's one thing I want to know.

MR. WEILER: Yes?

PRESIDENT NARIMAN: Here, at Page 13 of 27, you said, option 1, Professor Gruber likened the MSA and its complex implementation regimes to a tax explaining that the most effective way to curtail cigarette consumption was by raising prices across the board. Where is that?

MR. WEILER: I actually have that. I

don't know why it didn't get into the book. Just, if you'll bear with me a moment -- I actually have that reference on a scrolled piece of paper. So, I won't take up your time, but I do have that reference.

PRESIDENT NARIMAN: We don't. We don't. You may have it.

(Discussion off microphone.)

PRESIDENT NARIMAN: Where is it to be found, because this is relevant.

MR. WEILER: It is in the transcript.

ARBITRATOR CROOK: Perhaps he could give it to us at the break.

PRESIDENT NARIMAN: Yes, but nobody gives it to us. They all say they are going to give it and nothing happens; that's their problem. Let them take two minutes.

ARBITRATOR CROOK: This is against our time.

PRESIDENT NARIMAN: It doesn't matter if it is against -- yes, go on.

MR. WEILER: 1271 of the transcript for

yesterday, so that would be day 6.

PRESIDENT NARIMAN: 1271?

MR. WEILER: 1271 at Line 6 to 9.

PRESIDENT NARIMAN: Who's evidence is that?

MR. WEILER: This would be the cross-examination of Doctor Gruber.

PRESIDENT NARIMAN: 1271, line?

MR. WEILER: 1271, line 6 to 9.

PRESIDENT NARIMAN: You have accurately quoted it. Okay. I take it. Or is this your summation -- summary of it? You better check up.

MR. WEILER: Actually, there's lots of --

PRESIDENT NARIMAN: No, not lots. Is this correct? Does he actually say this or is this your understanding of what he said? I want to know. Then you say we misquote and so on I don't want any misquotes.

(Pause in the Proceedings.)

PRESIDENT NARIMAN: It must be in

Gruber's report not in 1271. Has he said anything like that in his report or in cross-examination?

(Pause in the Proceedings.)

MR. VIOLI: 1251.

MR. WEILER: 1251. Okay. Thank you for your indulgence.

It's Page 1251 of day 6, and I'll just read it into the record for you.

"Actually, the truth" -- this is Professor Gruber speaking: "Actually, the truth is the OPMs were at a slight disadvantage because the way the formulas worked. They were actually about 5 percent higher than the SPMs, so we've been arguing about NPMs relative to SPMs. The only thing we didn't discuss is the OPMs, they're actually 5 percent higher."

"PROFESSOR NARIMAN: Was there a price control provision?

"No, the MSA imposed an assessment that was well expected and passed through to prices. The MSA imposed what I had mentioned in my academic work. The MSA essentially imposed a tax

for reasons that made -- political reasons. I don't know why. They didn't call it a tax: They called it an assessment with a volume adjustment, but basically it was a tax and we know from previous evidence on cigarette prices that would be passed through to prices of cigarettes much like a tax is."

PRESIDENT NARIMAN: Where is it explaining the most effective way -- explaining the most effective way.

09:10:59

MR. WEILER: Well, he's referring to his academic work --

PRESIDENT NARIMAN: No, no. Where is that statement, that the most effective way to curtail cigarette consumption is by raising prices across the board? Where has he said that? He hasn't said that. Please, don't write these sort of things explaining that. He hasn't said it. Very difficult, you see, to follow all these arguments of yours.

09:11:27

Okay. Carry on.

(Pause in the Proceedings.)

MR. WEILER: Okay. So m, we're back on Article 1105, another page on interpretation.

The Respondent has a position which is that Article 1105 only concerns treatment received by investments, and that's to the explicit exclusion of investors. We note that no NAFTA cases are cited for this proposition, and we would submit it's an artificial distinction. It doesn't support the object and the purpose of the NAFTA.

09:12:21

Yes Mr. President?

PRESIDENT NARIMAN: No, nothing.

MR. WEILER: We would note that even the definition that the Free Trade Commission adopted that refers to the treatment of aliens has to mean investors by definition. It doesn't say "alien investments," it's a treatment of aliens. Well, who are the aliens? They're the ones that owned the property.

So, we would submit that it's an

09:12:46

artificial distinction. We would also submit that, in any event, the individual Claimants' association, NWS, are investment enterprises,

anyway. So, that's all I think we need to say about that.

We also note that the Respondent says that we should only look at Tribunals that were only looking at the version of this minimum standard, that is, a customary international law version. Well, that's fine, because we have the citations there to our Memorial where we've done that.

09:13:21

We also submit that, because the United States takes the position that all its bilateral investment treaties have the customary international law standard in them, even though their wording is somewhat different here and there, that that must mean that every single Tribunal that is deciding a minimal standard provision under the U.S. BIT must be deciding customary international national law.

Now, the next point that was made was

09:13:50

that principles of international of international law are not capable of being a source of customary international law, and that's clearly a

misconstruction of Professor Chang, who, as I noted here, was a protege Professor Schwartzenberger who had developed this concept called the inductive approach to treaty interpretation. Basically, there are general principles of international law and there are principles. What they were doing, both Doctor Chang and Doctor Schwartzenberger was essentially trying to develop a way in which one could

09:14:25

consolidate areas of law by determining what principles could be drawn from them, but they can't be confused with -- and both authors were very clear when they wrote -- that's not to be confused with the general principles of international law.

There's principles for interpretive uses under their inductive approach and there are principles of general -- general principals of international law, and we would submit that

09:14:53

general principles of international law certainly can be evocative of customary rules.

We would also note that reference was

made to the other NAFTA parties with respect to there being in agreement. We would note if you look at some older Kinian treaties -- and I don't mean 80 years, I mean 20 years -- they actually refer to treatment in accordance with the principles of international law. And again, we would submit that it's an artificial distinction to suggest that one can't develop principles from general -- I'm sorry, that one can develop rules from general principals of law. We just think that that's unnecessary.

Another point that was made was this notion -- this question of whether or not an alien can assert a right or some sort of expectation interest with respect to the minimal standard that would mean they would essentially have some sort of different treatment, the idea being this might lead to uneven floor. With respect, we would suggest that that's confusing minimum with minimal.

The test isn't for the -- for Article 1105, the test isn't what's the lowest

possible standard that anyone has to give, the test is, what's the floor below which no one should go. The fact that someone might be a Native American and therefore be entitled to certain rights because of that distinction, because of who they are, doesn't mean that they're getting better treatment under the provision. The provision requires treatment in accordance with customary international law.

I'm going to go quickly.

We heard some talk yesterday of the Oscar Chinn Case. We would note, with respect to the notion of general principles, while this case was cited for the purpose of explaining how customary international law works, we would note that the comprimi in the Chinn Case actually was one, the Treaty of Saint-Germain and, two, general principles of international law. And the various witness of that six-to-five decision of the PCIJ referred to principles of international law, and they're referring to them almost synonymously with what we would call custom. So, it's clear that

it's not nearly as neat as the Respondent would like.

I think we covered legitimate expectation enough. I'm just going to go past that.

The one point I would like to make about treaty rights is we heard an awful lot about the Jay Treaty. We didn't hear very much about the 1794 Canadaigua Treaty. I don't think now is probably the best time to get into a long discursive discussion on the subject, but we would submit that if you look to our briefs and you look to also our expert briefs and you look to the Respondent's briefs that you will find an exchange there that we think would be quite enlightening.

One point, though, that we would make is that there have been examples in recent American history in the 1920s and again in the 1980s where the United States didn't have a problem establishing a separate commission to deal with disputes arising under a treaty, such as the Iran-U.S. Claims Tribunal. Our Claimants would

like to strongly note that that's never happened with respect to any of the treaties that have been made with the Haudenosaunee, and we would submit there is really no good reason why. There couldn't be a commission under the 1794 Canadaigua Treaty. There's really no reason why there couldn't be, and we would submit that sometimes it's necessary to find that rights need a remedy.

I'm going to skip past Federal Indian laws because, again, I think we've well briefed, so I don't think I need to take too much time with you there.

With respect to denial of justice and due process, I would refer you again to the briefings of both parties. What's important to note here is that denial of justice does not just apply to courts, the authorities certainly demonstrate that. And, more over, when we have been talking about, in our briefings, about fair and equitable treatment and how it should be construed, we've been very clear that we think there are more than one principle or doctrine that

apply.

We've talked about the principle of due process, we've talked about the doctrine of denial of justice. We don't think that it's appropriate in this sort of analysis to try to drag someone down a little alley and say, oh, you said denial of justice. That's a magic word. That means you're challenging the court system. We didn't say we were challenging the court system and we
09:20:11 don't think that we should be dragged down that alley to only talk about -- to look as if that's what we were complaining about.

Our briefs in the Memorial and the Counter -- and the Reply Memorial state how we say fair and equitable treatment being informed by a doctrine of denial of justice and the principle of due process, as well as, also, the abuse of rights theory.

ARBITRATOR CROOK: I'm sorry. I know
09:20:33 the time problem and I'll try to be short, but I want to be clear.

So, you are saying denial of justice

does not adhere in your interactions with the courts, but rather as a consequence of the legislative actions taken by the legislatures and enforcement actions taken by administrative officials; is that the argument?

MR. WEILER: Denial of justice can apply in --

ARBITRATOR CROOK: Please, is that your argument?

09:21:02 MR. WEILER: Argument in this case is that we deserve the same right that the OPMs did to actually stand up and defend a health claim today, either defend it and defeat it or negotiate a deal to it, not be told we have to put money away for 25 years for a claim that doesn't even exist.

So, that is a legislative challenge, I'd say, but it has a court element to it as well, but it's not a challenge to the court system en
09:21:36 masse; it's rather in the context of this specific case.

ARBITRATOR CROOK: Thank you. I don't

want to take more of your time. Thanks.

MR. WEILER: This is a question that we'd like to leave with the Tribunal.

We note that, in the past couple of days, Professor Anaya has, a couple of times, mentioned that there may be a norm that the parties haven't covered and he asked at one point whether that meant -- and please, obviously, correct me if I'm wrong -- but whether that meant
09:22:12 that the Tribunal was somehow -- would not be able to enlighten itself with respect to that.

The Respondent volunteered that that would be, in their position, inappropriate because they wouldn't have had a chance to brief on that, and we would submit that, if there is a rule that we have missed that any Tribunal member believes should be covered because it would be appropriate to make the right decision, then we would certainly welcome the opportunity to do a discrete
09:22:47 brief with a limited number of pages with a limited number of time on that particular issue, simultaneously between the two parties. We leave

it to you if you want to do that and you can get back to us at whatever point. We obviously do have to get back to you on cost. We have to give you our detailed costs; so, you will be receiving one more submission from us, anyway. If you choose to ask us to look at that question, we certainly are prepared to do so.

I think the last slide I'm going to do
09:23:29 is this adverse inference unless -- do you feel you're going to cover it?

MR. VIOLI: Yes I'm going to cover the factual.

MR. WEILER: Okay. Well, then I'll just leave it at that and thank you for your time and let Mr. Violi continue.

MR. VIOLI: I'll try -- how much time do we have?

SECRETARY YANNACA-SMALL: You have 52 -- you covered 52 minutes.

09:23:58 MR. VIOLI: Okay. So we have?

SECRETARY YANNACA-SMALL: So you have an hour and 20 minutes?

(Discussion off microphone.)

MS. MONTOUR: I just wondered -- sorry, could you clarify something for me. I just wonder if time discussions could go on the record.

I noticed -- Mr. Kovar, was there an issue as to time discussion? I just wasn't sure?

MR. KOVAR: No, I had asked earlier Katia how much time there was.

The question I wanted to raise, Mr. Chairman, was, if there's an absolute time when this hearing must end and I've heard that it may be 1:00 o'clock, but I don't know that for sure -- if that's the case, then I think, to be fair, the Claimants' presentation must end at 10:30. So, they would have two-and-a-half hours and then we would have two-and-a-half hours on principle.

MR. VIOLI: Well, I don't know if we've had two-and-a-half hours, unless we've had it with questions and all that.

MR. KOVAR: But then there wouldn't be that time for us.

MR. VIOLI: If they don't have questions for you, then you'll go --

MR. KOVAR: But we wouldn't know, of course.

Anyway, I just would like to make that point.

Thank you.

MR. VIOLI: The focus of what I want to accomplish here is first to deal with the documents issue and then respond to two questions that the Tribunal presented.

And one was, focus on a treatment of least -- what I called least -- or first off, I'm not going to get into the substance, I'm going to get into the documents first, but give you an overview of where I'm going.

The Tribunal asked two questions.

You wanted to hear today by least lost alternatives. So, I've come up with this concept of least lost alternatives for all parties involved.

The second thing was the treatment of

Native Americans in the federal proposal -- was there evidence of treatment of Native Americans in the federal proposal and how it was so treated.

The first thing. You should have --

(Discussion off microphone.)

MR. VIOLI: What's going to be handed out or going to be handed out is the Claimants' first request for production of documents, the Claimants' second submission on the production of evidence, and then the Respondent's response to that second submission.

PRESIDENT NARIMAN: Mr. Violi, you can proceed in your own way. I would, please, very much appreciate if you could just -- again, just sum up in 5 or 10 minutes your total case and what you have proved in this case, you see?

MR. VIOLI: Yes.

PRESIDENT NARIMAN: With deference to either 1102, 1103, or 1105 or any one of them or more of them.

So, if you could just pinpoint this instead of going into this that we asked them to

produce, they didn't produce, all that -- that's taken far too much time. We heard you on that.

MR. VIOLI: I think it can be relatively quick, and because of the presentation yesterday, Mr. Nariman about what was said and misrepresented, I think that needs to be cleared up, but I'll go very quickly.

On January 22nd of 2007, Claimants requested -- and the significant request of the material request was at number 6. All documents concerning or analyzing, comparing, or summarizing the operation effect enforcement of the Escrow Statutes as amended by the Allocable Share Amendments in respect of Claimants or a particular class. If you recall we've discussed that.

There was an objection by Respondents to that request and in response on February 28th, Claimants took a significant amount of time to put together a rather lengthy document which you should have in the rubber bands, and this was Claimants' second submission on the production of evidence. In that second submission, we were more

articulate, more refined, more narrow, more focused, on the particular documents we wanted, and we went through each of our requests, our initial requests and told them exactly where they fit in, what they refer to, and what we were looking for. We even went one step further, Mr. Chairman, and in Annex 9 -- in Annex 9 of that request --

PRESIDENT NARIMAN: That's second

09:28:44 submission.

MR. VIOLI: Second submission, in February of '07.

In Annex nine, you'll see --

PRESIDENT NARIMAN: Wait, wait, wait. Annex 9. Page? Page?

MR. VIOLI: Annex 9 of -- this is the Claimants' second submission of document on evidence. What we see here is the Annex 5. It start here this is Annex 9.

09:29:25 PRESIDENT NARIMAN: Thank you.

Okay. Thank you. Yes.

MR. VIOLI: So, here is where we went

through what we were able to find over the preceding few years, right, by various sources. We gave specific documents, and we said, they appear to be incomplete, they are not originals, and they're not, to our knowledge, copies of the originals.

(Discussion off microphone.)

MR. VIOLI: Oh, it's going to be audio recorded. Sorry. I'm sorry.

09:29:52 So, what we did was we went through the documents we had on the jurisdictional hearing, if you recall, and we asked for better copies -- some had attachments -- you can see that mine were kind of blurry -- and we made the specific requests -- I mean, you can't get any more specific than that. And indeed, we even went so far as to ask for that Michael Hering document that has star, star.

I have a copy of it here. They were given this on February 28th or 27th.

09:30:26 And we said, we want copy of the original because it's truncated, it doesn't have all of the -- Respondents responded by telling us,

as far as the other documents in the Annex 9, of those documents attached reference in reference to Exhibit 14B, Claimants' Exhibit 14 C, E, F, K are not as Claimants are asserting. Claimants themselves submitted the completed versions and they go on and try to explain why we should rely on the documents they gave us, but they never responded to the one document they came in and tried to put in yesterday, nor did they come in

09:31:08 with any other documents of NAAG, the communications the e-mails, when they're talking about negotiating the NPM allocable share, when they're talking about changing it, having their meetings. None of those communications have been produced.

PRESIDENT NARIMAN: What does all this lead us to? That is what I am on.

MR. VIOLI: This leads us to the transparency, and I'll get to that in a moment.

09:31:30 PRESIDENT NARIMAN: Put it into the -- this is not a general litigation you have to tell us what it's in.

MR. VIOLI: Well, it's also -- so, at that time, there was no GRE working group to our knowledge, right? We didn't know about it, we didn't make a request for it, we just asked generally for classes of manufacturers.

ARBITRATOR ANAYA: Does this relate to your 1105 claim?

MR. VIOLI: It relates to what the Tribunal had asked me before and what Mr. Kovar

09:32:03 represented yesterday. If you don't want me to speak to what is essentially the creation of an attack on counsel's credibility, I'll move on.

ARBITRATOR ANAYA: If it relates to the claim, of course.

MR. VIOLI: Yes, of course, because it does because it relates to the documents we requested.

PRESIDENT NARIMAN: So, get to it, for God's sake.

09:32:26 MR. VIOLI: So, we received the document that mentioned the GRE working group, right? The date of that document is September,

seven months after our initial requests.

Yesterday, Mr. Kovar, the first slide, pointed out or he gave a truncated, a truncated, citation or reference to the record.

So, Mr. Chairman, just to clarify, the decision of the arbitrator is a public document with certain econometric data redacted -- thank you -- but it's never been introduced by the Claimants.

09:33:05 Now, I responded according to Mr. Kovar, I don't think the 2004 document has ever been redacted or unredacted. Well, if you move -- turn the page you'll see that what I actually said was, I don't think the 2004 document has ever been redacted or unredacted. The second reference that Mr. Crook made was to a 2004 proceeding and that was never made public or redacted or unredacted -- in redacted form or otherwise.

09:33:34 The point there -- that was at Tab 1 of the binder. The point was, and we're still making the point, that the documents in the NPM

proceedings are confidential and they remained confidential and not allowed to be produced to this court. The 2004 determination has never been made public. The 2003 has been made public in a redacted form.

Now, again, and that's more to the point of the -- that's more to the point of the adverse inference where we're going with these NPM documents.

09:34:18 Now, Mr. Kovar then quotes -- again, truncating a quote --

PRESIDENT NARIMAN: You keep answering Mr. Kovar for God's sake. This your closing speech. Makes some impact on your claim that the Claimants' claim is established because of this, this, this, and it falls under either 1102, 1103, 1105, for this reason.

MR. VIOLI: Well, the Grand River --

PRESIDENT NARIMAN: Then we can follow

09:34:42 all this. Forget what he said or didn't say.

MR. VIOLI: The Grand River working group, obviously, the testimony from Mr. DeLange

and Mr. Levine in his deposition, which the Tribunal has seen, said that it does not go to the litigation; it goes to other matters. It goes to enforcement -- all matters relating to Grand River. Claimants did not know about the Grand River working group when we served our request for documents.

PRESIDENT NARIMAN: Again, you are going back to that, now. Leave that alone. We're

09:35:09 not interested in all of this.

MR. VIOLI: If you're not I'll move on Mr. Kovar made it sound like there was a misrepresentation to you about the --

PRESIDENT NARIMAN: Forget that. It is in your interest to convince us. Forget Mr. Kovar. You don't have to convince him.

MR. VIOLI: The point -- I'll leave it at that -- is that the documents were not known by Claimants at the time they made the production.

09:35:33 The references in the record are to when we made the document demands, and we said if we'd known we would have asked for those documents specifically

by name. So, the temporal reference was left out by Mr. Kovar.

Now, he also said that counsel made a wild allegation to the effect of -- I can only tell you will personally that they will or would have materially affected your decision on whether competition was affected. Competition was effected by these measures. Whether we were harmed by those measures -- and third, whether

09:36:11 they were truly needed. That is at Tab 5 of the binder.

At Tab 5 of the binder, I've put in the first page of the 2003 decision, the NPM proceeding decision. The point of the NPM proceeding matters -- and I have the full hearing -- decision, the Arbitral award, if you want it in redacted form. The point was not to put that in as evidence in chief. The point was there were submissions in those proceedings that are material

09:36:44 to the state's position, conflict with their position, and to Claimants' position to this case.

MR. KOVAR: Mr. President, may I

register my objections. I think the Claimant has now put in a document in evidence that they have not submitted before.

MR. VIOLI: This is not for the purposes of evidence --

MR. KOVAR: That's a violation of your order. I would like to register my objection to that.

MR. VIOLI: Let me -- if I respond.

09:37:06 This is not for evidence in chief; this is for the adverse inference. Okay. Sure.

So, what we see here in these documents is a reference to the OPMs -- to the OPMs saying, in this proceeding, if we raise our price by higher than the $3 per carton that we have to pay to the MSA -- if we raise it by higher, whatever it is, $12, but it is in response to the MSA, it is caused by the MSA. Therefore, when we lose market share by raising our prices way beyond the

09:37:40 MSA, it's a result of the MSA and we get to claim money back under the NPM adjustment.

The states responded in this document

that would be gaming the system, much like a loophole, right? That would be gaming the system, here. And what we did and tried to do by getting these documents is to build what's called an econometric model which shows that, in fact, the OPMs did game the system. They priced their product very high, both in the discount and premium, to lose discount share of the market, right? And by losing the discount share of the

09:38:20 market they get three percent reduction in their MSA payments for of every 1 percent they lose. So, you want to lose the low-paying brands, and you get a huge windfall, and the state said we never intended that. We never intended that in this MSA. This is a consequence that cannot happen in this court, in this proceeding. We wanted all of the documents to present those arguments to you that those were the states. The OPMs have a loophole; they have an unintended

09:38:48 consequence; the states admit, it but they didn't do anything about it.

We have a loophole but they want to

take your loophole away. Exempt SPMs have a loophole, same thing, no problem for them. That's why we wanted the documents, and that's the adverse inference we'd like the Tribunal to draw by not having them before the Tribunal.

In full, NAAG would have all these documents, state submissions, the OPM submissions, and that's one of the reasons or, for our adverse --

09:39:21 PRESIDENT NARIMAN: Your case now is -- forget these documents.

MR. VIOLI: Yes.

PRESIDENT NARIMAN: Your case is that they deliberately raised their prices, the OPMs, far in excess of what ought to be the normal price, et cetera, covering cost and profit.

MR. VIOLI: That's correct.

PRESIDENT NARIMAN: In order

ultimately, even though they would consciously

09:39:43 lose a market share either to you or somebody else that they get back.

MR. VIOLI: 3 percent for every 1

percent.

PRESIDENT NARIMAN: 3 percent of?

MR. VIOLI: 3 percent for every -- if they lose 1 percent market share, they get to get 3 percent of their payments reduced, up to a certain percentage. So, if they get up to 16 and two-thirds percent -- if they lose 16 percent market share, they get to reduce their MSA payment by close to 50 percent, cut it in half.

09:40:09 PRESIDENT NARIMAN: That's according to you -- was the loophole they should have covered --

MR. VIOLI: That is the loophole -- the gaming of the system that the OPMs engaged in, that the states acknowledged, and said. You know what, there's a problem with that.

ARBITRATOR CROOK: Mr. Violi let me make sure I understand this.

You are saying that the OPMs set out

09:40:28 deliberately to lose market share because losing market share was financially advantageous to them; is that your argument?

MR. VIOLI: That is our argument. That's what our economist would have said who are allowed to say it in another forum, and that's what we said here and proved it and proved it better if we had gotten all documents because they kept them all from us.

ARBITRATOR CROOK: Okay. So, for you to win, the Tribunal has to make a finding that the OPMs set out to deliberately lose market share because that was financially more advantageous for them; is that right?

09:40:56

MR. VIOLI: For me to win this point is that the Tribunal finds that these documents were material and relevant to a fact at issue and they we were withheld from the Tribunal and the Claimants in presenting their case.

ARBITRATOR CROOK: Okay. So, you would base the finding -- you would ask us to draw an adverse inference that the OPMs set out to deliberately lose market share because that was financially advantageous, and you would do that on the basis of an adverse inference. I'm not trying

09:41:15

to be argumentative. I'm just trying to understand.

MR. VIOLI: No, I don't think that's an essential element. We have other proof of the way this system works and it's being inefficient and creates various loopholes for other manufacturers under this regulatory --

PRESIDENT NARIMAN: Let me put it this way. The Respondents have not given us anything on record, nor have you, as to why they increased their prices manyfold.

09:41:42

MR. VIOLI: This is a tid-bit.

PRESIDENT NARIMAN: I'm just -- please, if you don't mind, forget those documents. They're not on record. You say that they should have produced; they didn't produce them, adverse inference. I'm not on the adverse inference.

I'm asking you that the fact that the OPMs had, whether deliberately or not, had increased their prices manyfold beyond the consequence of it was not whether they did it deliberately or not whether they did it

09:42:09

deliberately or not deliberately -- that may be an inference. The necessary consequence was that for everyone 1 percent -- you mentioned 1 percent.

MR. VIOLI: 1 percent they get 3 percent back of the MSA payments.

PRESIDENT NARIMAN: I see. For every increase they get 3 percent back, and that was a loophole in the MSA which they also wanted to exploit; that's your companies.

09:42:43

MR. VIOLI: And that they're currently exploiting, yes. Those are the proceedings that they told you about that they're ongoing that Professor Gruber talked about during his testimony that they're still ongoing. They replaced him. The states don't want to use him anymore /they got somebody else and maybe they got some success. And he told you that there was a determination against the states so there was a 6 percent loss in market share that the arbiter found and they trebled it to 18 percent. So, that is what's going on, and the states have said, that's gaming the system. That's an unintended consequence.

09:43:10

You can't -- R.J. Reynolds said in this document, we're private parties. We're not public interest or officials. Our interests are not the same as yours, Mr. Attorney General, under this MSA. So, while you might want us to just raise our price enough to keep the market share, our profit maximizing response is to raise it as much as we can and that's a result of the MSA, and if we lose market shares, that's a result of the MSA and too bad for you, you have too pay us 3 percent for every 1. Okay.

09:43:42

MR. LUDDY: May I say one thing on that briefly.

MR. VIOLI: Sure. Sorry.

MR. LUDDY: To really tie it into our overall theory in the case is, they did that, and I went through this with, I believe, Mr. Hering but I'm not entirely sure -- they did that, raised their prices three times, knowing that they would lose market share, knowing that the states would have their back, because the states would then have their own backs to the wall under the NPM

09:44:07

adjustment and they knew that if they raised their prices, NPM market share would go up and that the states would have to go after the NPMs and drive the NPMs out or else they would lose all of their money under the NPM adjustment, and that that is what drove the attack on the NPMs in '03, '04, '05, and that is why we have the Allocable Share Amendments.

The OPMs did game the system; they gamed the states. And you'll recall that I read from a press release issued by the attorneys general on the day that the MSA was announced, where they said, we expect prices to increase by $0.45 a pack over the next three years; that's what they expected. They didn't realize the game that the OPMs had set up, and the game the OPMs set up for them was, we're going to gain market share and increase our profit margins. If the states don't do anything, that's fine. We'll take our profit margins and we'll get the NPM adjustment.

PRESIDENT NARIMAN: And the states only

went for the NPMs ultimately.

MR. LUDDY: That's right.

PRESIDENT NARIMAN: That's your case.

MR. LUDDY: Yes.

MR. VIOLI: And the next day after they signed the MSA, the Attorney General in that press conference, she said, we think -- we expect prices to go up $0.45 -- about $0.45 or $0.35 in 3 years. The next day they raised their prices $0.45 to the penny. The next day, not three years.

PRESIDENT NARIMAN: That, again, was unintended.

MR. VIOLI: By the states, but intended by the OPMs, because losing market share gets them 3 percent back.

In fact, they won one of these proceedings, as the PWC document -- they won for -- well, they didn't win, they settled. They sued the states to get money back for 1999 to 2002. They settled on 1999 and 2000, so the manufacturers under the MSA, they got loophole money in '99 and 2000; they did. Now, they're

litigating 2003 and 2004, as Professor Gruber told you.

I'll get into more of the -- forget about the documents for a second.

PRESIDENT NARIMAN: Yes. Forget about them.

MR. VIOLI: Now Mr. Koh, in his opening statement, said that Claimants are really looking for some kind of advantage. It's as if the -- they're saying, essentially, that because state regulatory measures didn't stop pollution, that the Federal Government or some other government somehow owed money to smaller polluters, simply as a way of giving them compensation.

With respect to Mr. Kay, a distinguished academician and obviously in the State Department, that's not what the Claimants are looking for.

And the hypothetical that I've put up on the screen, just briefly, imagine a diesel bus manufacturer is competing for transport contracts and services, and that manufacturer is dealing

with a gas automobile manufacturer or a natural gas manufacturer; right?

Now, suppose that the gas automobile manufacturer sits on the committee which determines the regulatory regime under which either both or one of them shall compete in the future. Is it fair, first, to have one group of competitors on the policymaking and influencing committee to the exclusion of the others?

Now, suppose in this analogy that there's the imposition of a regulatory licensing measure on the diesel manufacturer, that is substantially higher than the gas vehicle manufacturer. One could question whether the transparency was legitimate by the result.

Now, suppose that both of these manufacturers, their product, has the same effect on the environment, but the licensing measures end up favoring one group based solely on their market shares in 2005.

So, in 2010, we have this committee where the gas automobile manufacturer makes a

decision, influences the decision, and it has the effect of discriminating and favoring that group of competitors based on an arbitrary or a date, as I said, 2005, 5 years earlier. At that point, the questions of legitimacy and legality are raised. If one is to be restricted, they should all be restricted.

Now, the Respondent here has raised public health and we've heard it quite a bit, and 09:49:32 I'm all for hearing about public health, but it's not a reason for proposing discriminatory treatment, and they still haven't come to grips. We heard Professor Gruber in his testimony say it was a bribe to join. He used the word "bribe" right before he got off the stand. He said it was a bribe to join, but I don't think it was a bribe to join. I mean, I wouldn't call it -- he said that word, he's the state's expert, but I'm not going to hold him to that, but I look at the 09:49:57 result, and the result is that public health is not a basis to discriminate in favor of exempt SPMs.

Respondent pointed to the face -- you heard Ms. Morris point to the face of the MSA, right, and the ASR. She said, look to the face of these documents or these measures. The MSA is not a measure, unfortunately. Neither the MSA nor the allocable share appeal statute state a public health justification for granting exemptions of nearly $400 million. My figure came out to about 370, Mr. Hering came out to about 340. It's a 09:50:35 simple calculation under PWC documents: You take 502 or thereabouts and you times it by how many sticks are exempt and you come up with a number. I'll take Mr. Hering's number, 340 million instead of my close to 400. It goes up every year, by the way.

PRESIDENT NARIMAN: Now you only have ten minutes.

MR. VIOLI: All the MSA payments going to the general treasury of the state. The MSA 09:50:56 money, not one dollar is earmarked for public health. It's not earmarked. Some states have about 30 percent, some build bridges with it --

whatever the case may be, but it's not earmarked for public health. As the American Lung Association, state of tobacco control for 2008 -- that's in the Claimants' Reply Memorial at Evidentiary Document Number 35, the record is miserable on smoking programs.

Now, we heard Ms. Thornton talk about the payments under the MSA. She didn't mention that the base legacy funding under the MSA, those 09:51:36 payments ended in 2008. The national public education funding ended in 2003.

She made the statement, in contrast, OPMs make annual payments and strategic contribution payments in perpetuity under the MSA, based on their relative market shares of certain base amounts, and she tried to say that because NPMs don't pay these payments, but strategic contribution payments only go to 2017 they're not perpetuity.

09:52:03 I understand zealous advocacy and we're trying to push the public health, but let's stick to the facts and what they are.

Respondent also pointed to the initial payments in under the MSA that the OPMs made, $10 billion; that ended in 2003. Also, by the way, initial payments were not paid by SPMs or exempt SPMs, our comparators.

As I stated before, and as Mr. Weiler has said, we compete principally in the discount segment area of the market with the exempt SPMs, and we've seen the evidence where they put us out 09:52:37 already in a couple of markets.

Now, then we got into a discussion of -- well, I didn't, but Ms. Morris got into the discussion of permitted conduct -- or unpermitted conduct, and I put it in quote, because I had pointed out to the Tribunal that it was really permitted in some extents -- restricted and the statement in the record was, merchandise and apparel bearing tobacco brand names may not be sold or otherwise distributed under the MSA. 09:53:10 Tobacco products cigarettes themselves may bear tobacco brand names, but that is a very different matter. Matchbooks, like those distributed by

NWS, are banned by the MSA because they do not serve sole function of advertising Claimants' brands.

Ms. Morris for the first time pointed out in this litigation that people can't use matchbooks under the MSA, and NWS is spending thousands of dollars buying hundreds of thousands of matchbooks.

What I'm going to hand out now is an opinion because as I said yesterday, this is the first time I heard such a claim, that they were going to say that we're doing something that the MSA doesn't permit, and she made the statement, on the record, first time I've ever seen it.

If you look at the case that we're handing out -- and I've even abbreviated it. I've given you just the first two pages. It is the case of Ohio versus R.J. Reynolds, and I'll recite what the Supreme Court of Ohio held in that case, or dealt with.

R.J. Reynolds currently uses match books in three different ways. First, it

purchases matchbooks that are distributed in bars, nightclubs, and lounges, in connection with marketing campaigns for its Winston and Camel brands.

Second, it purchased similar matchbooks for use at musical and sporting events.

Third, R.J. Reynolds buys space on matchbooks from DDB and Sons, a company in which it displays Winston brand and related promotional messages.

The next paragraph says, in this enforcement proceeding, the State of Ohio challenges R.J. Reynolds third use of the matchbooks. The state does not now challenge the other ways in which R.J. Reynolds uses the matchbooks, although it reserves the right to do so in the future, because some or all of those uses may fall within the exception in Section 11.3(f)5 of the MSA for merchandise used within an adult-only facility.

So, Ms. Morris gave the impression that we were doing something so horrible using match

books. Here, the State of Ohio has approved two of the three mechanisms. And there's been no evidence that we're giving matchbooks to anybody other than adults or handing them out, other than in a facility. Had we known, we would have been able to deal with this issue straight up, but to get blind sided by it yesterday -- and believe me, I haven't slept all night to deal with these issues -- I think was unfair that's why I'm putting a case in the record that we didn't -- I never thought it was an issue, to tell you the truth, but it's out there and there's many more.

The next quote -- the next point Ms. Morris said, that is, no more T-shirts with Marlboro on them, no more belt buckles, leather jackets, billboards, hats, no more Joe Camel, no more other cartoon advertising, no more marketing to youths in youth magazines. All those public health restrictions came into play, and they applied in 99.6 percent of the U.S. market. Now, again, this is the first time I've heard this. She talked about magazines -- the MSA doesn't say

you can't advertise in magazines -- all stuff I heard for the first time yesterday.

Pick up the version of US Magazine, this month's US Magazines. R.J. Reynolds advertises in it. US Magazine has much use as it does adults, if you see the people who read that.

Second thing, go to Internet -- go to the Internet. They mentioned a lot about the Internet. Nothing in the MSA about Internet, but they raised it.

Go to Marlboro.com, get your free t-shirt. All you have to is register, give your Social Security number, prove your 18 years of age, and you'll get your Marlboro free shirt. What else can you do? You can win a trip to the Marlboro range. I submit that if Respondent, the United States Government, is going to litigate against us -- I'm not the brain power -- look at the brain power. I only have guts and I only have a strong back, but I don't have the brain power these guys have, right?

ARBITRATOR CROOK: Mike.

MR. VIOLI: So this is where we are.
PRESIDENT NARIMAN: Stick to the point.
MR. VIOLI: So, this is where we are: Accusations made at the last date, and I'm responding to them.
Now another comment, Mr. Violi is mistaken. The terms of the MSA are quite clear that such brand name merchandise is only permitted to be worn or used while inside an adult-only
09:57:18 facility and may not be distributed to any member of the general public. Thus, even if Claimants argue that their t-shirts, for example, are not sized for children, that does not change the fact that they are selling brand name merchandise to the general public, which would be prohibited under the MSA.
Number one, Mr. Montour never said he sold brand name merchandise. I don't know where that allegation came in. Where the allegation is
09:57:38 that you can only wear a brand name merchandise in adult-only facility, it's not what the MSA says. Use, distributed, yes; wear, no.

Now, in the next slide, you'll see I point to the specific MSA provision that I also pointed the Tribunal to; it's the sponsor supervision. And it says, "Nothing contained in the provisions of Subsections 3(f) and 3(i) shall apply to apparel or other merchandise marketing, distributed, offered, or sold or licensed at the site of a brand name sponsorship permitted pursuant to 2(a) and 2(b) by the person to which
09:58:19 the relevant participating manufacturer has provided payment in exchange for the use of the relevant brand name in the brand name sponsorship or third party that does not receive payment from the relevant participating manufacturer."
My point was then, and it is now, not a misrepresentation. This is exact -- I put the words of the MSA' it's not legislation. This is what I quoted, this is what I'm quoting now.
The next one, nothing contained in the
09:58:44 provision of Section 3D shall apply to the use of a brand name on a vehicle used in a brand name sponsor ship or apply to outdoor advertising. My

point exactly, no misrepresentation. It says it right there: You can put your brand name on a vehicle, you can put billboards up. Outdoor advertising is defined as billboards and what have you.
PRESIDENT NARIMAN: The point you are making is that the Claimants have, though not parties to the MSA, conformed to all the requirements regarding advertisement in the MSA;
09:59:15 is that your point?
MR. VIOLI: Yes. And it's at least consistent with what everyone else is -- we don't advertise in magazines. We didn't know we could, not that we would.
PRESIDENT NARIMAN: That's all right.
MR. VIOLI: We don't target youths. Sorry.
Now, the other point was that -- I hit the wrong slide -- but the point there is --
09:59:36 PRESIDENT NARIMAN: You have very few minutes --
MR. VIOLI: Okay.

Furthermore, Mr. Violi misrepresented various conduct restrictions in the MSA, implying that the exceptions had somehow swallowed the rule.
Mr. Violi highlighted the fact the MSA only limits but does not prohibit brand name sponsorship. That is true, but what he failed to mention is that participating manufacturers no
09:59:57 longer engage in these sponsorships, making the provisions to a certain extent moot. First time we've heard that here.
Somehow, the OPMs have given up all their brand name sponsorships. I've never heard it, never heard it. And you know what? Neither did the Federal Government, because in 2005, in their lawsuit, they particularly went after Marlboro, particularly went after Altria, particularly went after Philip Morris. In fact,
10:00:22 Philip Morris has a game, another game, another loophole. Let me get my parent company, Altria, to sponsor a race car series and I'll do one and I'll say that my parent company isn't bound by the

MSA. That's what the Justice Department complained about, and that's what was proven in that case. I have plenty more on that, but I won't go to it. I have R.J. Reynolds, too -- not on sponsorships, but on advertising.

Now the statements of NAAG. This whole case for the Respondent, you would think that they would have states galore coming in. We have heard from a couple, three Attorneys General, New Mexico, Idaho, California, but everything is the states, principally -- NAAG, principally, and they're charged with the responsibility for enforcing the MSA.

Under the terms of the MSA, they got $50 million to do so, and they get certain monies every year. Fine.

So, we're relying on NAAG to essentially take our applications, run the tobacco industry in the United States.

10:01:15 We see a quote, Mr. Hering, in 2003, NPM releases amounted to approximately 58 percent of deposits. What about exempt SPMs? They're

right about the same number. Their payments were right about that number.

What about other years? Why 2003? I received data in that New York case which has all the releases, all of the deposits. I'm not going to make a statement, because it would be wild and reckless, but it was not produced in this case, and I think it should have been produced in this case. I would have had something else to say.

10:01:49 And then, we have Mr. Hering's statement. We talked about the transparency in the legislative process, how he went from state to state and he met CITMA and he went and he talked to the AGs and he went to the senators. Look at the quotes of the Nevada Assembly there, right, talking about the allocable share legislation and the complementary legislation. Nevada's payment under the MSA are at risk here if this is not passed. You received some $39 million annually,

10:02:16 and those payments that are at risk should the adjustment ever come to be enforced against the states. They're not at risk if you don't pass

allocable share or complementary legislation.

The amendments, the documents that they have, they requested Philip Morris and all the other companies, please give us an assurance that if we change the law it's not going to be a basis to say its null. Now, if they don't diligently enforce it, different story, but that applies under the original Escrow Statute.

So, here we have statement from NAAG to

10:02:51 the Nevada General Assembly, and i don't know if it was controverted or we saw that single stick was testifying, but I don't know if single stick saw this comment, that Nevada's money at risk if you don't pass these two laws, blatant fallacy under the adjustment. Everybody's money is at risk if NPM is gamed, right, because of the volume adjustment, but not the NPM adjustment, and that's what he's talking about here, because it says, adjustment ever to become enforced. The volume

10:03:16 adjustment itself is self-executing.

So, we have what I submit is a blond acceptance of NAAG's testimony is misplaced.

There is simply no scenario under which this would have been a rational policy. Claimants' point to none. Clearly, the allocable share release mechanism was a loophole. As Mr. Hering explained, the great irony is that, if you exploit the allocable share release to the maximum and sell your cigarettes in just one state, the harm that the cigarettes that cause disease, cancer, and health, all the harm is concentrated in that

10:03:46 one state, uncorroborated.

May I just have five minutes? Can you indulge me for five minutes.

PRESIDENT NARIMAN: Only five.

MR. VIOLI: The assumption that NPMs would operate nationally is not borne out by the evidence; it's nowhere. We've looked for it, the Tribunal has looked for it. There's no document that says it. No NPM operated nationally at the time of the MSA or to this day.

10:04:07 There was no small company --

PRESIDENT NARIMAN: Where is this brief you are referring to? We don't have it.

MR. VIOLI: The Department of Justice brief?

PRESIDENT NARIMAN: No, no, no.

(Discussion off microphone.)

MR. VIOLI: So, and the bit about concentrating your sales, we saw evidence of exempt SPMs doing that, targeting NPMs, targeting Grand River, targeting Seneca cigarettes, going in those states, using their exemptions, below cost pricing, driving us out of business. Thus, the opportunity and use of exempt SPMs is an even greater irony.

We have statement from Ms. Morris that says, you know what? If we have to take the exemption to get the MSA, it's a small price to pay. Nothing about the exemption was required in the MSA. The MSA doesn't require an exemption, not at all. As a matter of fact, most people who join the MSA don't have an exemption. Nothing was required to get the MSA.

And at whose expense is Ms. Morris talking about when she says it's a small price to

pay? Who's expense? We think it's the Claimant. We think it's evident.

The biggest loopholes are in the MSA. Leaving aside the conduct restriction exclusions which I said, you know what? Use your parent company to advertise, come in and use patch books but only say their adult facility, use the Internet -- whatever the case, forget those loopholes. The NPM adjustment provision gives an NPM adjustment payment credit to every manufacturer in the MSA. This is true, as Mr. DeLange, testified, even when OPMs or SPM hasn't lost market share.

Now, I showed you a chart and I don't want to get into it, but SPMs went from here to here. They went from about 2 percent to 8 percent, but as Mr. DeLange said, the NPMs adjustment version gives them $86 million potential credit. They didn't lose any market share. How could you give them $86 million? They didn't lose mar -- Mr. DeLange said Philip Morris didn't lose market share, and it's the biggest one

to win under that NPM adjustment provision, Lorillard and Philip Morris. They're getting money or potential money -- they're litigating -- they've already settled for a couple of years by losing market share, but they're not. It's the group as a whole that has to lose market share, not the individual.

Exempt SPMs didn't a stick of market share. They've only gained 2 percent -- at least the OPMs, some of them lost, exempt SPMs skyrocketed. And the biggest ones who have the most market share get the most NPM adjustment. That's a windfall, and that's what Brett DeLange -- those are the figures he said, $86 million for exempt SPMs, and $1.1 billion for OPMs.

PRESIDENT NARIMAN: Okay now we stop.

MR. VIOLI: If you would like I have the Grand River application to speak to, but thank you.

MR. WEILER: President Nariman if I could, 20 seconds.

You had a question that you wanted me

to answer. It's 1271 of the transcript and I'll quote it -- I'll just read it to you.

"You know" this is Gruber -- "You know, tobacco cessation programs work. Some counter advertising, like talking about how smoking is bad for you, works, but it's all dominated by price. Price is by far the most important aspect."

"PRESIDENT NARIMAN: Now, the higher the price, the less are the incidents of smoking, which is deleterious to health?"

"Yes."

So, I was not misleading you, Mr. President. I'm sorry I didn't have the direct document at the time, but 1271.

PRESIDENT NARIMAN: Yes, no --

MR. VIOLI: Also, remember this, Tribunal, you asked those two questions. I didn't get to that but they're in the slides about the least alternative and the --

ARBITRATOR CROOK: Mr. Violi, before you leave the mike, one housekeeping question.

Costs. If we look in your papers will

we find your submission as to what you think should be done as to costs?

MR. VIOLI: I would defer to Professor Weiler on that, if I may.

ARBITRATOR CROOK: Okay. We'll examine your papers. Thank you.

MR. VIOLI: Okay. Thank you. Sorry.

MR. WEILER: And the final thing is that Mr. Luddy just wanted to make sure that I mention that he actually misspoke when he said that there was an agreement with respect to the witnesses that would be heard and you have the documents. I understand the cache was provided to you.

MR. VIOLI: And one other thing, housekeeping, you asked for a list of confidential documents and a list of cases, all the Grand River cases --

PRESIDENT NARIMAN: Yeah.

MR. VIOLI: -- where judgments have been dismissed, vacated, or are still pending, I have that for the Tribunal, as well.

PRESIDENT NARIMAN: Now, shall we take a break.

MR. VIOLI: Oh, you asked for the family -- I didn't get to talk about it, but the FDA law, new FDA law, as well. That has the -- those provisions in the front the preambles that say where as --

PRESIDENT NARIMAN: Yes, I want that. Where is that?

MR. VIOLI: And the CFR regulations that go with it, they're in the binder. They are the federal regulations that go with the --

PRESIDENT NARIMAN: The FDA law.

MR. VIOLI: Yes, and the FDA law is there and the regulations for the FDA law are in the binder.

ARBITRATOR CROOK: Thank you, Mr. Violi.

(Discussion off microphone.)

MR. FELDMAN: Mr. President, we have copies of the federal cases you asked for decisions.

ARBITRATOR CROOK: 2000 pages.

MR. KOVAR: More than 2000 pages.

ARBITRATOR CROOK: Okay. So, can we take a brief break.

PRESIDENT NARIMAN: What is it? 15 minutes, 10 minutes?

Mr. Kovar?

(Discussion off microphone.)

MR. FELDMAN: Can it be 15 minutes?

PRESIDENT NARIMAN: 15 minutes. Yes, please.

(Whereupon, at 10:10 a.m., the hearing was adjourned until 10:25 a.m., the same day.)

MR. KOVAR: Mr. President, Members of the Tribunal, good morning.

May I first say that --

PRESIDENT NARIMAN: All this is covered in this tape, is it?

MR. FELDMAN: Yes.

MR. KOVAR: What you have there, Mr. President, are the decisions of the court in the federal litigation.

PRESIDENT NARIMAN: Thank you.

MR. KOVAR: May I first say that the legal advisor Mr. Koh expresses his great regrets that he can't be here today. Literally, starting at 10:00 o'clock, had to be at a memorial service for the late Justice Harry Blackman, who was his mentor and he's giving a speech.

So instead, he sent a letter which I just like to read into the record, is something of what he might have said if he were here.

And it says, "Dear President Nariman, Professor Anaya and Mr. Crook. We are deeply grateful to each of you under these most trying of weather conditions for your extraordinarily hard work and commitment to this public process.

Since I appeared before you on February 1st, I have been reading closely the daily transcripts of these proceedings and had planned to return and participate in today's closing argument.

Unfortunately, the moment that the U.S. Government's closing presentation will now begin

coincides exactly with the memorial speech I had long been scheduled to give in memory of my late mentor Justice Harry Blackman.

Please forgive my absence at our closing presentation which I deeply regret. Members of the Tribunal, on behalf of my country and government, I thank you for your most careful attention which has been apparent from your thoughtful questions and interventions throughout this hearing.

In my opening statement, I noted that this is the first NAFTA Chapter Eleven merits hearing conducted during President Obama's administration. The work we devoted to this matter underscores our administration's deep commitment to binding and transparent international dispute resolution in investment treaty. Particularly, the NAFTA.

I committed to you that the United States would do its part fully and fairly to present our case and to respond forthrightly to your questions. I believe that our team from the

legal advisor's office of international claims and investment disputes has done so.

At the same time, we ask that you now decide this matter based solely on your jurisdiction, the law and the facts. As my colleagues led by Assistant Legal Advisor Kovar and Attorney Mark Feldman have demonstrated these last two weeks and will account again today, a consistent picture emerged from the presentations you have heard.

Claimants simply have not carried their burden. When you fairly find the facts and apply the law, you will see Claimants have not proven an investment in the United States. Liability of any kind for discrimination, denial of justice, or expropriation or any claim of damages. Nor have Claimants convincingly explained why this Tribunal should reach out to address grievances that are not before you under bodies of law that do not cast doubt of the governmental practices under examination and that are not relevant to the investment issues at hand.

Let me reiterate, that the United States remains deeply committed to the goals of NAFTA's investment chapter to provide specific protections for foreign investors and their investments, that are critical both for the investors and for the governments that must regulate in the public interest.

For the reasons that my colleagues will review again today, we believe that those goals will best be promoted in this case by a decision your Tribunal finding no liability and no damages.

Please accept, Members of the Tribunal, the assurances of our highest consideration. Sincerely, Harold Hungu Koh, Legal Advisor."

If you may, we can give you a copy of the letter.

PRESIDENT NARIMAN: Please thank Mr. Koh for his message and we do miss his absence. Thank you.

MR. KOVAR: Thank you.

Mr. President, I'm going to make some general remarks, and then I'm going to ask my

colleagues to address some specific issues and questions that have been raised over this two-week period.

The goal of NAFTA's investment chapter is to provide specific protections to foreign investors and their investments. Protections that are critical both for the investor and for the Government that must regulate in the public interest.

This is a commitment enshrined in the NAFTA and shared by each of the partner governments, Mexico, Canada and the United States, who appear before Chapter Eleven Tribunals like this one.

I believe you've seen in particular the interest of these two governments in this case. Canada filed their official views on issues involving interpretation of the NAFTA that have arisen in this case and both Canada and Mexico have attended most, if not all, of the sessions of this case.

Now, much of the evidence and law in

this case has been presented in a rather diffuse and fragmented manner. The Tribunal was repeatedly asked what I think have been incisive and probing questions to both parties to ensure that the facts presented and the evidence produced and the inferences to be drawn, the law to be applied are as clear and precise as possible.

Thank you for persevering with your questions when I and my team sometimes took our time to get to them or insisted on laying groundwork when you wanted us to get to the point. We hope we've answered the questions to your satisfaction, but if not, please ask us again.

Let me summarize, again, the fundamental points we believe must be addressed to decide this case. Under Article 24(1) of the UNCITRAL arbitration rules each party has, quote, the burden of proving the facts relied on to support his claim or defense, unquote.

10:33:48 This well-established rule is the norm in international arbitration. In his treatise Professor Carin has written that Rule 241 is

simply a restatement of the general principle that each party has the burden of proving the facts on which he relied in his claim or in his defense.

Professor Carin says the rule is consistent with and part of the, quote, standard rule that the Claimant has the burden of demonstrating the legal obligation on which its claim is based. This is on Page 568 of the treatise which is attached to the U.S. objections

10:34:25 to the Claimants' request for production of documents dated February 6th.

PRESIDENT NARIMAN: 568 of which textbook?

MR. KOVAR: David Karen's treatise and it's attached to our objections to Claimants' request for documents of February 6, 2007, appendix tab three.

Claimants have alleged several breaches of the NAFTA and they have the burden of proving

10:34:53 each of those claims. Claimants must first prove that under Article 1101(1) they are investors with an investment in the United States, as those terms

are defined in NAFTA Article 1139.

Claimants must then prove the measures challenged in this arbitration relate to them or to their investment, that is, the measures have a legally significant relationship with them and their investment.

With respect to their Article 1102 claim, Claimants must prove that, one, the challenged measure accorded them treatment with

10:35:24 respect to their investment, two, that there are like circumstances with local investors, and three, that the challenged measures treated them less favorably than they treat local investors or investments.

With respect to their Article 1103 claim, Claimants must prove the challenged measures accorded them or their investment treatment that was less favorable than that accorded a third country comparator and like

10:35:47 circumstances.

With respect to their Article 1105 claim, Claimants must prove that the challenged

measures failed to accord Claimants' investment treatment in accordance with the customary international law minimum standard of treatment of aliens.

To that end, Claimants must point to state practice and an opinio juris supporting the existence of the customary minimum standard of treatment principle that would apply. With respect to the Article 1110 claim, Claimants must

10:36:19 prove at a minimum that the challenged measures radically diminished the value of their alleged investment.

If the Claimants can prove that the Tribunal had jurisdiction to hear their claims and if Claimants can prove a violation of any of these articles 1102, 1103, 1105 or 1110, Claimants would still be required to prove that they or their investments incurred loss or damage arising out of a specific breach of the NAFTA.

10:36:46 That is, Claimants would be required to establish the sufficiently clear direct link between the wrongful act and the alleged injury.

To carry that burden, Claimant would be required to submit documentary on testimonial evidence that is sufficiently complete, credible and consistent.

PRESIDENT NARIMAN: I wanted to know what is the position of the United States of America in this proceeding? You do represent each and every one of the states concerned and are we to look to you as if you are the states?

I mean, how is this to be -- what's your status in these proceedings? Because it becomes relevant for purposes of all this discovery documents not shown, shown, all that to your argument but I just want to know what is the status of you as a litigant in these proceedings.

MR. KOVAR: Well, the claim has been brought against the United States as a party to the NAFTA.

PRESIDENT NARIMAN: You as the alter ego of the states in this litigation and for the purposes of this litigation, as if all the states had been joined.

MR. KOVAR: Well, if the action

complained about is a governmental action of one of our federal entities, the state --

PRESIDENT NARIMAN: That's --

MR. KOVAR: -- then we are responsible if that reaches the NAFTA.

PRESIDENT NARIMAN: Responsibility is separate. Sorry. I want to know for purposes of this case, I think it's a very important question we have to deal with, that is the United States, is this litigation as if it were brought against all the states but since under NAFTA it becomes the obligation of the United States, therefore, the United States is represented as representing all the states.

I mean, you are, as it were, the spokesman of all the states because there's no controversy between Claimants and you, as such. It's only because as of your obligation under NAFTA.

MR. KOVAR: I may want to consult with Mr. Feldman.

PRESIDENT NARIMAN: Let me know later.

Yeah, we must know what the position is.

MR. KOVAR: I think the Claimants' approach which is to say, we love the federal government and we don't like the states, isn't really consistent. Because --

PRESIDENT NARIMAN: Not on their approach. I'm not bothered about their approach. I'm asking you as juristic personality, what is the juristic personality of the United States in these proceedings.

MR. KOVAR: We are the Respondent, so the Claimants' complaint is against the United States.

PRESIDENT NARIMAN: As if you represented the states. See, can you say or can you not say, is what I want to know. That we don't know some things may happen in the states that's none of our business. We have no idea what it is, or, or, or, are you directly responsible to the Claimants in respect of all the complaint actions of the states?

MR. KOVAR: That's why I bring you back

to NAFTA. If the complaint makes out a violation of the NAFTA, then the federal government is responsible.

PRESIDENT NARIMAN: But that complaint or violation is by the states, not by you?

MR. KOVAR: Yes. But if the violation were established that the violation would be on the federal government as the party to the treaty.

PRESIDENT NARIMAN: In what capacity are you here?

MR. KOVAR: I mean, there may be circumstances where our ability to get information or documents or something out of a subsidiary entity, a state or government could be a municipality in a different case, may be limited because we have our own separation of powers issues but I don't think that's been -- we haven't made that as an issue in this case. It has been an issue --

PRESIDENT NARIMAN: I'm not saying anybody raised it as an issue. I want to know since a lot of argument has been addressed on the

states suppressing this and they're not producing that and so on and so forth, what is the status of the United States of America in these proceedings apart from the fact that you're liable under NAFTA?

MR. KOVAR: We are the Respondent and we take responsibility for the actions and to defend them under the treaty. And I guess since we have a little bit of time for rebuttal, I'll try to have a consultation with Mr. Feldman later and see if we need to elaborate on that.

PRESIDENT NARIMAN: Anything that could right us on this.

MR. KOVAR: Now, the MSA, let me tell you a bit about how the case looks to us. The MSA was a settlement of litigation between the states and the big tobacco companies for a series of statutory and common law causes of action for reimbursements for health cost, as well as for some common law torts.

As part of the MSA, the companies agreed to pay certain mandatory payments over a

long period of years and to agree to certain specified restrictions on their rights. We heard about advertising, research, lobbying, publication of their products and so on.

Small manufacturers were given inducement to join the settlement through a permanent exemption from MSA annual payments based on their existing share of the U.S. tobacco market in 1997 or 1998.

Manufacturers who decided not to join the MSA were not subject to any of the conduct restrictions or payment obligations but were required to pay amounts into escrow based on the number of sticks of cigarettes they sold on which they paid state excise tax.

Through a complicated formula they provided for the possibility that certain amounts would be released back to those non participating manufacturers to ensure that their escrow deposits were not greater than the payments that would have been incurred if they had joined the MSA.

It turns out this formula was, as we've

described it, exploited by certain NPMs who concentrated their sales in only a few states to maximize their release of the escrow funds. This loophole as we've called it, at least as the Tribunal called it, in the jurisdictional award created a great marginal cost advantage for these NPMs inconsistent with the core public health policy rationale of the escrow statutes because more cigarettes could be sold at lower prices, that did not fully reflect the cost of the public health of that product and adequate funds were not being held in escrow for eventual recovery by the states if they later successfully brought suit for the health consequences of those sales in their state.

Now, the Allocable Share Amendment was drafted, approved by the parties to the MSA and along with the complementary enforcement act, and over several years it was passed by all but one of the settling states and it is the Allocable Share Amendment, the ASA and the complementary act that is the challenged measures in this arbitration, as

well as the original escrow statutes only for on-reserve sales.

Now, by contrast, the Claimants have spent their time in this hearing trying to prove the following, so it would be my characterization of it. That the purported public health justification for the MSA and its related measures is little more than a sham. That the real purpose of the MSA was for the big states and the big four tobacco companies to enter into a revenue sharing cartel-type arrangement, but nevertheless, the original Escrow Statute, part of the MSA regime was allowed to permit non participating manufacturers to thrive by establishing regional brands and receive large releases of the majority of their escrow deposits.

That the major tobacco companies then conspired with the states to end this arrangement despite having helped create it under the charade of, quote, fixing the loophole to put in place a punitive set of complementary acts that they knew was unenforceable against foreign manufacturers

like Grand River. The escrow statutes and the complementary acts, harm and discriminate against the Claimants as members of indigenous nations and indigenous owned businesses by purporting to require escrow on some aspects of their business.

The Escrow Statutes and complementary acts violate Claimants' rights by attempting to enforce the laws against them as a foreign manufacturing company that does no business in the states.

Claimants' entire amended claim is based on proving that the Allocable Share Amendments were not aimed at closing a loophole in the escrow statutes, but rather revoking a promise that the NPMs could avoid the escrow obligations by maintaining regional brands, was it a loophole or a promise.

Respondent United States has put in what we believe is an abundant amount of contemporaneous documents and expert witness statements to show that the Allocable Share Amendments were intended to close the loophole and

our witnesses responded to hours of cross-examination under Claimants' questioning on these points.

Now, what is Claimants' evidence and how do they meet their burden. In order to prove this case, Claimants have told the Tribunal and, of course, this is my own characterization, you don't have to pay attention to the fact that the MSA, the Model T escrow statutes, the Allocable Share Amendments and the complementary acts were duly enacted by the legislature of each of these 46 states and on their face, that they were enacted in the interest of public health. It's really just a sham. Don't believe the testimony of five witnesses presented by the Respondent. Three Assistant Attorney General, Brett DeLange, Dennis Eckhart and David Thomson, as well as NAAG's Michael Hering and Professor Jonathan Gruber. Essentially, they're not believable, they're not telling the truth.

Instead, come with us behind these facades and see that they really had ulterior

motives. For example, they point to documents. A document authored by Philip Morris, it will tell you what's really going on. Look at this little bit of an e-mail originally from Michael Hering, it will tell you what he was really thinking but we will cross-examine -- and in that case, they cross-examined Mr. Hering for four hours and did not ask him about the e-mail.

Let us suggest inferences. This is the Claimants' case. Let us suggest inferences for you to draw from documents that are not before you and that we did not specify before that we wanted. And now we would ask who has testified for the Claimants on this great conspiracy. Not really anyone, not orally and not through written witness statements on the record.

What the Claimants do is they present, they wave around this collection of documents which is not so large, but which is buttressed by a rather mysterious mountain of other documents that if only they had them, they would prove their case.

On this basis, the Claimants are asking the Tribunal to substitute their allegations of this conspiracy for the stated purposes behind this complex public health regulatory regime and the consistent, earnest and well-meaning testimony of the three civil servants with over 50 years experience in public service, and two individuals who devoted large parts of their careers to the cause of reducing the public health impact of cigarettes.

With all due respect, we would ask the Tribunal to consider that it is the Respondent, United States, that has put in almost all of the evidence in this proceeding on these points, and that the Claimants are asking you to disregard it all as nothing more than pretext. Essentially, on the basis of their say so.

But remember, the burden here is on the Claimants to prove their allegations. It's not on the U.S. to prove that the measures had a legitimate public health justification. The Claimants have subjected these proceedings to a,

if I can characterize it myself, almost a harangue about documents. They talk about them a lot, yet when we look at Claimants' case, damages and other things, we find there's astonishing few documents. Where are the audited financial statements to prove damages, where's the loan agreement, where's the trademark licensing agreement to prove an investment. Where are the articles of incorporation for the U.S. based business association, where are the banking records for their purported escrow deposits. I ask you, where the banking records. And this is Claimants' factual case. Let me look briefly at their legal case.

We've heard during these proceedings, the Tribunal request many times that the Claimants tie the facts and theories that they were trying to develop through their cross-examination and their documents to their legal theory in the case, but at least in our view despite a willingness to do this, we haven't really seen the Claimants get to the point of actually tying it all together.

We've heard the Claimants argue how the different discrete standards of liability under Chapter 11 pretty much all flow together and how they permit the Tribunal to read legal principles in, almost pretty much as it wants to. They're really sort of inviting you to decide how to read them in and how much. From other areas of international law. The upshot according to the Claimants is that the NAFTA Chapter 11 allows you, I'll pick some of these out, we heard some new ones today. It could be a good faith standard, a rule of reason test, an abuse of authority standard, balancing test, sliding scale or, basically, to evaluate whether the Allocable Share Amendments were fair and equitable, with no real specific guidance or limitation.

Again, with due respect, this bears little or no relationship to the specific provisions defining the Tribunal's jurisdiction on which we believe the Tribunal must apply.

Let us consider how much time the Claimants have spent in this proceeding addressing

what we believe are major weaknesses in their claim. How much time have they spent trying to prove their damages? How much time have they spent trying to prove the elements of their unusual state by state expropriation claim? How much time on the question of nationality based discrimination under the national treatment and most favored nation treatment obligations. How much time on duty to consult private companies and businessmen. How much time examining the practice of Canada and the United States under the Jay Treaty? We would submit, not enough.

Contrary to Claimants' assertions, Chapter 11 does not vest this Tribunal with jurisdiction to opine on any and all trades of competition cases or human right instruments that the Claimants my bring up.

Chapter Eleven has specific requirements that must be proved by Claimants to establish their case. This, we submit, they failed to do.

Mr. President that concludes my general

remarks and I would like to now ask my colleagues to address you. First, Mr. Feldman will come up and among other things will touch on Claimants' NAFTA case in detail and the question of time bar, then Ms. Morris will discuss several aspects of the issue of the character of the measures at issue, respond to some of the points that were made this morning.

And Ms. Thornton will answer questions that have been raised about the legislative process and the margin of deference due national authorities by NAFTA Tribunals. And Mr. Sharp will touch on damages.

We may also call on other colleagues to contribute additional points or to take your questions.

Thank you very much.

PRESIDENT NARIMAN: Thank you.

Yes, Mr. Feldman?

MR. FELDMAN: Good morning, Mr. President, Members of the Tribunal. Over the past few weeks, we've spent a lot of time

discussing a complex regulatory regime and a complicated set of facts.

But for purposes of the NAFTA Chapter 11 obligations at issue this case is quite straight forward. Claimants have no national treatment or most favored nation treatment claim under Article 1102 or Article 1103 because they have not even attempted to show any discrimination on account of nationality in this case.

10:54:20 Claimants assert that they do not need to show discrimination on the basis of nationality to establish a violation of Article 1102 or Article 1103. That is wrong. The three NAFTA parties agree a Claimant must show discrimination on the basis of nationality under Article 1102 or Article 1103, and on this issue I refer the Tribunal to Page 66 of our rejoinder where we set out the views of the three NAFTA parties on the issue.

10:54:50 ARBITRATOR CROOK: Mr. Feldman, if I may, there's a mechanism, there's the FTC guidance. We don't have guidance on this point.

Do we really have the agreement of the parties?

MR. FELDMAN: Thank you, Mr. Crook. When you have submissions from the three parties on the identical issue, taking the identical position, we would submit that you do you have agreement of the parties on that issue.

ARBITRATOR CROOK: How would you deal with the cases that have rejected that standard?

MR. FELDMAN: Our position is when it

10:55:22 comes to the FTC interpretation, that would be a binding interpretation. In the case of 1128 submissions, the agreement of the parties would not be binding on the Tribunal, but it is certainly of great relevance to the question and we would also point to several cases which are in our rejoinder in which the NAFTA Tribunals themselves agreed with the NAFTA parties on this issue.

In particular, I would flag on Page 68

10:55:48 of our rejoinder where we quote from the Pope & Talbot Tribunal which rejected a national treatment claim and found that there was no

convincing evidence that the treatment at issue, quote, was based on any distinction between foreign owned and Canadian owned companies.

And then in Methanex, the Tribunal found that the ban at issue, quote, does not differentiate between foreign investors or investments and various MTBE and that was the additive at issue, producers in California. And as a result the Tribunal rejected the national

10:56:29 treatment claim.

In the ADF case, the Tribunal found that the national treatment claim found because the Claimant had presented, quote, no evidence at all to show that a U.S. steel manufacturer or fabricate for by virtue of its nationality have been exempted from the requirements of the buy American provisions which were at issue.

So I submit we have NAFTA party agreement on the issue regardless of where the

10:56:57 Tribunal may come down on whether that actual agreement exists. The case law independently is clear that for any claim of national treatment or

most favored nation treatment, the Claimants must show discrimination on the basis of nationality.

The case law agrees, the parties agree, that to otherwise adopt Claimants' theory of being able to point to a comparator that happens to be of a certain nationality, without any additional analysis, that is simply not the obligation that

10:57:33 the United States and the NAFTA parties signed up to under 1102 or 1103. These are provisions aimed at protecting against nationality based discrimination.

ARBITRATOR CROOK: What of Respondent's argument that you can't really determine or establish nationality based discrimination, if that's the test, then 1102 largely goes away.

MR. FELDMAN: It certainly is possible for Claimant to establish nationality based discrimination. The Claimant needs to show based

10:58:05 on the facts on the ground that there is a nexus between the treatment at issue and their nationality. They need to show that nexus.

Specifically, I think there's helpful language from the Corn Products decision.

(Pause in the Proceedings.)

MR. FELDMAN: This is from Corn Products versus Mexico. The Tribunal in that case found while the existence of an intention to discriminate is not a requirement for breach of Article 1102 and both parties seem to accept it's not a requirement, where such intention is shown that's sufficient to satisfy the third requirement, that being nationality based discrimination, but the Tribunal would add even if intention to discriminate had not been shown, the fact that the adverse effects of the tax were felt exclusively by the HFCS producers and suppliers, all of them foreign owned to the benefit of the sugar producers, the majority of which were Mexican owned, would be sufficient to establish that the third requirement of less favorable treatment was satisfied.

So through an analysis of the facts on the ground, if it becomes clear there is, in fact,

a nexus of the treatment at issue and the nationality of the Claimant, then the Claimant can show, in fact, there has been nationality based discrimination, but Claimants make no attempt to argue that in this case and with the facts on the ground, they cannot because as we've heard in written submissions and oral testimony in this hearing, these measures do not discriminate on the basis of nationality.

Look at the state directories, Brett DeLange read it at length from the Idaho state directory. Foreign manufacturers, domestic manufacturers, there is simply no distinction being made on the basis of nationality in this case.

By deciding this one straight forward legal issue, Claimants' 1102 and 1103 claims can be dismissed in their entirety. Claimants also have no expropriation claim under Article 1110 because they have made no attempt to demonstrate the challenged measures had a sufficient economic impact on their investment. Given the Grand River

Seneca exports are as strong as every Claimants' expropriation claim should be dismissed.

Finally, Claimant has no minimum standard of treatment under Article 1105. As we discussed the FTC interpretation on Article 11051 is binding on the Tribunal and Claimants failed to show any customary international law prohibition against the frustration of an investor's so called legitimate expectation.

Claimants do not make out a racial discrimination case, let alone demonstrate the violations of individual human rights would be included in the customary international law minimum standard of treatment applicable to investments under Article 1105.

Even if there were an applicable duty to consult, it would apply only to consultations with tribal authorities and not with Claimants who are private indigenous persons.

And finally, with respect to Claimants' denial of justice claim, Claimants have not exhausted that claim, and in any event, under the

Escrow Statutes, Grand River could not be deprived of any property unless and until an MSA state obtained a tobacco related judgment against the company. Thus, the denial of justice claim should likewise be dismissed.

And I would just say a few words on the Tribunal's time bar decision and Claimants' efforts to avoid the restrictions of that decision.

In 2004, you will recall that Claimant submitted a claim to arbitration challenging the original escrow statutes in this case and demanding $340 million in damages. Claimants allege that the original escrow statutes were causing the complete destruction of their business. That claim was found to be time barred by the Tribunal, at least with respect to off-Reservation sales.

And to avoid that ruling on time bar Claimants have been forced to overhaul their claim which now rests on the assertion that the original Escrow Statutes, rather than causing the

destruction of their investment, in fact, contained a promise of large releases in perpetuity to NPMs that maintained a regional brand.

Claimants' new theory is not only unsupported but cannot be reconciled with their prior demand for $340 million in response to the original Escrow Statutes.

And with that, I would ask the Tribunal to call on Ms. Morris to address several issues concerning the challenge measures in this case.

PRESIDENT NARIMAN: Are you going to address us again?

MR. FELDMAN: Yes.

PRESIDENT NARIMAN: I'm just asking you because I have something to ask you later.

MR. FELDMAN: Yes.

MS. MORRIS: Good morning. I am going to reprise just a couple of points from my character section and respond to a couple points that were made on that this morning but before I do, I would just like to speak briefly about the

other factor of the expropriation analysis that I discussed, the economic impact.

And Mr. Luddy was discussing this morning Claimants' proposition that you should only analyze the economic impact on their sales in certain specified states and the specific states have changed and are now Oklahoma, Arkansas and Georgia, but I would like to explain to you why we believe that is not a proper way to examine Claimants' expropriation claim.

Throughout some of their recent filings and in Mr. Wilson's reports, Claimants and Mr. Wilson have raised, excuse me, three primary reasons why you should restrict your analysis to the state identified by the Claimants. One of those reasons was not addressed by Mr. Luddy this morning, but for sake of completeness, I would like to respond to it.

So these three primary reasons are the extra territoriality principle, the Tribunal's decisions on objection to jurisdiction and considerations of fairness. And I would like to

explain why none of these three possibilities or possible rationales should be accepted by you.

So the extra territoriality principle holds the laws of a state should be considered to apply within the territory of that state. And I would just say that the fact that the extra territoriality principle exists does not require or even imply that Claimants' investment should be treated as being separate by state simply because the measures at issue are state measures.

And as far as that goes, I would also refer you to a slide from my presentation, which, hopefully, we can pull up on the screen here for you, which just notes the various reasons why Claimants themselves don't treat their sales and individual states as separate property interests.

So the states or Grand River, rather, doesn't have sales force by state. It doesn't track good will by state. It doesn't know its states in its MSA application, how many cigarettes are sold into any given state by its distributors, and Seneca cigarettes are not just sold

off-reservation in the five original states.

We would argue that the fact that state measures are at issue, you should analyze Claimants' investment by state.

With respect to your decisions on objections to jurisdiction, I believe it was Mr. Wilson at one point suggested that in that decision you had imposed some sort of geographic limitation on the analysis of Claimants' claim with respect to the Allocable Share Amendments.

And I would just note that in that decision you adopted Claimants' Allocable Share Amendment claim as they had proposed it in their motion to amend, for lack of a better word, and in that motion to amend, they didn't put any geographic limitation on their sales or their development of the Seneca brand within the United States.

And the last principle or the last proposed rationale is general appeal to fairness which was offered by Mr. Wilson in his report and also by Mr. Luddy this morning. And the thrust of

the argument there, as I understand it, is that it would be unfair to Claimants to penalize them by reducing their damages by looking at their successful sales in states that didn't violate the measures and use those to offset their losses in states that did apply the measures as they allege.

And I would submit that the true inequity here would be to permit Claimants to divide up their investment in a way that doesn't correlate with reality.

11:08:08

So as I've explained, they don't divide it up by state, they don't treat the investment as being separated by state. So it's not in any way inequitable to require them to show sufficient economic impact on their investment as a whole in order to demonstrate their expropriation claim. And in fact, we would regard it as inequitable for them to carve off some small part of their investment and argue that alone has been expropriated.

11:08:36

And the one last point I would like to make, with respect to the three states that they

allege their brand has been expropriated in or their investment rather has been expropriated in, I would just note they haven't pointed to a date of expropriation for those states and they do state, I have to say I don't recall exactly where but it was in my slides yesterday. I believe it might have been in their reply that they have been driven out of the market in Oklahoma and Arkansas in 2005 but Mr. Wilson's charts did show substantial sales in Oklahoma, Arkansas and Georgia in both 2005 and 2006.

11:09:15

So if you don't have any questions on those points, I would like to move on to just a few points on character. I gave you quite a substantial presentation yesterday, so I'll do my best to keep it short.

As you know, the three main -- I address three main arguments of Claimants with respect to character. The first one being that the states did not in fact collude with the PMs to collect participating manufacturer market share in return for MSA payments.

11:09:47

Claimants spoke of an OPM loophole this morning and my colleague Mr. Feldman will address that at more length later in the presentation.

With respect to what I discussed yesterday, I made a reference to the statements of purpose, clear on the face of the MSA in the statutes, and I would note that in that respect the Supreme Court has referred to the MSA, has characterized it as a landmark public health agreement, and noted it addresses one of the most troubling public health problems facing our nation today. So just another indication that the public health purposes behind the MSA had been recognized not only by us but also by, for example, the Supreme Court.

11:10:23

And I would just note also Michael Hering addressed the four ways that the MSA regime serves the public health in his testimony, and I'm pulling those up here. You have the payments themselves, higher payments mean higher prices and lower consumption. The public health restrictions in Section 3 of the MSA. The creation of the

American Legacy Foundation and funds available to states for anti tobacco programs. With respect to those funds and the anti tobacco programs, I believe Mr. Hering testified that the states don't always spend as much money on anti tobacco programs as we would like, but I would note in the 2006 GAO report which I believe we put into the record, I know it's in the record. I don't know if we put it in or not, but the state expenditures for health purposes for four out of the five original states and, in fact, all three of the states for which Claimants are now alleging expropriation, they spend over half of their MSA funds for health-related purposes. At least, based on the data in the government accountability office report issued in 2006.

11:11:29

(Pause in the Proceedings.)

PRESIDENT NARIMAN: Sorry, please carry on.

MS. MORRIS: Certainly. I would like to say we heard a lot about Attorney General Sorrell's letters in these last two weeks but as I

11:12:07

pointed out with one of his letters yesterday in one of my slides, as you can see from his other letter today, the ultimate goal of the states was, in fact, to reduce consumption and I'm going to try and read what this says but I have to say it's a little difficult from here.

Second, the report correctly states that the principle cause of downward adjustments in MSA payments has been the decline in national cigarette consumption from the base year of 1997. However, the negotiators of the agreement would have applauded the decline in consumption that has occurred.

At the time the agreement was reached, the attorneys general who negotiated it affirmatively stated that reductions in cigarette consumption were a goal of the agreement and that the states would gladly accept lower revenues resulting from such declines. Although the decline reduces MSA revenues, in the long run states will benefit from the reduction in healthcare costs that will result if such

reductions can be sustained.

And so I would just like to emphasize this corresponds very nicely with Mr. Hering's testimony yesterday about the MSA states enforcing the public health restrictions of the MSA, even though that usually will result in lower MSA payments because they're going after advertising and marketing on the part of the cigarette manufacturers. Usually, that is in violation of the MSA.

In addition, the MSA regime has, in fact, been effective at promoting the public health. And I would like to show you a couple of slides based on CDC data. This is the same data underlying the chart that Mr. Violi showed us yesterday. It's a bit more of the close up on the data, so you can see clearly the trends involved. So if you look at the first slide, you can see in the years prior to the MSA, if I'm reading the number correctly, it looks like an 8.5 percent decrease.

MR. KOVAR: Want to come over here?

MS. MORRIS: Sorry. I didn't quite have time to put all this in my script, so I apologize. If you look at the data pre MSA cigarette consumption decline by 8.5 percent between 1990 and 1997 and post MSA there's quite significant drop and cigarette consumption declined by 22.5 percent between 1998 and 2007.

If you go to the next slide, you'll see in the years leading up to the MSA, there was actually a slight increase in consumption, so there wasn't a consistent downward trend, there was, in fact, a rise in consumption that was of concern to the states.

Then the last, you can see a dramatic decrease in consumption following the MSA. And then I also wanted to go back, I believe it was Professor Anaya was asking me for evidence that the MSA regime has, in fact, reduced smoking rates. So I have a couple slides or one slide on that, then a couple citations I would like to give you.

So this slide is from Professor

Gruber's rebuttal report, Paragraph 16 which President Nariman recommended in the hearing one day, and you'll note this quote says, "While there is some room for dispute as to the share of the decline in smoking due to the MSA, there is a consensus among experts that the MSA was responsible for a large decline in smoking because cigarette consumption is price sensitive." It is for this very reason that the Allocable Share Amendments are so critical to the public health goals of the MSA. With the allocable share loophole in place, NPMs were able to keep prices low and, therefore, reduce smoking, undercutting the very health goals of the MSA.

The Allocable Share Amendments were critical measures to protect the public health by ensuring that all cigarette are priced at a higher level that reflects their social costs.

Then the two citations that I wanted to give Professor Anaya for the social science articles that look at statistical significance of the MSA with respect to reduction in smoking

rates, there's an article by Sloan and Trogdan which is in our rejoined at Page 47, note 140, and then Claimants also put in an article by Farrelly, et al, which is their reply Exhibit 36. And that article looks specifically at the truth campaign, which I mentioned, which was a public service announcement or series of announcements aimed primarily at teenagers.

So, as I mentioned, the settling states are willing to forego payments in return for compliance with the conduct restrictions.

I already referred to Mr. Hering's testimony yesterday and you have it in your slides and then I would also note that in the U.S. Government post trial brief in Philip Morris which the Claimants provided as one of their exhibits, there are several examples of the states enforcing the conduct restrictions of the MSA.

For example, three states sued Brown & Williamson for a marketing campaign using hip hop imagery. The California Attorney General's office sued R.J. Reynolds regarding its magazine

advertising placement policies, and the Washington Attorney General protests Philip Morris's attempt to go beyond the sponsorship limitations in 2001 and Philip Morris did, in fact, back down from its position there.

And I believe that this attempt by Philip Morris to sponsor more than one event is the event that Mr. Violi was referring to this morning. And if that is, in fact, the case then it did occur in 2001 although it was referenced by the United States obviously later in its submission.

Similarly, the offer of grandfather share to induce SPMs to join would reduce the MSA's states revenues but the states thought it was worthwhile if it would expand the coverage of the healthcare provisions of the MSA.

With respect to the legislative process, my colleague, Ms. Thornton, is going to be speaking about that also, but I would just like to note the MSA amendment in early 2003 said that the Allocable Share Amendments and the

complementary legislation would be considered qualifying statutes under the MSA.

And the first Allocable Share Amendment was passed in late 2003 in Idaho, then in Oklahoma it was passed in January 2005, then in South Carolina, for example, in January 2006, so I just want to emphasize here, this was not a process that occurred overnight. There were years of advanced notice in between the passage of these statutes, and that plenty of parties whom I indicated on slides yesterday as an example did have an opportunity to participate in this process.

The second point that we tried to make in our character presentation was that the U.S. federal government does not believe that the MSA has failed or that it was not intended to serve a public purpose.

I won't go into the specifics again here unless the Tribunal has questions but the main take away from our perspective is that just because the MSA could have done more, doesn't mean

that it was ineffective or that it didn't serve the public health interest of the state. With respect to the June 2009 statute which I think Claimants referenced briefly this morning, I would just like to note that it has nothing to do with pricing of cigarettes or pricing controls and that it isn't able to do everything that the MSA does --

ARBITRATOR ANAYA: Ms. Morris, what about all these alternatives to the MSA that we were presented with?

MS. MORRIS: Some of my other colleagues are going to be discussing how you should approach or how we submit you should approach those alternatives.

Within the parameters of my discussion here, for example, with the June 2009 statute, I would say the MSA, for example, does some things that the June 2009 statute can't do because the constitutional limitations on speech, and that simply because the federal government could have chosen to use this program sooner had it wished to

doesn't mean that the MSA was improper or that it didn't serve public health purposes or the states weren't entirely legitimate in choosing to go forward with the MSA, rather than waiting for a federal regulatory program that didn't come until ten years later or 20 years later rather.

MR. VIOLI: Ten.

MS. MORRIS: Sorry. I'm a little tired.

11:21:48 So then, unless you have other questions about the Philip Morris case or the June 2009 statute or the proposed settlement agreement, I'm going to pass over that because I went over that quite a bit yesterday and just move on to the argument that the allocable share release mechanism was a loophole and the grandfather shares are not.

The Tribunal ruled on this on the decision in objections to jurisdiction. And I

11:22:17 would refer you to Brett DeLange's testimony to the statement of purpose of Idaho's Allocable Share Amendment, which referred to an unintended

consequence that frustrated the purposes of the statute, and I also have some additional testimony from Mr. Hering that we found in the record before the Nevada Committee on Commerce and Labor.

He was testifying there on the behalf of the Allocable Share Amendment and as you can see in the slide -- the date is and I will find the date for you. I think I have it in my notes, I'll check. The second piece of the legislation

11:23:01 is the Allocable Share Amendment. This is meant to deal with a loophole in the statute as it was drafted. The allocable share release was a provision that was meant to protect the NPMs. It was meant to protect them by preventing a situation where they might have to deposit more as an NPM than they would have to pay if they joined the settlement. I permitted a release, I think it should be it permitted a release if it could ever show they would have to deposit more then they

11:23:32 would have to pay if they were joined.

The problem was that it was not artfully drafted. Rather than comparing the

amount they would have to pay for the same sticks, it compared the amount they would have to pay for the cigarettes sold in Nevada against the amount that the state of Nevada would receive if the company joined.

Because the MSA is a national settlement where the statute is a state statute there's an apples and oranges comparison problem. And the date of this is April 4, 2005.

11:24:07 I'd also like to touch again on my argument about regional brands yesterday. Even assuming for the moment that the states did want to encourage NPMs, they would not have chosen, we submit, such a perverse mechanism for doing so. If they wanted to encourage NPMs, for example, they could have lowered the NPM deposit costs across the board. There is no reason why the states would have said in order to encourage NPMs,

11:24:41 we're going to do this by requiring them to concentrate their sales in one or a few states specifically then to permit them to receive these large releases which correspondingly leave minimal

amounts in escrow to protect those states in the case of future liability or future settlement.

So we submit there is no conceivable policy basis for this approach and that it had to have been a mistake. And thus the core of Claimants' argument with respect to the choice that they were offered, namely to join the MSA or to remain a regional brand with the promise of large releases of escrow deposits is without

11:25:20 basis.

As I mentioned yesterday, the exploitation of the allocable share release mechanism had damaging consequences that undermined the purposes of the MSA regime.

I would like to clarify something I said yesterday. I think I might have misspoken. I believe President Nariman asked me about the causes of reduction in OPM sales and the corresponding rise in NPM sales. And I stand

11:25:49 behind my statement that we believe that the excessive price increases of the OPMs played a role, but we would also point you to Professor

Gruber's testimony that the lower marginal cost of the NPMs enjoyed under the original allocable share provisions was a key factor in the growth of their NPM market share and he also pointed to internet sales as being very important. However, I believe I mentioned a two percent number and I don't believe that Professor Gruber has quantified the percentage of NPM market share growth that was due to the original escrow deposit statutes and internet sales as opposed to OPM pricing decisions.

And I would note also that the grandfather share in contrast to the allocable share release mechanism increased participation in MSA, extending the application of the public health restrictions. And Gruber and the Claimants have both indicated that this was an incentive to join and combined with the willingness to sue participating manufacturers that were not in compliance with these health restrictions, we submit, shows this was not just about the money for the states.

A key part of the public health restrictions are the restrictions on advertising and merchandising. And I would like to just say a little bit about that. So the United States is not in any way saying that Claimants' merchandising and advertising is horrible or illegal or improper in any way. It is entirely legitimate advertising and marketing activities but with all due respect, we believe that if the Tribunal examines the plain language of the MSA and Mr. Arthur Montour's testimony here, and in his witness statements, it will become clear that much of Claimants' advertising and merchandising activities are not permitted under the MSA, although they may be and we believe they are entirely legitimate advertising activities for an NPM.

One example of this is billboards. So in the spreadsheet submitted with Mr. Monitor's witness statements, there's an entry for an I-90, New York State Thruway billboard, 12 feet by 24 feet. And thankfully, since I can't do the

math in my head, this is 288 square feet. So we would just note that part of Claimants' advertising does include, I won't say extremely large, but large billboards on the side of highways which go far beyond the 15 square feet that's permitted for posters under the MSA. Another example would be the car and motorcycle give-aways that we've discussed. I would just note these promotions are not the same as using a car or motorcycle with a brand name at a sponsorship event because these are actually being given away to a member of the public through a drawing, for example.

ARBITRATOR ANAYA: How about a give-away to a ranch? I understood Mr. Violi to say the majors, the OPMs, one of them, I can't remember which one has a drawing and gives away a vacation to a ranch or something like that.

MS. MORRIS: I believe that was the Marlboro Web site. I have to defer to our MSA experts on that but our understanding, this may well go back to an exception that Mr. Violi noted

the other day which was that you could give a gift but it couldn't have the brand name on it in return for a purchase. So it's possible this could be a gift that doesn't have the brand name on it, but if you'd like a more specific explanation with regard to that give away, in particular, I'm happy to confer with our experts.

PRESIDENT NARIMAN: The problem is all these advertising restrictions which are in that chapter three of the MSA, they were all negotiated. So it's not a ban on advertising, you see. It's not legislation, it is all negotiated so the OPMs also wanted to keep advertising of a particular type, not of a particular type and so on. So which influenced people to smoke more or not smoke more was left to the ultimate consequences.

So at this point you can perhaps stretch it up to a point but not more. There was a ban on advertising, yes, all this is very, very relevant but the MSA does not ban advertising. It permits certain advertising, it does not permit

other types of advertising. Whether one person fell within it or fell outside it, are matters of negotiation and agreement because it was not a statute. It was an agreement. The best, law's common denominator had to be taken because everybody had to agree.

MS. MORRIS: It is certainly a negotiated agreement and it doesn't put a flat ban on advertising but we do believe that the advertising and marketing restrictions are quite broad and that they do in fact--

PRESIDENT NARIMAN: If all this was public health, I should have thought there would be a ban on advertising, that's simple. Nobody can advertise cigarettes. That's something that would help prevent smoking. Not all these ifs and buts and yes, you can do it like this but you can do it so many inches, people with bad eyes, good eyes so on. Makes no sense to my mind.

Anyway . . .

MR. FELDMAN: Mr. President, I would add a few points on that issue. This was a

negotiated agreement and like any agreement there's give and take on all sides to reach the end result. Second, the fact that Native Wholesale is engaged --

PRESIDENT NARIMAN: But there was more not in the interest of public health, that's the problem.

MR. FELDMAN: We submit, and as we've indicated in many ways the restrictions go beyond what could have been accomplished through legislation. So in that sense what was gained from public health couldn't have been gained in the legislature which is very significant, but I would also emphasize that when we point out that the advertising of Native Wholesale Supply is not consistent with the MSA, Native Wholesale Supply is free to engage in this advertising. We in no way mean to imply they're doing something wrong.

Our point is they're attempting to compare themselves with participants in the MSA and if they want to make that comparison, then they would have to go all the way and play by the

same rules. That is our point.

PRESIDENT NARIMAN: Good point. Okay.

MS. MORRIS: Okay. So I would then like to wrap up by noting our argument that Claimants did not apply to sign the MSA in good faith. Just looking at the special requests in Grand River's MSA application, we believe that these requests go to fundamental principles, fundamental parts of the MSA, and that when you take all of them together, which I can go through again, that Grand River not make MSA back payments on sales of certain brands, that Grand River be permitted to remain in default on its prior escrow deposit requirements in numerous states, that Grand River receive a grandfather share based on the market share in the two years prior to joining the MSA rather than 1997 and 1998, in which it had no market share. That Grand River's MSA application be without prejudice to its litigation challenging the legality of the MSA regime. That Grand River owe no MSA payments on cigarettes sold on-Reservation. And that Grand River not concede

to the advertising and marketing restrictions at the core of the MSA's public health provisions.

So we would just submit taking all of those together, it appears that what Grand River was more interested in was the exemption from the Allocable Share Amendments that it requested as its alternative damages analysis.

And I would just like to note also in the letter from Mr. Greenwald, he stated -- well, first he went through various threshold problems with the MSA application which in some respects it tracked the problems that I've noted, but he did clearly end his letter with an indication that Grand River was welcome to amend its application and apply again and that NAAG and the states would be happy to consider that application and to negotiate with Grand River should the threshold requirements be met.

So unless there are other questions, I thank you very much.

PRESIDENT NARIMAN: Mr. Kovar?

MR. KOVAR: Ms. Thornton.

MS. THORNTON: Good morning, Mr. President, Members of the Tribunal.

What I would like to try and do this morning is address two critical questions that you have asked of us over the course of this proceeding. It's very important to the United States Government that you feel that we have endeavored to the best of our abilities to answer the very difficult questions and important questions you've posed. We submit we have good answers to these questions.

So the first of these questions is, is the deference question that Professor Anaya has asked over the course of these proceedings. What's the standard of deference that applies. I'm going to specifically address it in the context of the 11051 minimum standard of treatment claim initially, but then I want to touch on the colloquy with Professor Weiler this morning about the deference applicable to the national treatment claim under 1102.

President Nariman, you yesterday

expressed some concern about what to do with the pre-legislative process, the meetings between participating manufacturers and the settling states who were parties to this settlement agreement about proposed legislation. So I'm going to address that particular issue in response to your concerns.

And then finally what I would like to do is just get at, President Nariman, your question yesterday, what if you conclude that the settling states could have achieved their stated ends in a better way or a different way. What do you make of that when you, you know, sit down to resolving the issues in dispute in this case.

And then very, very briefly I would like to respond to just a few of the points that Professor Weiler made this morning.

So we heard this morning from Professor Weiler a very important concession. And his concession was that he agrees with the United States Government. When we rely on the SD Myers Tribunal and tell you that when interpreting the

minimum standard of treatment obligation Article 11051, NAFTA Tribunals do not have, quote, an open-ended mandate to second-guess government decision making. That's an important point from our perspective and it's very important that Claimants agree with us on it.

But I projected the SD Myers quote in my presentation yesterday but I want you to know that it's just not the SD Myers Tribunal that has been charged with analyzing this obligation and has arrived at the same conclusion.

In our estimation the NAFTA Chapter 11 Tribunal in Thunderbird v. Mexico was exceptionally clear on this point. I projected an excerpt from that award on the slide. The Thunderbird Tribunal held the role of Chapter 11 in this case is therefore to measure the conduct of Mexico towards Thunderbird against the international law standards set up by Chapter 11 of the NAFTA.

Mexico has in this context a wide regulatory space for regulation. In the

regulation of the gambling industry, governments have a particularly wide scope of regulation reflecting national views on public morals. Mexico can permit or prohibit any forms of gambling as far as the NAFTA is concerned. It can change its regulatory policy and it has a wide discretion with respect to how it carries out such policies by regulation and administrative conduct.

The international law disciplines of Article 1102, 1105 and 1110, in particular, only assess whether Mexican regulatory and administrative conduct breach these specific disciplines.

Now, the United States respectfully submits just as the Thunderbird Tribunal held that Mexico has a particularly wide scope when regulating the gambling industry because it reflects the national view on public morals, we respectfully submit that you, too, should give a certain scope of deference when analyzing the attempts of our state legislatures to regulate the tobacco industry in the interests of public

health.

Now, what does this deference mean in the context of this case. President Nariman, you asked the parties to return to this. You expressed concern yesterday not with the legislative process by which the Allocable Share Amendments were adopted, but the discussions held between parties to the MSA, that is, the state AG's and the participating manufacturers about how to close the loophole and the original Escrow Statutes.

We respectfully submit that these discussions were merely strategy sessions between interested parties about a legislative fix to the problem that they would jointly propose.

Now, we'd like to say something about how legislation is proposed in our system of government so that you can see these pre-proposal strategy sessions were not out of the ordinary. The legislatures of the various states of the United States are set up in many ways like our Congress is set up, with two -- two bodies that

legislate separately and in many states the two houses of the legislature are controlled by different parties. And the houses of the legislature, you know, might be controlled by a party that's different than -- than the party of the governor of the state. In many states the Attorneys General are elected in their own right separately from the governor.

The point of all of this is, just because an Attorney General proposes a particular piece of legislation does not mean that the legislation is going to be passed.

And what we believe -- what we've attempt to do through Michael Hering's testimony in this proceeding is demonstrate to you that when -- when the Attorney General proposed the legislative fix there was a full vetting of this proposal before the various state legislatures. And NAAG attended and testified in support of the Allocable Share Amendments but NPMs also attended and their representatives -- their representatives attended in opposition. And the settling states

did their best to weigh these competing interests and arrive at the right legislative fix for the problem.

Now, Claimants allege that you should reject the stated purpose of the Allocable Share Amendments which, in our view, is just plain on their face. And infer instead because of these strategy sessions the Allocable Share Amendments were the fruit of a conspiracy organized by the participating manufacturers in the MSA states to Claimants' detriment.

Now, we haven't heard a lot about the Methanex case in this proceeding but we think it's very instructive on this point and also on the national treatment point. But in Methanex, Methanex came to a NAFTA Chapter 11 Tribunal and said, we're challenging a California measure that's been adopted to ban MTBE, which is an additive in gasoline. And we're challenging it because, California, you say that you've banned this ingredient because you want to protect the environment, you believe that -- that this

ingredient when it seeps into the groundwater has detrimental and environmental consequences. But that's not what we think really went on here. That's what your legislation says, but what we think happened is our competitors and in a particular ADM in the ethanol industry, they met with your governor privately, they flew him out to Decatur, Illinois, and they said, you should adopt this fix because it's in our interest. Right? So that's what Methanex's alleged to the NAFTA Chapter 11 Tribunal.

The Methanex Tribunal rejected these allegations.

The Methanex Tribunal held, and I've projected this on the slide, Methanex entered a political economy in which it was widely known, if not notorious, that governmental, environmental and health protection institutions at the federal and state level operating under the vigilant eyes of the media, interested corporations, non-governmental organizations and a politically active electorate continuously monitored the use

and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons.

Now, the Methanex Tribunal concluded that because Methanex should have known about the legislative process in our country that its competitors would be employing lobbyists, that it had -- itself had retained lobbyists, that it would not look behind the stated rationale of the

11:45:00 legislation offered by the Government of California and try and infer some sort of anti-competitive intent.

We respectfully submit that you should do the same and decline to look behind the stated rationale of the challenged measures in this proceeding and make the inference Claimants would like you to make.

Now, President Nariman, to your very fundamental question about whether the states

11:45:25 could have achieved these public health ends through a different means.

We believe that the findings of the

NAFTA Chapter 11 Tribunal in GAMI v. Mexico are instructive on that point. That Tribunal considered allegations that Mexico had gotten the balance between competing interests wrong when it passed an executive decree expropriating certain sugar mills and not others. GAMI came before that Tribunal and said, Mexico's stated purpose is that we're doing this to prevent a crisis in the sugar market. But what was actually happening is --

11:46:04 PRESIDENT NARIMAN: This is the Thunderbird decision?

MS. THORNTON: This is the GAMI decision. Yes. And we've noted that you -- it's not in the record but we've got copies of it that we'll provide for you so you can take a look at it.

PRESIDENT NARIMAN: G-A-M-I?

MS. THORNTON: GAMI. G-A-M-I. Right. So GAMI said, well --

11:46:21 PRESIDENT NARIMAN: GAMI versus?

MS. THORNTON: Mexico.

PRESIDENT NARIMAN: What year?

MR. FELDMAN: '04.

MS. THORNTON: '04.

So GAMI said, while the stated purpose of this decree was to prevent a crisis in your sugar market, what was really going on was you were trying to benefit your own domestic sugar mill producers to the detriment of us, foreign investors in our investment. The GAMI Tribunal rejected this argument wholesale.

11:46:57 And I've projected their holding on this issue on the slide because I think it's instructive.

The Government may have been misguided. That is a matter of policy and politics.

The Government may have been clumsy in its analysis of the relevant criteria for the cutoff line between candidates and non-candidates for expropriation.

Its understanding of corporate finance

11:47:22 may have been deficient. But ineffectiveness is not discrimination.

The arbitrators are satisfied that a

reason exists for the measure which was not itself discriminatory. That measure was plausibly connected with a legitimate goal of policy ensuring that the sugar industry was in the hands of solvent enterprises and was applied neither in a discriminatory manner nor as a disguise barrier to equal opportunity.

Now, I want to stop here just to say --

11:47:57 to call your attention to the fact that in this part of the GAMI award, the GAMI Tribunal was analyzing the GAMI Claimants' national treatment argument. And this is the level of deference that the GAMI Tribunal extended to the measures of Mexico in question. And we would invite you to consider that this level of deference should be extended when analyzing Claimants' national treatment claim here.

So finally, you know, the question of was this the most effective means of achieving the

11:48:29 stated ends, what I would like to do is direct you to the findings of the Fourth Circuit Court of Appeals in Star Scientific. And that case is in

the record, the Counter Memorial, Volume 9, Tab 154.

Now, in the Star Scientific case the Fourth Circuit included, the states surely could have properly accomplished the same end -- and this is about the escrow deposits -- by enacting a more financially --

PRESIDENT NARIMAN: It's not common. You don't want it.

11:49:14 MS. THORNTON: Oh, yeah. I'm sorry. I don't have a slide for this, I'm sorry.

PRESIDENT NARIMAN: Just read it, yeah.

MS. THORNTON: Okay. The states surely could have properly accomplished the same end by enacting a more financially burdensome form of legislation. Such as an act imposing a tax on cigarette manufacturers but giving a tax credit to those who sign the MSA. This is an alternative.

But the Fourth Circuit Court of Appeals

11:49:47 said, it's not going to engage -- this is a Court of Appeals in our judicial system. It's not going to engage in the kind of second guessing of the

legislature.

They held, this mechanism -- and again we're speaking of the escrow deposit mechanism -- is rationally related to the stated purpose of the statute and beyond that we must leave the weighing of interests and the wisdom of the legislation to the legislature.

These are the points that I'd like to leave you with on the questions of --

11:50:23 PRESIDENT NARIMAN: I have one question to you, based on what you have put forward.

According to you, what is the purpose or object of the NAFTA statute? Would it be correct to say that to provide remedies for impediments to free trade, that has caused detriment to the Claimant?

MS. THORNTON: Well, I'd like to address the object and purpose of NAFTA Chapter 11.

11:50:52 PRESIDENT NARIMAN: I'm talking of Chapter 11.

MS. THORNTON: Okay. Chapter 11. It

is to protect foreign investors and their investments, to provide a real measure of international law protection for foreign investments.

The foreign investments of our Treaty partners, you know, when foreign investors enter into our territory and make foreign investments here and -- and the -- invest our investors and their investments when they go to Canada and

11:51:21 Mexico and make investments in those territories.

PRESIDENT NARIMAN: For foreign investors has not been adversely affected by the complaint measures, what should be the attitude of the Tribunal?

MS. THORNTON: Then there's no breach.

PRESIDENT NARIMAN: No, no. Has not been adversely affected, that means there was been discrimination, there has been whatever the Article 1102, 1103, 1104 provide, 1105, but

11:51:52 they're perhaps benefitted by these measures. They have not -- although they are discriminated, they are not come out of it to their detriment.

That's why I was asking you.

MS. THORNTON: Right.

PRESIDENT NARIMAN: What is the scope? Because you seem to have studied all this. That's why I'm asking.

MS. THORNTON: Well, what I -- on the discrimination point I would submit to you --

PRESIDENT NARIMAN: No, you have not followed the query. I'm not asking about

11:52:15 discrimination. I'm saying suppose there was discrimination against a given government who comes before and there are measures which, to the satisfaction of the Tribunal, are detrimental, generally speaking, but have not caused any detriment to the Claimant themselves. What happens to that? You can answer it also because it's quite important from my point of view.

MS. THORNTON: Mr. Feldman, do you want to answer it?

11:52:47 PRESIDENT NARIMAN: Yes, go on. You can answer it.

MR. FELDMAN: Thank you, Mr. President.

I would refer the Tribunal to Article 1116 of Chapter 11. These are requirements for submitting a claim to arbitration. And as set forth in Article 1116(2), that states, an investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired or should have first acquired knowledge of the alleged breach and knowledge that the investor has
11:53:23 incurred loss or damage. The investor must incur --

PRESIDENT NARIMAN: Presupposes incurring of loss or damage.

MR. FELDMAN: It is a precondition to submitting a claim under Chapter 11.

PRESIDENT NARIMAN: I missed that last part. We had decided it on that limitation part in jurisdiction, yes.

MR. FELDMAN: That's correct.
11:53:45 ARBITRATOR ANAYA: Just so I'm clear, if there are no damages, there's no claim?

MR. FELDMAN: That's right. Damages

are a precondition to submitting a claim to arbitration under Chapter 11.

ARBITRATOR ANAYA: So can a Tribunal find that there are no damages and hence not proceed to address whether or not there is a breach of 1102, 1103, 1105?

MR. FELDMAN: Yes. It is a precondition to submitting a claim to arbitration. Damages are --
11:54:16 PRESIDENT NARIMAN: Read that last part again.

MR. FELDMAN: The language is, an investor may not make claim if more than three years have elapsed from the date on which the investor first acquired or should have first acquired knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

And I would also refer the Tribunal to
11:54:38 the Article 11161 which states, an investor of a party may submit to arbitration under this section a claim that another party has breached an

obligation under one of the Section A obligations or Article 1502(3)(a), and that the investor has incurred loss or damage by reason of or arising out of that breach.

So the breach and resulting damage are preconditions to submitting a claim under Chapter 11.

ARBITRATOR ANAYA: Yeah. But a claim has already been submitted and we made a
11:55:08 jurisdiction award. Is it possible once that's happened for a Tribunal to simply decide on the basis of an absence of damages and not proceed to decide on whether or not there's a breach of NAFTA?

MR. FELDMAN: Thank you, Professor Anaya.

You'll recall that we had moved to bifurcate on the number of issues including the existence of and investment in this case and the
11:55:30 Tribunal had ruled only the time bar issue would be bifurcated and a number of other issues which, in our view, are jurisdictional were joined to the

merits. So certainly this is the first opportunity the Tribunal has had to address the issue of damages. And if after that first opportunity to address that issue the Tribunal were to find that there are in fact no damages, the Tribunal is certainly free to dismiss the claim as not having been adequately pled under Article 1116.

ARBITRATOR CROOK: Okay. So,
11:56:01 Mr. Feldman, the answer to Professor Anaya's question in your view is yes; is that correct? You want to look at his question on the screen?

MR. FELDMAN: Thank you, Mr. Crook. Yes. The answer is yes.

PRESIDENT NARIMAN: Okay. Thanks very much, Ms. --

MS. THORNTON: Now, I --

PRESIDENT NARIMAN: You want to add something, please?
11:56:27 MS. THORNTON: Professor Anaya, do you have a follow-up?

PRESIDENT NARIMAN: Yeah, he has no

follow-up.

ARBITRATOR ANAYA: No, I just wanted to go back to your argument on the points you were just making in connection with the GAMI decision. Were you finished with that?

MS. THORNTON: Yes. I was going to proceed to just respond to a couple of Professor Weiler's points from this morning.

ARBITRATOR ANAYA: Related to that?

11:56:46 MS. THORNTON: On 11051 but moving off deference. So if you have a question, please. . .

ARBITRATOR ANAYA: I wanted to get clear on this deference issue.

Are you -- I take it you're then disagreeing with Mr. Weiler's characterization of the standard we were to apply in examining whether or not the Escrow Statute or the Allocable Share Amendment -- I guess we'll talk about the Allocable Share Amendment -- violates the NAFTA; is that right?

11:57:20 MS. THORNTON: Yes.

ARBITRATOR ANAYA: And so --

MS. THORNTON: With respect to 1102.

ARBITRATOR ANAYA: -- you seem to use similar words, rational basis.

MS. THORNTON: We believe that there is -- with respect to 11051 --

ARBITRATOR ANAYA: Right.

MS. THORNTON: -- that there is a substantial degree of deference subsumed within these customary international law doctrines.

11:57:41 You know, customary international law affords states a matter of discretion to legislate within their own borders.

ARBITRATOR ANAYA: How about with 1102?

MS. THORNTON: Now, with 1102 we just disagree with Professor Weiler.

Professor Weiler made representations to you today that there is no sort of step back, you know, when you're analyzing an 1102 claim.

11:58:09 We submit very clearly that in our view the only kind of discrimination that's cognizable under 1102 is nationality based discrimination. Claimants just haven't shown it here. Domestic

NPMs are treated exactly the same way they are.

So for that reason we believe their claim fails. But if you're looking for a standard, we would just invite you to look at the GAMI Tribunal's analysis of this issue because they were thinking about many of the same issues that you've been trying to think about in the context of 1102 in particular.

And I'll just follow -- you mentioned

11:58:43 yesterday that other NAFTA Tribunal awards are not binding on this Tribunal, we recognize that. We just think it's persuasive and it points you in the right direction. So that's why we offer it today.

ARBITRATOR ANAYA: And so just to follow up, I'm sorry.

But the relevance, then, of the existence of all the alternatives to the escrow scheme --

11:59:09 MS. THORNTON: We believe that it's not your job to determine whether or not the legislature's achieved the best -- sort of -- you

know, set about and accomplished their legislative goals in the most efficient manner possible.

ARBITRATOR ANAYA: The alternatives that were presented to us this morning were characterized the least restrictive ones. Is that the same --

MS. THORNTON: Yeah, I -- I don't know where that concept is coming from. I submit that perhaps Professor Weiler is drawing upon that from

11:59:42 the WTO jurisprudence and that is their -- that is part of the WTO, the appellate body's analysis of national treatment claims.

But the Methanex Tribunal, which I invite you again to review said that those -- that analysis isn't proper when you're looking at national treatment obligation under 1102. There's no, like, products analysis and that the standard that he offered is not relevant. Your inquiry with respect to 1102 is more narrow.

12:00:16 Just very quickly, I don't want to eat into my colleague's time, a few quick points in response to Professor Weiler's arguments this

morning.

He pointed out that when I spoke yesterday about the recognized established customary international law norms subsumed within this umbrella concept which NAFTA parties referred to as the minimum standard of treatment, I said something like that we recognized. I simply misspoke.

I don't mean the only customary international law norms that the United States recognizes. I'm talking about customary international law norms that the international community of states have recognized through their practice as being binding on them out of a -- and that they're obligated to afford these protections to foreign investments and their investors. That's point number one.

Point number two. Professor Weiler said, well, you know, Claimants are -- or the Respondent is making this argument about 11051 not applying to investors, just to the investments of investors, and they say, well, there's no case

law, Professor Weiler.

Well, we submit this is a novel theory that Claimants are advancing in this case.

We don't need to look to the case law. Our argument is a Vienna Convention argument ordinary meaning of the Treaty terms understood in context in light of the Treaty's object and purpose.

Look at the text of 11051. It only runs to investments of investors.

In contrast, the text of 1102, 1103, those obligations go to investors as well as to their investments.

So we submit that the NAFTA parties were doing something different in 1105.

11051, their intention was to protect the property interests of foreign investors under the customary international law minimum standard of treatment and we believe they clarified this in their 2001 interpretation, if I can find it.

I don't have a copy of the interpretation. I'm sorry. I'm --

Thank you. I'm sorry.

When they -- when they -- the NAFTA parties said -- the FTC said very expressly, Article 11051 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another party. So we believe the analysis is clear based on the ordinary meaning of the agreement and in light of the binding FTC interpretation.

ARBITRATOR ANAYA: Sorry. Just back to your point on what is need to define customary international law.

When you say that states or the international community of states must recognize a norm of customary international law, that we need to find that, I mean you're not saying we need to find some statement by the United States that it recognizes the specific norm? I mean, what I understand you to mean, that we recognize through its practice and inference that we will draw from that other opinio juris, right?

MS. THORNTON: That's right.

ARBITRATOR ANAYA: Then we find that already there is some document issued by the Department of State saying we hereby recognize this as a norm of customary international law; is that correct? We can make that assessment. We can review the state practice, make inferences of opinio juris --

ARBITRATOR CROOK: Yes.

MS. THORNTON: Yes.

And finally, very quickly, Professor Weiler talks about the recent Argentine cases which have interpreted the fair and equitable treatment obligation in the U.S./Argentina BIT. And it is the position of the United States Government that whenever we have negotiated a fair and equitable treatment obligation, what we were really doing is referring to the customary international law minimum standard of treatment. In this way we believe our Treaty practice is different than the practice of other states.

Now, some recent Argentine Tribunals

have interpreted the fair and equitable treatment obligation, the U.S./Argentina BIT as co-terminus with customary international law, the minimum standard of treatment, and to include a protection against the frustration of legitimate expectations.

Our submission to you is that they didn't really analyze this issue properly in the framework of customary international law. And we submit to you that if you look to what customary international law says about contracts and state liability for contract breaches, not ordinarily giving rise to violations of international law, you will agree with us that a state cannot be bound by a lesser form of assurance.

12:04:53

Really -- Mr. Crook, you really touched on this in -- in some of your comments earlier.

Claimants are basically arguing that this legislative scheme was a quasi contract. It was an implicit contract to them. And we submit that's just simply not the case.

12:05:24

We retain the right to modify our

regulations. And it does -- and legislation. And it can impact foreign investments in their investments -- foreign investors in their investments. That doesn't mean a customary international law norm has been breached.

Okay. I think that's -- I'd like to invite the Tribunal to have Mr. Sharp come and address some of the questions on damages.

ARBITRATOR CROOK: Are you sharp, Mr. Sharp?

12:06:16

MR. SHARPE: I'll do my best.

Thank you, Mr. President, Members of the Tribunal.

I will speak briefly about damages issues. We think that the record speaks very clearly for itself.

But I also remind the Tribunal that the Claimants did drop their cross-examination of our damages expert, Mr. Kaczmarek.

I would like to make four brief points and then just a couple of clarifications for you.

12:06:34

Point number one. We discussed

yesterday how and why Claimants' damages claim continued to be a moving target. And now again today at this final hour, we find them moving again.

If you have handy, you can look at the exhibit that Claimants' counsel distributed this morning, Exhibit 1, I believe it was, to Mr. Wilson's second report which listed the investment in markets claim at $24 million.

12:07:11

You'll recall that in Mr. Wilson's initial expert report, Claimants sought $38 million for the investment in market. That then decreased to $24 million in Mr. Wilson's second report and now we've heard this morning that Claimants have dropped that claim altogether.

This further reduces Claimants' primary damages claim by 25 to 30 percent, from $74.8 million, initially the range was 74.8 to $97.2 million in Mr. Wilson's revised report and now it's about 50.8 to $73 million.

12:07:48

Point number two. Although it's true that Mr. Wilson corrected four major errors from

his first report, he did not correct his -- the single largest mistake in his expert report. That's his brand impairment analysis, which is fundamentally flawed.

Mr. Wilson contends Claimants' primary investment in the United States consists of the Seneca and Opal brands. The damage to those brands, he says, enhanced the extent of Claimants' allege injury is equal to the profits they allegedly lost as a result of the challenged measures.

12:08:34

But Mr. Wilson never established that the brands have value or that the challenged measures caused all of the lost profits that they alleged.

And as you'll recall, Claimants themselves acknowledged that many other factors, they have contributed to these so-called lost sales.

12:08:58

So we submit that it is not correct that Mr. Wilson corrected the fundamental errors in his second report. The single largest error

remains. His analysis is fundamentally flawed.

But even if Mr. Wilson's valuation theory were proper, we submit that the evidence in the record, the evidence that he relied on to establish the Claimants' claim, is demonstrably flawed. Navigant noted at Paragraph 79 of its second report, quote, nearly every data element of Mr. Wilson's analysis, sales volumes, sales price, unit costs, et cetera, is internally inconsistent, is in conflict with other data or has changed drastically, often without explanation, since Mr. Wilson's first report, end quote.

I'll speak very briefly about the absence of audited financial statements.

The issue, we submit, is not whether GRE and NWS were legally obliged to prepare audited financial statements. The issue is why Claimants failed to produce audited financial statements in this case for years ending 2006, 2007, 2008, the critical years for damages.

Now, Claimants produced some of their audited financials from earlier years. We have, I

believe, GRE's audited financials from 2001 to 2005. And as was pointed out this morning, we have NWS's up till part in 2006, but we're lacking the years ending -- audited -- the audited financial statements for years ending 2006, 2007, 2008.

Why? There has been no explanation provided.

We submit that given all of the inconsistencies in the data which we established yesterday that audited financial statements would have --

PRESIDENT NARIMAN: The audited financial statement for 2005 there, has it been produced?

MR. SHARPE: For which company?

PRESIDENT NARIMAN: You said 2006, '7, '8 is not there.

MR. SHARPE:

PRESIDENT NARIMAN: What about 2005?

MR. SHARPE: Correct. We have audited financial statements --

PRESIDENT NARIMAN: They are audited?

MR. SHARPE: As far as I recall, yes, they're audited. Certainly for NWS.

Given the internally consistent and even contradictory sales and cost data, we submit it would be obvious that the Tribunal would benefit from having audited financial statements in which independent auditor tried to reconcile these underlying -- the underlying data with the higher level cost and sales information that Claimants' counsel referenced this morning.

And we further submit that it's all well and good for Mr. Wilson to attempt to do -- construct a bottom-up analysis as was intimated this morning. Mr. Wilson acknowledged, as you'll recall, that Claimants do not have accurate information about their sales in individual states.

Point number four. Claimants continue to suggest that Mr. Kaczmarek offset Claimants' damages in certain states with sales increases in other states, where, as you know, Claimants' sales

are booming.

Mr. Kaczmarek certainly questioned the Claimants to define their expropriation claim by identifying only certain states where Claimants may have suffered damages without looking at other states where Claimants obviously are benefiting from these -- the challenged measures, but he himself did not make any offset.

And to remind, the challenged measures increased the cigarettes off-Reservation. They made it more attractive for non-residents of the Reservation to come onto Reservation to purchase those cheaper cigarettes. And we've seen huge increases in Claimants' on-Reservation sales, particularly, say, in New York where the escrow obligations to not run to the on-Reservation sales. But Mr. Wilson never corrected for these higher sales volumes in his damages calculations.

Mr. Kaczmarek indicated Mr. Wilson should have accounted for these increased sales but Mr. Kaczmarek himself did not offset this decrease himself -- did not make this decrease

himself.

I'll just make two final quick points.

I wanted to correct a possible misunderstanding from yesterday which hasn't been raised today, but I think it's important.

When discussing Mr. Wilson's failure to account for NWS costs, Mr. Crook asked at Page 2318 of the transcript whether NWS had failed to account for the cost of the cigarettes themselves.

In reviewing Mr. Wilson's model, I see that he allocated those costs to GRE. So those costs would not -- in his model they would not have been incurred by NWS. So that was not one of the mistakes.

He did fail to account for all costs incurred by NWS, but under that model the costs of the cigarettes themselves were allocated to GRE, not an NWS, so that was not a mistake. I just wanted to make that clear.

And finally, I think it's important for the Tribunal to recall that Claimants' damages

claims are themselves not separable.

Claimants have not apportioned among themselves their damages on or off Reservation, thus if the Tribunal decides that it lacks jurisdiction to hear the claims of any Claimant, it cannot permissibly award damages to any remaining Claimant.

So, Mr. President, Members of the Tribunal, the record shows that Claimants have not met their burden to prove any damages in this case and, thus, their claims, we submit, should be dismissed.

PRESIDENT NARIMAN: Thanks so much.

MR. SHARPE: Thank you.

PRESIDENT NARIMAN: Yes. Now --

MR. KOVAR: Mr. President, while we're waiting for Mr. Feldman, may I ask a point of housekeeping. We will be -- we have requested costs under Rule 40 but we would like to request 45 days to submit the breakdown of our costs.

PRESIDENT NARIMAN: Both parties.

MR. KOVAR: Would that be acceptable?

MR. VIOLI: Yes.

PRESIDENT NARIMAN: Yes.

MR. KOVAR: Thank you.

PRESIDENT NARIMAN: One week. Within a week.

MR. KOVAR: We said 45 days.

PRESIDENT NARIMAN: You said -- I thought you said four or five. I thought I was being generous.

(Laughter)

PRESIDENT NARIMAN: Okay.

MR. FELDMAN: Thank you, Mr. President.

I'd like to briefly address a few separate issues.

The first is to emphasize that Grand River has been telling U.S. courts one set of facts and has been telling this Tribunal another set of facts.

When defending against state enforcement efforts, Grand River does not want to be subject to the jurisdiction of U.S. courts. But when seeking hundreds of millions of dollars

from U.S. taxpayers, Grand River asks this Tribunal to find that it has business operations and investment in the United States and, therefore, jurisdiction under NAFTA Chapter 11.

Grand River can't have it both ways. It cannot state in sworn testimony in U.S. court proceedings that it has no U.S. operations while representing to this Tribunal that it is engaged in a U.S.-based venture with Native Wholesale Supply.

In some instances Grand River has succeeded in having state enforcement actions dismissed for lack of personal jurisdiction.

Curiously, Claimants have highlighted those decisions in this hearing, but those decisions only confirm that Grand River has no investment in the United States.

It's not surprising that Claimants have designated --

PRESIDENT NARIMAN: But your witness, Mendelson, what's his name?

ARBITRATOR CROOK: He's theirs.

PRESIDENT NARIMAN: All right. I thought that was your witness?

MR. FELDMAN: No, Professor Mendelson was their expert.

PRESIDENT NARIMAN: He says there was an interest.

MR. FELDMAN: Yes. He does.

It s not surprising that Claimants have designated every one of their witness statements in this arbitration as confidential.

12:17:47

Those witness statements, of course, if they had not been designated confidential, could have been used by states seeking to establish personal jurisdiction over Grand River. But because they are designated confidential, states do not have access to those witness statements and cannot use those witness statements as evidentiary support in their enforcement actions.

And I would like -- on the issue of investment, I would like to briefly touch on the issue of escrow deposits.

12:18:19

This morning Claimants included some

snippets of language from our side involving Grand River's ownership of escrow deposits. And -- and certainly we would agree that -- that any escrow deposits made by Grand River, pursuant to the Escrow Statutes, Grand River is the owner of those deposits.

But for purposes of the Claimants' argument about an investment based on such deposits, there are several questions. The first is, one, when were those deposits made; two, in what amounts; three, who made the deposits? Was it Grand River. Was it Tobaccoville? It's unclear. And when Claimants were pressed this morning about what documentation is there of those deposits, all they could point to was the witness testimony of one of their witnesses. We have no documentation of these deposits. They cannot support a finding of an investment in this case.

12:18:51

12:19:20

And I would highlight on that point that the Claimants' own damages expert makes clear that at least in their -- in the view of their damages expert Grand River made no escrow deposits

in the United States.

And here I would highlight, and you see on the screen this is from Mr. Wilson's rebuttal report, quote, as a legal matter, I am told that counsel considers the escrow obligations under the MSA to be the responsibility and under the control of the importers and holder of record of product in the United States. Therefore, as GRE maintains no responsibility for escrow payments, they have not been included as a cost herein.

12:19:57

So we see that in the view of the Claimants' own damages expert, Grand River in fact had made no escrow deposits in the United States under the Escrow Statutes.

I would like to turn to a few questions concerning federal Indian law which Ms. Cate had discussed last week, and I would just like to pick up on a few of Professor Anaya's questions from last week.

12:20:39

First concerning evidence in the record of states that -- that are applying escrow obligations for on-Reservation sales.

Based on our review of the record, it is clear that at least with respect to the State of Oklahoma, that Oklahoma clearly has been applying escrow obligations for on-Reservation sales.

And first I would refer to the testimony of Michael Hering, which is at Page 411 of the transcript for this hearing, where Mr. Hering states, in Oklahoma, for instance,

12:21:12

Oklahoma has state stamps that are the normal non-Reservation state stamps. It also has compacts with a number of its Tribes. And under those compacts a version of the state tax stamp is applied to those sales and at a different rate usually and with the Tribe retaining a portion or in some cases I think all of the funds. And those are considered by Oklahoma to be units sold.

I would also refer the Tribunal to a colloquy that occurred at the jurisdictional hearing in this case between Mr. Crook and Mr. Violi.

12:21:47

At Pages 195 and 196 of the

jurisdictional hearing transcript, Mr. Crook asks, my question precisely is, are any states now applying the Escrow Statutes with respect to on-Reservation sales?

Mr. Violi responds, yes, the State of Oklahoma I know for certain is, because I sat across the table from the Attorney General and I said, you do not affix the state excise tax stamp on these cigarettes, how can you charge? And

12:22:32 Mr. Crook responds, okay. So we know one state.

We also have separate materials which are not in the record which have been prepared by NAAG which list several other states that often, through compacts with Tribes, are enforcing escrow deposit obligations, at least to some extent, for on-Reservations sales.

I would like to make a broader point in terms of Claimants' on-Reservation expectations.

It is significant that in the Second

12:23:03 Circuit decision in Grand River versus Pryor, Grand River made an Indian commerce clause argument in that case. And Grand River's Indian

commerce clause argument did not involve the application of escrow deposit obligations for on-Reservation sales.

Rather, the argument concerned Grand River's responsibility for escrow deposits, quote, because its cigarettes are subsequently resold by third parties off-Reservation, so in the New York case Grand River was arguing that the resale of cigarettes passing through Native Wholesale

12:23:50 Supply, the resale of those cigarettes off-Reservation violated the Indian commerce clause. Grand River made a similar argument in this arbitration.

ARBITRATOR ANAYA: Pardon me.

The resale violated the Indian commerce clause or the regulation of that resale?

MR. FELDMAN: I'll read the language from the decision.

Grand River, quote, contends that the

12:24:11 statutes, the Escrow Statutes, contravened the Indian commerce clause by holding it responsible for escrow payments because its cigarettes are

subsequently resold by third parties off-Reservation. That was the argument.

And in this arbitration, in Claimants' amended statement of claim at Paragraph 42, they state, quote, as Claimants would subsequently discover, the MSA states began to assert and to this day still assert that Grand River must make escrow payments under the Escrow Statutes even if it was unrelated third parties who had apparently

12:25:12 purchased products from the Claimants on sovereign Aboriginal territory and subsequently resold them to wholesalers or consumers in the territory of MSA states or on other Tribal lands. The point of this is to clarify that at least as we understand Claimants' argument with respect to their on-Reservation sales, that their expectations of freedom from state regulation extends not only to transactions occurring on-Reservation but in fact the resale of cigarettes passing through Native

12:25:42 Wholesale Supply by third parties off-Reservation.

And we just wanted to make that clarification. That is our understanding of what

their -- their on-Reservation expectations argument consists of with respect to the Escrow Statutes.

I would also like to address the issue of the excerpts from the significant factor hearing, the few documents that were offered for the first time by Claimants this morning.

There were several points to make in response to these excerpts that were put in this

12:26:16 morning. The first is, again, to reiterate, the MSA is not a challenged measure in this arbitration. Claimants even put on a slide this morning stating flatly the MSA is not a measure. And yet, Claimants state this morning that -- that the biggest loopholes are in the MSA. Even if that were the case, that is wholly irrelevant to this arbitration.

But there are a few other points to

12:26:47 make on that. The first is the representations accompanying the documents that somehow, at least from the -- from what I was hearing this morning, it seems like the implication was that somehow the

states were responsible for Claimants' inability to use additional significant factor documents in this arbitration. And we would clarify once again -- we would clarify once again, as addressed by Mr. Kovar yesterday, that Claimants on one occasion approached the court in New York for permission to use significant factor documents in this arbitration. And on that one occasion they were successful. The parties worked together successfully and, again, this involved counsel for the OPMs, the New York Attorney General's office the federal government, counsel for the Claimants. We all worked together to make that happen to enable those excerpts to be used in this arbitration.

And I emphasize yet again that the narrow excerpts received by the Tribunal, that the excerpts that Claimants wanted you to see were even narrower.

Again, it was the states that broadened the context of the excerpts that this Tribunal received in this arbitration.

And I would emphasize once more that Claimants have not made any other attempt, no other approach to the court in New York to use additional significant factor documents in this arbitration.

And as Mr. Kovar addressed yesterday, many of the documents, the significant factor documents in the possession of Claimants, are redacted. They are free to use redacted documents in this arbitration but for whatever reason they have chosen not to do so.

PRESIDENT NARIMAN: Sitting in Washington, they're not saying that contradict the U.S. Supreme Court, but the evidence that's common record so far here doesn't quite convince me that the MSA is a landmark public health agreement. I don't know how landmark it is. It is not some monumental thing which ultimately has not produced very much in the end.

MR. FELDMAN: Well, Mr. President --

PRESIDENT NARIMAN: Of course, it's not open to us to question what your Supreme Court

said, but it doesn't appear to be so.

MR. FELDMAN: Mr. President, you've received a lot of evidence on this issue. You've heard a lot of testimony. You heard that -- that after the 90-day offer for a grandfather share that 99.6 percent of the tobacco market was subject to stringent -- stringent marketing and lobbying requirements, requirements that -- that included restrictions that could not have been achieved through legislation. Anything on this scale I think it's fair to say was quite significant.

You may take issue with the characterization of landmark, but given the evidence on the record, it is very fair to say that this is a very significant public health achievement.

Can more be done? More can always be done.

Bu in 1998 this was very significant. And as you saw from the slides that Ms. Morris presented this morning, the causal link between

the MSA and the further reduction in smoking is unmistakable. You saw that the slight acceleration in smoking leading up to the MSA and then you saw a steady decline in the years following the MSA.

We have evidence in the record making clear that the MSA -- that the causal link between the MSA and the reduction of smoking in this country is beyond debate.

I would make one more point on the significant factor documents, which is, leaving aside --

ARBITRATOR ANAYA: Pardon me.

Although the Claimants do debate that. And could you explain -- maybe I just missed it earlier -- the difference between your graphs on the reduction?

MR. FELDMAN: Yes. The Claimants' graph took a much broader view. And so, when you look over and say, a 50 -- I don't remember the number of years, but when you broaden it out, it's difficult to see what was going on in the 1990s

and then in the early 2000s. And our graphs focused on the 1990s and the early 2000s where you can get a more detailed sense what the rates were.

And what you see shortly leading up to the MSA is actually a slight increase in the level of smoking and then a marked decrease following the MSA.

ARBITRATOR ANAYA: So you're not disputing their graph?

12:31:19 MR. FELDMAN: No, their graphs are accurate, but it was just over a very long timeframe.

PRESIDENT NARIMAN: There's jus one other thing I wanted to tell you about the -- it was the -- why I mentioned that it's not such a significant or landmark agreement, because the United States of America, that's you, in a small statement and complaint in 1991 -- in 2001 said quite categorically that cigarette companies who 12:31:49 own 99 percent of the market for cigarettes in the United States, that is all those OPMs.

MR. FELDMAN: Yes.

PRESIDENT NARIMAN: Or such continuing threat to health and well being of the American public and there is every reason to believe they will continue with their fraudulent and unlawful conduct. I mean, therefore, you yourself are not quite satisfied with this agreement?

MR. FELDMAN: Again, Mr. President, we can always do more.

PRESIDENT NARIMAN: That's your stance.

12:32:17 MR. FELDMAN: It is not our position that the MSA solve every public health problem in connection with cigarettes in this country.

Our position is that it is a significant public health achievement and has accomplished real public health gains. We do not take the position that nothing more needs to be done.

PRESIDENT NARIMAN: Thank you.

MR. FELDMAN: And I just want to make a 12:32:39 couple more points in connection with the significant factor documents.

One is that -- that even assuming that

OPMs were to take advantage of this loophole as the Claimants have characterized it, that loophole -- NPMs would ultimately enjoy the benefit of that loophole through the operation of the amended allocable -- or I should say the amended release provision under the Allocable Share Amendments because under that amended provision the NPM gets to compare itself with participating manufacturer, the payment obligation 12:33:12 of those manufacturers after adjustments.

So if there were to be an NPM adjustment which OPMs would enjoy some sort of windfall, as Claimants were saying, NPMs ultimately would share in that windfall through the operation of the amended release provision under the Allocable Share Amendments.

And the last point --

ARBITRATOR CROOK: Can you clarify that, Mr. Feldman? Are you saying that if there 12:33:40 were to be this adjustment for the benefit of the OPMs, what would happen to other players?

MR. FELDMAN: That NPMs under the

Escrow Statutes could also benefit from that because under the amended release provision, and again it's comparing is an NPM worse off under the Escrow Statutes than it would be under the MSA. Under that amended provision, you look at the payment obligations under the MSA after adjustments. So if an NPM adjustment were to apply, that would be part of -- that would be part of the analysis of what, if any, release an NPM 12:34:17 would be able to receive, which would reduce their escrow obligations.

PRESIDENT NARIMAN: I see. Okay.

MR. FELDMAN: And I would just emphasize that the significant factor documents that Claimants were pointing to this morning, those were arguments made by the states in that proceeding. But as we've heard this week and last week, the states' arguments on that issue were not accepted by the firm. And so ultimately the 12:34:47 determination made by the decision-maker in the significant factor hearing, that decision-maker did not embrace the arguments being made by the

states, which you saw in the excerpts provided by Claimants this morning.

PRESIDENT NARIMAN: Okay.

MR. KOVAR: Mr. President, I would say that completes our presentation.

Were you intending to have rebuttals or is this the --

PRESIDENT NARIMAN: If you want to say something.

12:35:14 MR. LUDDY: I think just a few minutes. We certainly -- I think we even have the time, right?

MR. FELDMAN: And I'm sorry, Mr. Luddy, just one more point.

PRESIDENT NARIMAN: Can we just have five minutes?

MR. FELDMAN: Just one final point.

I wanted to know before standing down, that in terms of the charts shown by Claimants, we

12:35:32 would take issue with Mr. Violi's statement that the declining consumption in the ten years prior to the MSA -- yes, was the same. We do take issue

with that statement.

PRESIDENT NARIMAN: I know.

(Whereupon a recess was taken from 12:35 p.m. to 12:41 p.m. on the same day)

PRESIDENT NARIMAN: Okay. Make it short.

MR. LUDDY: I am going to be short, Mr. President.

First, Mr. Wilson testified that he had

12:41:36 asked GRE for audited financials and that they did not have them, at least for the years in question. Mr. Sharp has -- it's not entirely clear to me what he's -- what he's alleging, but he has used a verb that -- that is problematic for me as an attorney. He has, at least today, stood before the Tribunal and indicated that we failed to provide audited financial reports.

And I would ask the Tribunal to ask Mr. Sharp if he's making an accusation against me

12:42:13 as counsel, that I failed to provide audited financial reports that exist, I would like him to make that allegation expressly, and I would like

him to advise both myself and the Tribunal of the basis for that allegation.

And if his allegation is that GRE has audited financials that they did not disclose to me, I would also like him to make that allegation expressly and provide a basis for that. For him to stand here before the Tribunal and say that we have not provided as opposed to they don't exist, we're entitled to an explanation -- particularly

12:42:52 me as an attorney -- an explanation of exactly the allegation he's making and the basis for it.

PRESIDENT NARIMAN: Please, no, that's not correct. What he said was -- I mean, whatever he may have said, his inference is that it was not produced, although it was produced to the expert witness, because he cited the expert witness' statement saying that it was produced before him.

Who was that gentleman?

MR. LUDDY: See, that's exactly my

12:43:23 point. That's not the case, Mr. Chairman. I understand my obligation to this Tribunal.

PRESIDENT NARIMAN: It's not a charge

against you.

MR. LUDDY: No, in fact, it is because I agree it would be my obligation to produce audited financials if they existed. They don't. That's why they weren't produced. And if he's suggesting otherwise, I would like an explicit allegation to that effect.

ARBITRATOR CROOK: In the interest of time, could we simply ask Mr. Sharp to stand up.

12:43:50 I did not understand him to be saying what you're saying, Mr. Luddy. Was that his intention?

Was it your intention? Were you trying to convey the sense that these things existed, but were not provided? I took you to mean in the sense that they did not exist.

Could you clarify, please?

MR. SHARPE: I have no -- it was not my intention at all to suggest that you have documents that you failed to produce. We asked

12:44:17 Mr. Wilson if he had audited financials for years ending 2006, seven and eight for GRE.

He said, yes, I reviewed them. That

may be the case or may not be the case. I would only invite the Tribunal to -- to recognize that we do not have on the record of this case audited financials for the years ending 2006, 2007, 2008. To the extent that I led to an alternative inference, I apologize.

MR. LUDDY: Fair enough, and I thank you for that and I think I've already spoken to that, what I think is an ambiguity in the record.

12:44:50 I'm going to spend just a few minutes disagreeing with Mr. Kovar's characterization of our case. I think the way he describes his case is a little bit more ambitious than -- than speaking for myself.

PRESIDENT NARIMAN: Mr. Luddy, just to be clear, how many Claimants do we have? According to you, is there one claim that was made on behalf of various people other than Native Wholesale?

12:45:18 MR. LUDDY: Well, the named Claimants are Native Wholesale Supply, GRE, Jerry Montour and Kenny Hill.

MR. WEILER: Not Native Wholesale Supply.

MR. LUDDY: I'm sorry. Arthur Montour, Kenny Hill, Jerry Montour and Grand River Enterprises.

PRESIDENT NARIMAN: As one composite claim.

MR. LUDDY: They are each Claimants in their own right.

12:45:43 PRESIDENT NARIMAN: No, no, but you have framed it in the form of one claim.

MR. LUDDY: Under various Articles of NAFTA.

PRESIDENT NARIMAN: Okay.

MR. LUDDY: We do think that the bona fides of the healthcare issue are central to this case, but our focus is a little different than theirs.

You know, Respondents have as late as 12:46:02 this morning, and certainly over the course of the last 48 hours, spent a lot of time talking about the healthcare benefits of the MSA, generally.

Now, personally, I don't think it is the great healthcare landmark that it has been described as, but, frankly, that's not a fight I'm interested in fighting, at least not in this form because several years ago the Respondent was successful in making clear to the Tribunal that the MSA itself was not the measure that's before the Tribunal.

The measure that is before the Tribunal 12:46:35 is the Allocable Share Amendments. And it is in the context of the Allocable Share Amendments that we focus our case, our affirmative case, as opposed to responding to allegations made by the Respondent, we want to talk about the healthcare benefits, if any, associated with the Allocable Share Amendment.

And once you start doing that, all these other things that we've been talking about kind of go by the wayside or at least become 12:47:09 background music. And in regard to the Allocable Share Amendments, we have by necessity been forced to focus on the handful of documents that we've

been managed to obtain over the years from other litigations or other sources, as well as the testimony of these state AGs and Mr. Hering.

Now, Mr. Kovar also suggested that I thought -- and I don't know who he was referring to Claimants, generally -- that I thought all the AGs were liars. You know, I really don't. I have cross-examined dozens of black-hearted liars over the years, and I don't think I cross-examined any 12:47:56 of them as if they were black-hearted liars, at least by New York litigation standards.

What I do think these gentlemen are is -- is politicians. You know, I have respect for them as members of the bar and as public servants. But at the end of the day what they really are is politicians. And I don't mean that as a -- as a -- as a slight. I mean, I guess in some quarters it's not a compliment, but it's certainly not a moral indictment either.

12:48:30 But one thing that is common amongst politicians is that they often stay say behind closed doors one thing while providing themselves

a fig leaf to accomplish what they want to accomplish in the public arena. And I think the evidence is overwhelming, even based upon the few documents we have and their own public testimony that that is precisely what happened here.

Behind closed doors we're dealing with the OPMs and the exempt SPMs, our competition. They talked about nothing but competition in the marketplace, pricing amongst the various competitors in the marketplace, and the protection of the states' payments from the OPMs.

PRESIDENT NARIMAN: That is Core Bundle tabs nine, ten, 11 and 12.

MR. LUDDY: That is correct. In the public square, and for better or worse, we are in the public square now. This is a public proceeding. In the public square when they're talking to the media or when they're talking to state legislatures, it is all about public health. There is never a mention of protecting the market share of the OPMs. There is never a mention of the fact that the OPMs have increased their

profits dramatically and they don't want to lose it. Nothing. It's all about public health.

And, frankly, you know, I don't blame them. They're politicians. I mean, stopping you smoking is the political equivalent of kissing babies. You can't get any better than that. What else would they talk about in the context of this in the public square.

But let's look at this in the context of the Allocable Share Amendments themselves, and I went through this with Mr. DeLange specifically yesterday; what the public health goals were of Allocable Share Amendments. And you can look at the Allocable Share Amendments, the complementary legislation, there is nothing in that legislation in terms of legislatively announced public goals of that litigation -- of that legislation that has anything to do with keeping NPM prices high to prevent you smoking. It's not there. And there's a good reason it's not there because legislatures can't publicly dictate pricing decisions to a single element of a market. They just can't do it

under United States law.

The only public health implication at all of either the escrow statutes, the Allocable Share Amendments, or the complementary legislation is the state legislature's announcement that they want NPMs to keep elevated escrow payments -- elevated escrow accounts, just in case they decided to sue them. All right. That is the public healthcare component that we are talking about here in the context of the Allocable Share Amendments.

All this other stuff is background music right now. Mr. Kovar was suggesting that I was trying to prove that the whole MSA is a public health sham and -- I'm not. He's got me biting off a lot more than I intend to bite off. What I do want to bite off and what I do think we've proven is that that component of the public healthcare argument, the fact that NPMs need to have additional dollars in escrow accounts is a sham.

PRESIDENT NARIMAN: Is what?

MR. LUDDY: A sham. And that the real reason for the Allocable Share Amendments are the reasons that are contained in the documents evidencing the discussions behind closed doors. And it's really a little bit of common sense. Behind closed doors they talked about billions of dollars that they're going to lose under the NPM adjustment, billions of dollars they're going to lose under the volume adjustment, and billions of dollars that go directly into the state's public purse. You weigh that on one hand.

On the other hand, they're talking about just getting some increased escrow dollars put into escrow accounts that the states do not have access to unless they sue the NPMs and recover. They've got 25 years to do it. And you heard Mr. Hering. Twelve years out, not a single complaint filed. They're not even looking at it. And the reason they're not looking at it is because all the cases since 1998, all the cases after the MSA, have clearly established that there is no authority in the United States of America

for any governmental entity to recover on a basis of subrogation for medical expense payments it has incurred on behalf of its citizens. There is no law to support those claims. And that has to be considered -- and they knew it in 2003, too, because the federal case had been decided by then, the Blue Cross/Blue Cross Shield cases had been decided by then, the union cases had been decided by then. It's a sham.

12:54:15 They wanted the Allocable Share Amendments to protect the OPM's market and to protect their own dollars. And they can't come into this Tribunal and trumpet these broad, wide-ranging healthcare issues when those healthcare issues have nothing to do with the Allocable Share Amendments.

PRESIDENT NARIMAN: Okay, fine.

MR. LUDDY: Now, the final issue that Mr. Kovar mentioned was that, you know, our whole

12:54:50 case was if we had these documents, we could prove our case. That's not our case.

Our case is, we can prove the case

based on the handful of documents we have managed by hook and crook to get. Our point with respect to the other documents is how much clearer the case would be if we had them. And I'll just give you one example. Mr. Hering, who we can all stipulate to, is a competent, diligent guy. He attended scores of meetings with NPM and OPM, OPM and SPM representatives.

I asked him even about the meeting that

12:55:29 we talked about, do you have notes?

He said, of course I would have had notes.

Just the notes from those meetings alone -- forget about the hundreds or thousands of other documents. Just those notes alone would have increased exponentially the proof before this Tribunal of exactly what I'm talking about.

So that is in terms of the public health issue and what we think is a sham on a very

12:56:02 narrow basis under the Allocable Share Amendments. That's the fight we're picking --

PRESIDENT NARIMAN: Notes of meetings

not produced by whom?

MR. LUDDY: By -- not produced by the Respondent.

PRESIDENT NARIMAN: Notes of meeting --

MR. LUDDY: Between the NPMs -- I'm sorry. Between the OPMs or SPMs and NAAG.

The chairman has indicated over the last -- you know, Exhibits 8, nine and ten are clearly relevant. I don't know how they cannot be

12:56:38 considered relevant.

PRESIDENT NARIMAN: No, but what are these notes of meeting?

MR. LUDDY: I'm postulating. I'm suggesting.

PRESIDENT NARIMAN: No, no, you said Mr. Hering. That's why.

MR. LUDDY: Right. I'm suggesting that Mr. Hering, just as an example, that Mr. -- and I'm not blaming Mr. Hering for withholding them.

12:56:57 I mean, I just think the Respondents had a duty to go to NAAG and get these documents, you know, evidence of what transpired in the

behind-closed-door meetings, so that the Tribunal would be in a better position, even as it is now -- again, I think we make our case just on what we got. But I think the Tribunal would be in a better position still to determine whether the very, very, very narrow healthcare issues associated with the Allocable Share Amendments were a sham or not. We submit they are.

PRESIDENT NARIMAN: Okay.

12:57:33 MR. LUDDY: That's all I have. Thank you.

PRESIDENT NARIMAN: Thank you, now lunch.

MR. LUDDY: We're actually --

PRESIDENT NARIMAN: No, no, what do you want to say now? Finish. Make it short if you do have to say something.

MR. VIOLI: It was just a follow-up on the point that you wanted us to respond to,

12:58:00 whether or not there was a better alternative. What you have in the binder that I gave you is --

PRESIDENT NARIMAN: Yes, I saw that.

MR. VIOLI: -- is the meeting that Mr. Luddy was talking about in January of '04, and that meeting was Mr. Hering and all the members of NAAG and they talked about legislation, that --

PRESIDENT NARIMAN: That's tab of what?

MR. VIOLI: It's in tab 8 and nine of the binder I just gave you.

They talked about what's called the NAAG proposal. In 2004 -- and this is that other e-mail that Mr. Hering wrote.

12:58:39

In 2004, they knew there was a problem so there was a proposal to pass a law among the states, and it would work this way, Mr. President: There's a flat tax, $7. If you pay $2 under the MSA, we'll credit you the two, you have to pay another five. You pay one dollar as NPM, you have to pay six. Everybody goes to seven. And they call it the NAAG proposal. And we submit and always wanted this to go into place.

12:59:12

Now, there's some discussion there. The NPMs really don't want it, because they want -- you won't see any NPM objecting to that

proposal. But what happens? What happens? They say, R.J. Reynolds lobbyists, what are we going to do about this? Because the problem is the exempt SPMs. They're the ones who say we want to pay two and only pay two. We don't want to pay the difference. That's the real problem.

So what do they say? You can say -- when the public asks for it because the word got out, you can say it's not ready for prime time.

12:59:48

It's not ready for prime time. In 2004, we're in 2010, six years later, and Mr. Hering's e-mail said, we'll fix the problem we have the Escrow Statutes now, and we'll work on the subsequent legislation next year, you know, to fix it.

If they do that -- this is an acknowledgement. If they do that, everybody is at the same level. Flat tax, if you pay one into escrow, you have to pay six. If you pay two, you have to pay five. OPMs pay five so they only have to pay two. Everybody is at the same level.

13:00:17

When Ms. Morris said "the goal," the goal here, this Allocable Share, is so that

everybody pays or every cigarette -- all cigarettes are priced to reflect their social cost, and then she said it was perverse to have it otherwise. She used the word "perverse." That's exactly the situation with the exempt SPMs, right? Their cost, their price, does not show the true cost. Now, NPMs do because we have to pay the full Allocable Share, the full -- no Allocable Share.

13:00:55

So if it's perverse not to have the Allocable Share provision in place, how can it not be perverse to have -- to allow the exempt SPMs to continue.

They say, well, you won't agree to this, and you won't agree to that.

We submitted an application. They only submitted part of it. That application when it left my office was this big. It has attachments to it. And they're getting our Customs records from it. We have to submit a waiver to U.S.

13:01:20

Customs that they can get every document showing every cigarette that crossed the United States

border from Canada. There is manufacturing agreements that were attached. They're all concluded in that MSA application.

PRESIDENT NARIMAN: Counsel appeared before any legislature before this was passed on behalf of NPM?

MR. VIOLI: NPMs don't have the money.

PRESIDENT NARIMAN: No, no, NPMs some --

13:01:48

MR. VIOLI: Yes, there are three in the record.

PRESIDENT NARIMAN: Not you fellows?

MR. VIOLI: No. There are three in the record.

PRESIDENT NARIMAN: Why didn't you fellows appear, your client, against the legislation? Why didn't you point this out to the legislature?

MR. VIOLI: I did point it out to the

13:02:04

Attorney General. They wrote the law.

PRESIDENT NARIMAN: I'm asking about the legislature, because there was evidence given

before legislature.

MR. VIOLI: I was not --

PRESIDENT NARIMAN: It's already none of the Claimants appear.

MR. VIOLI: Before the legislatures, no. We're generally advised. But the point is that the MSA --

PRESIDENT NARIMAN: All this would have been better served if it had been addressed to the --

MR. VIOLI: Oh, they tried. The CITMA group tried, at least in the three states they noticed, they tried. But if you have the Attorney General and R.J. Reynolds lobbyists, there is no way, Mr. President. Not even me.

I want to point out the MSA application. The MSA application -- he said, it's a quick letter you wrote, Violi, just to get out of the pretext sham. It wasn't.

It has manufacturing agreements. It has our trademarks. It has our escrow agreements. It has the status of our accounts, which they

didn't put in. It has all the documents that we submitted, the waivers, so U.S. Customs could give them directly all the records of our sales that came across the country. All of that was in the MSA application. What comes back? All of that was pretext, what came back.

Oh, give us your packaging, your Grand River -- give us your packaging, come into compliance with state laws, and generally one other thing.

The paragraph before -- and then he says submit the new application with these materials.

He said in the paragraph before, there's no way. There's no way you're getting this -- you're getting in the MSA with these conditions you want, and that is not to pay for these brands that don't belong to you.

Now, why -- we talked about General Tobacco. Why did I point out General Tobacco? Because in the record we made a request for their agreement. General Tobacco joined the MSA, was

the same boat as us. They joined the MSA, got 12 years to pay. But they sued. That's what the complaint is in the record. Because after they got in the MSA, they said there's no bloody way we can compete. We can't compete. These are their words.

They said, we cannot compete under these regime because the exempt SPMs -- and they're out of the market now. They just got delisted.

But the point is, they said we can't compete so they wanted to sue the states, and that's what the complaint shows. It shows the forebear ance agreements, which I've been asking for, for all the companies, not just General Tobacco.

And the state said, we understand you have these claims, but, you know, we'll have a forbearance agreement on the back payments.

The whole point was, was General Tobacco sued in that case? It got dismissed because the judge said, sorry, you weren't

fraudulently induced to join the MSA, so if you join MSA, you will forever be barred to say, I think there's a problem with this. It's favoring one group or class of competitors over another.

PRESIDENT NARIMAN: Okay, Violi, enough.

MR. VIOLI: Okay.

MR. WEILER: Thank you, Mr. President. Three points. Two are answers to questions from the Tribunal to my friends.

The first one is with --

PRESIDENT NARIMAN: What if we withdraw the question?

MR. WEILER: I'll be very quick.

First one is articulation of damage. We would submit that if you look at Articles 1116 and 1117, it says "loss or damage." A simple articulation of loss, even if you were to find that there were no damages --

ARBITRATOR ANAYA: I actually was looking for the word "or" and it says "and."

PRESIDENT NARIMAN: It's not "or."

1116, one and two, both say "and."

MR. WEILER: No. It's "loss or damage."

ARBITRATOR ANAYA: Oh, okay. I'm sorry. I was looking at another part.

MR. WEILER: That's okay. 12 years.

PRESIDENT NARIMAN: Loss or damage added.

MR. WEILER: Right. You could find 13:06:09 that there were no damages, but you would still be obliged to go through the process if we had articulated a loss. We would submit that you shouldn't if we've articulated loss and damages. But we would say it should be -- it would be putting the cart before the horse if you say, oh, they have no damages so I'm not going to figure out if there's liability.

PRESIDENT NARIMAN: No, that's not the point. Please follow what they -- 13:06:31

MR. WEILER: Okay.

PRESIDENT NARIMAN: The point is like this, which was made earlier. It is like this.

You came with a claim and you said that we have suffered loss and damage and so on.

Now, at that stage it is not possible to say that you haven't until the merits come in, so that all goes to the merits.

MR. WEILER: Uh-huh.

MR. PRESIDENT: Now, the point of 1116, whether it should be viewed, whether it's appropriate for Tribunal if it comes to a 13:07:01 conclusion that they haven't shown adverse expectation, if a Claimant, not you -- if a Claimant hasn't, it's a question of law. If a Claimant of law hasn't shown adverse effectuation, then, as a matter of propriety should the Tribunal go into the rest of the allegations about the measures not conforming to 1102 or 1114?

MR. WEILER: I'd have to agree. If they haven't been able to prove that they've been adversely affected, then there wouldn't be -- 13:07:41

PRESIDENT NARIMAN: They wouldn't suffer any loss or damages.

MR. WEILER: I don't think I have a

problem. I think we're on the same page.

PRESIDENT NARIMAN: That's the only question.

ARBITRATOR ANAYA: All right. Well, so you're saying there can be a loss but without a damage.

MR. WEILER: Well, loss or damage. It's a matter of -- I think the president's answer is about jurisdiction versus merits.

PRESIDENT NARIMAN: That's right. 13:07:58

MR. WEILER: That one has to articulate the loss, and then --

PRESIDENT NARIMAN: At that stage we couldn't say, nobody could say it. They couldn't say you suffered no loss until the whole thing came about. But if we come to the conclusion that you have not been affected adversely --

MR. WEILER: Then we're out. If we can't, but we --

PRESIDENT NARIMAN: No, no, Mr. Weiler, 13:08:21 this is a point, which you must bear in mind.

MR. WEILER: Okay.

PRESIDENT NARIMAN: A question is a question of law, namely, that in a NAFTA claim, apart from adverse effectuation, even if there is discrimination all the things are satisfied. But is it or is it not implicit in NAFTA that a Claimant must establish loss or damage to the satisfaction of the Tribunal --

MR. WEILER: Yes.

PRESIDENT NARIMAN: -- before -- before we can -- to establish any claim at all? 13:08:58

MR. WEILER: Yes, under Section B of Chapter 11.

PRESIDENT NARIMAN: Yes.

MR. WEILER: If it was Chapter 20, then you would continue, but under Section B of Chapter 11, you'd be correct. That's what we're doing.

ARBITRATOR ANAYA: So if there are no damages, is that the same as saying there's no loss?

MR. WEILER: Yes. In the merits phase, 13:09:16 yes, it's the same thing.

PRESIDENT NARIMAN: Suppose Mr. Weiler

-- sorry. Suppose you came and told us very frankly that, I'm sorry I have made massive profits and I have suffered no loss, but these fellows over here very badly, all the states, very badly, their treatment falls under 1102, three, four, et cetera, and please determine this.

MR. WEILER: I have to prove loss.

PRESIDENT NARIMAN: And should the NAFTA Tribunal determine it.

13:09:43 MR. WEILER: Yes, I have to prove loss or damage.

ARBITRATOR ANAYA: Just so I'm clear, loss is the same as damages?

MR. WEILER: In merits, yes.

PRESIDENT NARIMAN: Of course, in merits.

MR. WEILER: Yes.

ARBITRATOR ANAYA: Of course, attorneys costs --

13:09:59 MR. WEILER: Mr. Violi would just want us to clarify. He's obviously concerned if this is where you're going, he would out that we have

professional people.

PRESIDENT NARIMAN: We are asking you hypothetically.

MR. WEILER: I know. And, hypothetically, I'm with you. I agree.

MR. VIOLI: I was thinking that loss could be if you're not damaged, but there's loss because of either reliance, not -- but attorneys fees, costs, things that the measures require that

13:10:21 didn't damage you from a loss profit's perspective. That's the only I was thinking why loss could be different. I can see as a litigator doing civil litigations, damages, and then you suffer a loss, but it's not damages, so that's the question that's --

PRESIDENT NARIMAN: As far as this case is concerned, your case is of damages. You haven't said anything else. You haven't made this fine distinction between loss and damages. You

13:10:48 have said, I suffered damages. This is the expert and so on.

MR. WEILER: We'll see if we can get

the next question quicker. The other one was about -- I took it to be about severability of the claim. It is possible for you to find that Grand River, no claim; Jerry, no claim; Kenny, no claim. But if you found that Arthur had a claim, you could certainly proceed and you could award damages.

PRESIDENT NARIMAN: That I agree.

MR. WEILER: Okay, good. Just wanted

13:11:18 to make sure.

The final one isn't a question. It's just a point. My friends showed you that lovely chart that showed the really good steep decline. I just wanted to remind you that that chart was in their Memorial and our Reply Memorial at paragraphs 43, 55 and 56. We explained why that chart is not accurate.

The primary reasons are, number one,

13:11:48 they used the wrong data. They used the trade data from the CEC, rather than the health data that their health expert, Professor Gruber, used. So they used the wrong data. If they used the

right data, rather than have a 25 percent decline, you'd would have an 18 percent decline.

PRESIDENT NARIMAN: You're saying your chart is the correct one.

MR. WEILER: Yes. I haven't measured them. But I'm just saying, they've got a 25 chart marked. It's actually 18 if you use the health data that Professor Gruber uses, and then the other one is the data they relied on 2007 is an

13:12:21 estimate. It's just an estimate. And they're representing it as if it's not an estimate.

And that's it. I'm done.

MR. LUDDY: Mr. Chairman, literally, 60 seconds.

Mr. Sharp had mentioned a dispute between Mr. Wilson and Mr. Kaczmarek on the subject of brand.

PRESIDENT NARIMAN: On what?

MR. LUDDY: Brand.

13:12:42 PRESIDENT NARIMAN: Okay.

MR. LUDDY: A lot of this comes down to their respective definitions of brand. We think

the evidence shows clearly what Mr. Kaczmarek is defining is a trademark. What Mr. Wilson is defining is a genuine brand. And in that regard I just want to point the Tribunal -- I'm not even going to go into it but the record is here and you can look at, at your leisure -- Exhibit 65 to the evidentiary submissions for Claimants' Reply Memorial --

PRESIDENT NARIMAN: Tab 65?

13:13:20 MR. LUDDY: Tab 65.

PRESIDENT NARIMAN: Of what?

MR. LUDDY: Of the Evidentiary Submissions for Claimants' Reply Memorial is a submission made by Philip Morris in the U.K. where in it defines both a brand and a trademark. If you look at the definition -- Philip Morris, which knows a little bit about the brands in the tobacco industry, if you look at their definition of brand, it is on all fours with Mr. Wilson.

13:13:49 Similarly, if you look at the definition of trademark, it's on all fours with the way Mr. Kaczmarek defines brands, and from

that a lot of things flow. Thank you very much.

PRESIDENT NARIMAN: Thank you.

Yes?

MR. KOVAR: Mr. President, just a couple quick points.

PRESIDENT NARIMAN: Okay.

MR. KOVAR: The Claimants act as if the question of money and the question of public health are entirely separate. In our view, that's

13:14:13 just not true. The Allocable Share Amendments -- money in terms of the costs imposed on a manufacturer does impact the public health. The Allocable Share Amendments imposed a full cost on the NPMs for their sales, thereby assuring higher prices and protecting the public health.

The purpose of the ASA, the public health goal was to raise the marginal cost of NPM cigarettes to avoid the large amounts of escrow in the very states where the cigarettes were being

13:14:47 sold. That was the problem. You're selling them in only a couple of states, and the escrow is disappearing from those states. You've got to get

the price up to the level it would be if it was in the MSA.

Professor Gruber addressed the same point saying, the public health issue is not the wealth of the cigarette companies. The public health issues is the price of cigarettes. That's his testimony.

The last conspiracy theory -- we heard one again, and it comes out of the Philip Morris

13:15:21 document by Regina Murphy. Remember, she worked for Philip Morris. And we have no assurance that her notes reflect anything more than what Philip Morris was interested in. We don't know whether there were discussions of the public health in that meeting.

The MSA application, Mr. Violi said that what came back to them was pretext, and that they could never agree to a situation where they would have to give up their claims challenging the

13:15:49 MSA. But the MSA is a settlement. It's a settlement of claims going on both sides.

If I may, I just ask for the slide that

we showed yesterday on what -- do we have that slide? Not this one, no, the one on the MSA application.

Here it is. These are the special requests that Grand River made on the MSA application. There's one more slide on the what the Response was.

PRESIDENT NARIMAN: We heard this. We got Greenwald's letter.

13:16:28 MR. KOVAR: Well, let me just leave it here, Mr. Chairman. If you read the Greenwald letter, you'll see that what it really said is that you're welcome to submit a new application at such time as Grand River is compliant with all state laws, can demonstrate its willingness to support and comply with the provisions of the MSA and can provide all of the information.

PRESIDENT NARIMAN: This was mentioned by one of your colleagues.

13:16:47 MR. KOVAR: That's right. And with that, I think, there's no reason to comment on the discussions you had with Mr. Weiler. I would just

give the floor to Mr. Sharp to make one last --

PRESIDENT NARIMAN: There is no floor.

MR. KOVAR: Oh, I'm sorry. I would ask him to take the microphone.

MR. SHARPE: All I would do is, please, just direct your attention to Navigant second expert report, page 15, "What is a brand," and in particular the citations for that discussion.

PRESIDENT NARIMAN: Navigant.

13:17:23 MR. SHARPE: Navigant, second report, page 15, where Navigant observes Claimants' definition of brand is really the product price, taste, and so forth. That's not the brand.

And if you would, please, have a look at the documents Navigant cited identifying what the proper definition of a brand is.

PRESIDENT NARIMAN: Lunch. Lunch.

MR. KOVAR: If this is the end, we'd like to thank you, Mr. Chairman.

13:17:49 PRESIDENT NARIMAN: No, thank you all very much for putting up with all my --

MR. LUDDY: Thank you very much,

Mr. President, on behalf of the chairman.

MR. KOVAR: Mr. President, may I also ask that we acknowledge the unsung heros of this meeting, the folks like Katia and her colleague, our tireless court reporter, and also paralegals and law clerks from law schools who have done so much.

PRESIDENT NARIMAN: And, counsel, on both sides significant. Thank you very much.

13:18:32 (Whereupon, at 1:18 p.m., the hearing was concluded.)

CERTIFICATE OF REPORTER

I, John Phelps, RPR, CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by an of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

JOHN PHELPS, CSR, RPR, CRR