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By E-mail & Courier

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Prof. S. James Anaya
Mr. John R. Crook
c/o Mr. Ucheora Onwuamaegbu
Secretary of the Tribunal
ICSID, 1818 H Street, NW
Washington, DC 20433

Re: *Grand River Enterprises et al. v. United States of America*

Dear Members of the Tribunal:

In accordance with the Tribunal's invitation set forth in the Secretary's April 3 letter, the United States offers the following observations on claimants' oral motion to amend their statement of claim to add allegations regarding the allocable share amendments. For the reasons detailed below, claimants' motion should be denied.

In their closing arguments on the last day of the jurisdictional hearing, claimants made an oral motion to amend their statement of claim to allege that they did not suffer any loss or damage as a result of the alleged discriminatory nature of the Escrow Statutes until the allocable share amendments were adopted.¹ As claimants made clear throughout the jurisdictional hearing, their new allegations regarding the allocable share amendments apply only to their Article 1102 and 1103 claims, and do not affect their claims under Articles 1105(1) or 1110.² Claimants did not make these new allegations earlier because doing so would have contradicted the premise upon which their original claim was based, namely that they were discriminated against by not having received a personal invitation to join the MSA. It was only after claimants were compelled to reveal that they did not

¹ *Grand River Enters. Six Nations Ltd. et al. ("Grand River") v. United States of America*, Hearing on Jurisdiction (Mar. 23-25, 2006), Transcript ("Tr.") Vol. 3 at 1161:9-18.

² See Tr. Vol. 2 at 518:3-8; *id.* at 523:11-21; *id.* at 524:23-25; *id.* at 608:19-22; *id.* at 610:8-11; *id.* at 799:10-800:4.

manufacture cigarettes for sale in the U.S. market at the time the MSA was negotiated³—that claimants sought to change the theory of their case.⁴

Claimants’ motion should be denied. Article 20 of the UNCITRAL Arbitration Rules grants a tribunal discretion to deny a motion to amend where the tribunal “considers it inappropriate to allow such amendment having regard to the delay in making it or the prejudice to the other party or any other circumstances.” That Article also prohibits amendment where “the amended claim falls outside the scope of the arbitral clause or separate arbitration agreement.” Here, there plainly has been delay and prejudice. Furthermore, “other circumstances,” including the fair and efficient administration of the proceedings and the fact that the amended claim would fail, warrant denial of claimants’ motion to amend. Finally, the motion must be denied because the Tribunal would lack jurisdiction over the amended claim.

I. Claimants’ Delay, Prejudice to the United States and Other Circumstances Warrant Denial Of Claimants’ Motion To Amend

Claimants’ oral motion to amend their claim should be denied because the motion is untimely, would prejudice to the United States, would compromise the fair and efficient administration of these arbitral proceedings and would be futile, in any event.

A. Claimants’ Unjustifiable Delay

International tribunals governed by the UNCITRAL Arbitration Rules consistently reject applications to amend where there has been considerable delay in

³ As late as the filing of their rejoinder, and in response to the United States’ allegation that claimants were not manufacturing cigarettes for sale in the United States at the time that the MSA was negotiated, claimants accused the United States of “misrepresenting and mischaracterizing” their arguments and repeated, for the third time, that “Claimants have been involved in the manufacture and distribution of tobacco products for sale in the United States since 1992.” *Grand River v. United States of America*, Rejoinder to Respondent’s Reply on Jurisdiction (Feb. 27, 2006), at 8.

⁴ Notably, within one week of the close of the hearing, on April 3, 2006, claimants applied for admission to the MSA. In their application, claimants represented that in order to avoid having to make escrow payments, which are due on April 15, they needed to know whether their application was accepted by all Settling States by April 7 – a mere four days after its submission. While claimants’ voluminous application obviously took some time to prepare, it is equally obvious that claimants postponed submitting their application until after the close of the hearing, even though doing so would make it unlikely that their application could be processed before their escrow payments became due. Claimants’ motivation for their delay is clear, as their application reveals the fact that they only began manufacturing cigarettes for sale in the U.S. market after the MSA was concluded, and contains names of additional distributors of their cigarettes which had not been revealed in their submissions made in the arbitration, facts that claimants wished to hide from both the United States and the Tribunal. Not having received a response on their application within a mere few days, claimants moved for an injunction in federal court on April 13, seeking to enjoin (i) the states’ enforcement of the allocable share amendment against Grand River, (ii) the states’ denial of Grand River’s admission into the MSA, and (iii) the states’ imposition of any ban on the sale of cigarettes produced by Grand River by reason of non-compliance with the Escrow Statutes.

making such a motion,⁵ and where that delay is unjustifiable.⁶ Here, the length of claimants' delay was considerable, and their justification nonexistent.

Claimants filed their notice of arbitration on March 12, 2004, and their statement of claim on June 30, 2005. Only on the last afternoon on the third day of the jurisdictional hearing, which had followed multiple rounds of briefing on the issue of bifurcation and the United States' jurisdictional objection that the claims were time-barred, did the claimants nonchalantly make their oral motion to amend their claim. Given that claimants raised their proposed amended claim only after rounds of jurisdictional briefing and at the conclusion of three days of hearings, their oral motion should be denied.

Moreover, claimants' delay is unjustified. As of June 30, 2005, when claimants filed their statement of claim, forty-three states and two territories had passed allocable share amendments to their Escrow Statutes. At the hearing on jurisdiction, claimants represented that references to the Escrow Statutes in their statement of claim were, in fact, references to the Escrow Statutes as amended by the allocable share amendments.⁷ Yet, claimants have not justified their failure to allege in their notice of arbitration or their statement of claim that it was only when the allocable share amendments were adopted that they first incurred loss or damage as a result of failing to obtain Grandfathered SPM status. The delay in seeking to amend has not been caused by changed circumstances, newly-discovered evidence or any other justifiable cause.

⁵ See, e.g., *Methanex Corp. v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits (Aug. 3, 2005) (“*Methanex* Final Awd.”) Part II, Ch. F at ¶ 28 (rejecting proposed amendment “made very late,” after conclusion of the first week of the main hearing and more than one year after the amendment to the regulations at issue had been enacted); *Westinghouse Electric Corp. v. Islamic Republic of Iran Air Force*, Award No. 579-389-2, ¶ 44 (Mar. 26, 1997) (“*Westinghouse* Awd.”) (rejecting claimant’s request at final hearing to amend its claim by adding an additional remedy); *Nazari v. Islamic Republic of Iran*, Award No. 559-221-1, ¶ 11 (Aug. 24, 1994) (rejecting request for amendment because of “significant lapse of time involved”); *Arthur Young & Co. v. Islamic Republic of Iran*, Award No. 338-484-1, ¶ 37 (Dec. 1, 1987) (“*Young* Awd.”) (rejecting proposed amendment that had not been raised in statement of claim or reply pleading); *Cal-Maine Foods Inc. v. Islamic Republic of Iran*, Award No. 133-340-3, Merits ¶ 1 (June 11, 1984) (rejecting proposed amended claim that had not been raised in the statement of claim or at a pre-hearing conference); *Dallal v. Islamic Republic of Iran*, Award No. 53-149-1, § I (June 10, 1983), reprinted in 3 Iran-U.S. Cl. Trib. Rep. 10, 11 (1983) (rejecting additional basis for claim that was first presented in post-hearing brief).

⁶ See, e.g., *Methanex* Final Awd. Part II, Ch. F at ¶ 28 (rejecting proposed amendment where “period of delay unexplained” by claimant); *Riahi v. Islamic Republic of Iran*, Award No. 600-485-1, ¶ 69 (Feb. 27, 2003) (“*Riahi* Awd.”) (rejecting proposed amendment where “Claimant has not given any acceptable reason why she failed to include [the proposed amended claims] in the Statement of Claim”); *Young* Awd. ¶ 37 (rejecting proposed amendment where “Claimant offered no explanation why it raised this request only at such a late stage of the proceedings”); *Harris Int’l Telecomm., Inc. v. Islamic Republic of Iran*, Award No. 323-409-1, ¶ 87 (Nov. 2, 1987) (“*Harris* Awd.”) (rejecting proposed amendment where “no explanation has been offered for the delay in seeking this alteration of the Claim”); *Sedco, Inc. v. National Iranian Oil Co.*, Award No. ITL 55-129-3, § II.C(3) (Oct. 28, 1985) (accepting modification only to extent it reflected certain findings in interlocutory award which claimant could not reasonably have been able to take into account earlier).

⁷ See, e.g., Tr. Vol. 2 at 732:10-12; *id.* at 732:16-18; *id.* at 732:23-733:4; *id.* at 824:2-4.

Rather, it is the direct result of claimants' realization that their claims as pled fail for lack of jurisdiction. This attempt to evade dismissal of their claims does not provide a justification for the undue delay in seeking to amend their claim. Claimants' motion to amend should thus be denied.

B. Prejudice To The United States

Claimants' proposed amendment also should be denied on grounds of prejudice to the United States, which has defended against the claims as pled. In the NAFTA, the United States granted its consent to arbitrate claims submitted "in accordance with the procedures set out" in that Agreement. Among those procedures is the notice of intent provision set out in Article 1119, which requires a claimant to provide the State with written notice which "shall specify," among other items, the NAFTA provisions alleged to have been breached, as well as "the issues and the factual basis for the claim." Similarly, Article 18 of the UNCITRAL Rules requires that the statement of claim "include a precise statement" of certain "particulars," including a "statement of facts supporting the claim" and a statement of the "points at issue."

The United States must rely on the notice of intent, notice of arbitration and statement of claim, to prepare its defense. As the *Methanex* tribunal observed, in accordance with UNCITRAL Article 18, the statement of facts supporting claimant's claim "must set out its specific factual allegations, including all specific inferences to be drawn from those facts."⁸ Similarly, as noted by the Iran-U.S. Claims Tribunal:

[T]he arbitrating parties are obliged to present their claim or defence, in principle, as early as possible and appropriate under the circumstances in each case. Compliance with this obligation is indispensable, in the Tribunal's view, to ensure an orderly conduct of the arbitral proceedings and equal treatment of the parties.⁹

Given the importance of providing respondents with sufficient notice of the claims against which they must defend, international tribunals consistently reject requests to amend claims where the purported "amendment" would change the essence of the claim.¹⁰ Claimants' proposed "amendment" would do exactly that, and should therefore be rejected.

⁸ *Methanex Corp. v. United States of America*, First Partial Award of the Tribunal on Jurisdiction (Aug. 7, 2002) ("*Methanex* First Partial Awd."), at ¶ 162.

⁹ *Young Awd.* ¶ 37, reprinted in 17 Iran-U.S. Cl. Trib. Rep. 245, 253-54 (1987).

¹⁰ See, e.g., *Riahi Awd.* ¶ 68 (rejecting proposed amendment that would "clearly change" the "essence of the initially presented Claim"); *Westinghouse Awd.* ¶ 44 (rejecting proposed amended claim where amendment would raise new factual and legal issues); *Harris Awd.* ¶ 87, reprinted in 17 Iran-U.S. Cl. Trib. Rep. 31, 55-57 (1987) (rejecting proposed amendment that would "significantly alter[]" the relief sought); *Flexi-Van Leasing, Inc. v. Islamic Republic of Iran*, Award No. 259-36-1, § II.3(a) (Oct. 13, 1986), reprinted in 12 Iran-U.S. Cl. Trib. Rep. 335, 346 n.2 (1986) (rejecting proposed amendment that attempted "to modify the essence of the basis of its claim").

Claimants' statement of claim includes no reference to the allocable share amendments. Claimants failed to attach the Escrow Statutes as exhibits to their statement of claim. They did, however, attach to their statement of claim the MSA, along with Amendments 1 through 19 of that Agreement. Notably, claimants did not attach Amendment 21 of the MSA, which allowed states to adopt the allocable share amendment without affecting the nature of their Escrow Statutes as "qualifying statute[s]" under the MSA. Amendment 21 was publicly available well before claimants filed their statement of claim. When referring to the Escrow Statutes in their statement of claim, claimants provide no date of enactment or amendment, nor any indication of whether their references are to the statutes as originally adopted or as amended.¹¹ The very paragraphs cited by claimants at the hearing on jurisdiction as containing references to the allocable share amendments only confirm that claimants' claim was directed against the Escrow Statutes as originally enacted, and not against the statutes as amended.¹² In those paragraphs, claimants complain about the "Renegade Clause" of the MSA – which granted exemptions to Grandfathered SPMs – and the "implementation" of that exemption "through legislative enactments."¹³ References in these paragraphs to the legislative enactments that "*implemented*" the MSA's terms confirm that the focus of claimants' complaint is the original Escrow Statutes, not the subsequent amendments to those statutes. And claimants themselves represented that their claims were not crafted specifically for this arbitration but, rather, mirror the claims that they made in federal court in the litigation they commenced in 2002.¹⁴ At that time, however, the allocable share amendments had not been enacted, further confirming that claimants' claims were not premised on these amendments.

¹¹ *Grand River v. United States of America*, Particularized Statement of Claim (June 30, 2005) ("SOC"), Exh. 17 (Escrow Laws chart).

¹² See Tr. Vol. 2 at 732:16-24 (identifying paragraphs 63, 44, 50, 51, 56, 57 and 65 of the Statement of Claim as allegedly referring to the Escrow Statutes, as amended).

¹³ SOC ¶ 44 ("This exempt status would later be accommodated in implementation by each MSA state through its respective legislative enactments."); *id.* ¶ 50 ("The intent and purpose of the Renegade Clause's exemption was to induce a group of smaller competitors . . . to join the MSA under a grant that effectively safeguarded their existing market share, while simultaneously and effectively taking the share held by other competitors, including the Investors, for the benefit of these Exempt SPMs."); *id.* ¶ 51 (The "Renegade Clause provisions of the MSA – which would be implemented uniformly in the years to come by each MSA State and territory" were intended to reserve "an exclusive slice of the U.S. market to a select club of smaller producers who were invited into this secret agreement by invitation only.") *id.* ¶ 56 ("[I]mplementing measures now present in all of the MSA States and territories" would require Grand River and Native Wholesale Supply to "incur liability for tens of millions of dollars in MSA payments" if they joined the MSA now, "despite the fact that Exempt SPMs will have incurred \$0 for selling the same number of cigarettes . . ."); *id.* ¶ 57 (MSA's terms "as subsequently implemented by the laws of each State" preclude claimants from joining on the same terms as their competitors and "measures imposed by each state to implement the MSA's terms" require claimants to make payments even if they do not join, "while Exempt SPMs are not required to make *any* payments for selling the same number of cigarettes."); *id.* ¶ 63 ("[T]he MSA implementing measures of each state now require the Investors and their investments to deposit millions of dollars annually into qualified escrow fund . . ."); *id.* ¶ 65 ("The Escrow Statutes . . . require . . . per carton payments . . . greater than the per carton profits of Investors or their investment enterprises.").

¹⁴ Tr. Vol. 2 at 915:6-9 ("[N]one of our arguments are minted for arbitration. Everything we have said, since day one, 2002, has been 100 percent consistent in this case.").

If claimants' new allegation regarding the allocable share amendments was, as claimants now allege, implicit in their statement of claim, then certainly it would have been reasonable for claimants to attach a version of the Escrow Statutes to their statement of claim that contained the allocable share amendments or attach Amendment 21 of the MSA, which refers to the allocable share amendments, to the version of the MSA which they submitted. One certainly would have expected to see some reference to the language of the allocable share amendments, which claimants now allege were solely responsible for the entirety of the loss and damage they sustained as a failure to obtain the payment exemption offered to Grandfathered SPMs.

Permitting claimants to amend their claim to add allegations that they first incurred loss or damage as a result of their not having obtained the payment exemption granted to Grandfathered SPMs only when the allocable share amendments were adopted would change the very essence of their claim, thereby prejudicing the United States, which has defended against claimants' claim as pled. Claimants' Article 1102 and 1103 claims are premised upon the alleged understanding between the major cigarette manufacturers and MSA states to reserve "an exclusive slice of the U.S. market to a select club of smaller producers who were invited into this secret agreement by invitation only."¹⁵ According to claimants' own expert, the application of the MSA payment scheme to claimants has damaged them in an amount equivalent to "the value of [claimants'] lost exemption quota under the MSA" based on estimated cigarette sales.¹⁶

Only after it was demonstrated conclusively at the hearing – and claimants finally had to concede – that they were not manufacturing cigarettes for sale in the United States at the time the MSA was negotiated did claimants feel compelled to change the very essence of their claim. Once this material fact was revealed, it became clear that claimants could not have received a personal, direct invitation to join the MSA as a Grandfathered SPM, and that even had they joined the MSA as a Grandfathered SPM, their payment exemption would not have been worth anything because they had no market share at the time. Thus, while claimants originally pled that the United States had breached the NAFTA by denying them Grandfathered SPM status and that they were immediately harmed by not having been invited to join the MSA as a Grandfathered SPM,¹⁷ that argument could no longer hold water in light of the facts that claimants were ultimately forced to acknowledge.¹⁸ Consequently, claimants were forced to abandon their claim as originally pled, and argued at the hearing – contrary to their earlier pleadings and expert report – that they would not have benefited from having obtained Grandfathered SPM status in early 1999 and had not incurred any loss or damage as a result of the alleged discrimination until the allocable share amendments were adopted. Under such circumstances, claimants' amendment prejudices the United States and should not be permitted.

¹⁵ SOC ¶ 51.

¹⁶ SOC Exh. 24 (LECG Report) at 2.

¹⁷ SOC ¶ 50.

¹⁸ See *supra* n.3; see also Tr. Vol. 2 at 517:7-17 (claimants conceding that Grand River did not manufacture cigarettes for sale in the U.S. until 1999).

The Iran-U.S. Claims Tribunal, applying UNCITRAL Article 20, has consistently rejected such requests to amend, where the purported “amendment” would in fact change the very essence of the claim asserted.¹⁹ Likewise, the *Methanex* NAFTA Chapter Eleven tribunal expressed regret at its decision to allow claimants to amend their claim when the amendment changed the nature of the claim and was ultimately found to have been premised on a misrepresentation.²⁰ Similarly, in this case, claimants have made material misrepresentations in their original pleadings – that the MSA states intentionally discriminated against them by neglecting to offer them a personal, direct invitation to join the MSA in 1998 when, in fact, it has now come to light that claimants were not in the business of manufacturing cigarettes for sale in the United States at that time. This Tribunal should not permit claimants to amend their claim when the necessity of that amendment stems from the revelation of fundamental misrepresentations in the claim as originally pled.

Claimants seek to make new allegations concerning the allocable share amendments only to postpone the time when they claim to have first incurred loss or damage with respect to their Article 1102 and 1103 claims.²¹ For the reasons explained above, permitting such an amendment would prejudice the United States and, therefore, should be denied. This prejudice would be even greater were claimants’ motion to be construed as a motion to amend their claim to add allegations that the allocable share amendments themselves breach the NAFTA. The United States, however, does not believe that claimants’ motion could be so construed.²² Nowhere in their written or oral

¹⁹ See *supra* n.10; see also *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, 1992 I.C.J. 240 (June 26) (Preliminary Objections), at ¶ 70 (rejecting claim raised for first time in claimant’s memorial as “inadmissible inasmuch as it constitutes, both in form and in substance, a new claim, and the subject of the dispute originally submitted to the Court would be transformed if it entertained that claim”).

²⁰ In that case, the tribunal found that it lacked jurisdiction over claimant’s original and amended claims, but that it might have jurisdiction if the allegations that Methanex made in its later written and oral submissions – namely, that the challenged measures had been adopted with the intent of harming it and its investments – were proven. See generally *Methanex* First Partial Awd. at 72-81. Methanex represented to the tribunal that it had recently obtained evidence demonstrating this alleged discriminatory intent, and the tribunal allowed the claim to go forward to the merits on this basis. Ultimately, the claim was dismissed for lack of jurisdiction and, in its award, the tribunal expressed regret that it had permitted Methanex to amend its claim based on its representation – which later turned out to be false – of newly discovered evidence. *Methanex* Final Awd. Part II, Ch. I at ¶ 60 (“[T]he Tribunal cannot unmake the procedural order it made allowing Methanex to amend its claim, which was based materially on Methanex’s explanation. Nonetheless the Tribunal can here record its disappointment that its procedural order was not then made with knowledge of the full facts and circumstances known at that time to Methanex itself.”).

²¹ See, e.g., Tr. Vol. 2 at 523:11-21 (“MR. CROOK: I understood you to say that there was no loss or damage before the allocable share amendments. Is that, in fact, your position? MR. VIOLI: On the discrimination claim, that’s correct. MR. CROOK: Just on the discrimination claim. MR. VIOLI: That’s correct, because the discrimination claim talks about the exemptions.”); *id.* at 824:6-12 (PRESIDENT NARIMAN: Therefore, your real loss was with the original statute, not with the amendment. MR. VIOLI: No, on the discrimination, no. . . . On the other claims, yes.”); see also Tr. Vol. 2 at 518:3-8; *id.* at 524:23-25; *id.* at 608:19-22; *id.* at 610:8-11; *id.* at 799:10-800:4.

²² There is one fleeting reference in the transcript where claimants suggest that their claim should be amended to allege that the allocable share amendments both breached the NAFTA and caused them loss or damage. See Tr. Vol. 3 at 1164:16-23. This statement, however, is at odds with claimants’ repeated representations throughout the hearing where claimants represented that they seek to rely on the allocable

submissions have claimants articulated such a theory. The United States would be left to guess – even after the close of hearing – as to the very nature of any such claim. To the extent that the Tribunal understands claimants’ motion to amend to encompass such a request, that motion should be denied on the basis, among others, of prejudice to the United States.

C. Other Circumstances

The Tribunal should also deny claimants’ proposed amendment because it would frustrate the arbitral goals of fairness and efficiency. In addition, the motion should be denied on futility grounds because the claim would fail even if amended. Furthermore, Article 20 grants this Tribunal discretion to consider any other additional factors present in this case that also militate against allowing the amendment.

Claimants repeatedly represented to the Tribunal that “no explanation exists” for the MSA states’ failure to invite them to join the MSA,²³ while claimants withheld from the Tribunal the information that they were not manufacturing cigarettes for the U.S. market at that time. To allow claimants to now amend their claim to allege that they were not harmed by that alleged exclusion after all, and only suffered loss or damage once the allocable share amendments were adopted, would be unfair to the United States.

Permitting claimants to amend their claim would also undermine the efficiency of the proceedings and encourage similar tactics from future claimants. As observed by the *Methanex* tribunal, permitting a “disappointed party” to reargue its jurisdictional case following an unfavorable determination would “turn the arbitration into the equivalent of Sisyphus’s torment or the film ‘Groundhog Day.’”²⁴ Claimants effectively ask this Tribunal for the same kind of unacceptable relief: when faced with the reality that their claims as pleaded are time-barred, they now ask this Tribunal for leave to reargue their jurisdictional case. As in *Methanex*, according such relief to claimants plainly would prejudice the United States and would be highly inefficient. It would transform Article 20 from a rule allowing amendments when appropriate to a rule allowing leave to amend as of right.

In addition, claimants’ motion should be denied because their amended claim would fail in any event. In denying claimant’s motion to amend, the *Methanex* tribunal observed that the proposed claim was “hopeless and bound to fail on its merits,” and that “[o]n this ground alone, the Tribunal would exercise its discretion against [the claimant] under Article 20 of the UNCITRAL Rules.”²⁵ There, the claimant sought to further amend its claim during the hearing to challenge an amendment made to the regulations

share amendments not as a separate breach of the NAFTA, but only to postpone the time when they first allegedly incurred loss or damage as a result of the breach which they allege occurred as soon as they were denied the payment exemption. *See* Tr. Vol. 2 at 608:24-610:11; *see also supra* nn.2 & 21.

²³ *Grand River v. United States of America*, Notice of Arbitration ¶ 35 (Mar. 12, 2004); SOC ¶ 53.

²⁴ *Methanex* Final Awd. Part II, Ch. E at 20 n.18.

²⁵ *Id.* at ¶ 27.

that it had challenged. As is the case here, those amendments were enacted far in advance of the hearing date. The *Methanex* tribunal held that the amended claim was bound to fail because claimants could not demonstrate any distinct loss or damage arising from the amendment to the regulations.²⁶

The same is true here. Claimants' amended claim would be bound to fail on multiple grounds. Certainly, under some circumstances, an amendment to a law may give rise to a new and different breach.²⁷ But claimants here have not alleged – nor could they credibly allege – that the allocable share amendments themselves breach the NAFTA. Claimants instead wish to argue that although the alleged breach of Articles 1102 and 1103 occurred earlier, when they were denied a payment exemption, they first incurred loss or damage as a result of the allocable share amendments. Claimants' claim that a breach occurred as a result of an earlier measure, but that their losses all arose out of a later measure, is bound to fail. As the *Methanex* tribunal recognized, the loss or damage alleged must arise out of the measure that is alleged to have breached the NAFTA.²⁸ The cases cited by claimants to support their theory that a loss may follow much later in time from the breach, also confirm that the loss and breach must emanate from the same measure.²⁹ Consequently, claimants' amended claim is bound to fail. In addition, as explained in more detail below, the amended claim would also fail to cure the jurisdictional defect in claimants' original claim.

²⁶ *Id.* The original regulations, challenged by Methanex, banned the use of MTBE in California gasoline and also conditionally banned the use of all oxygenates, other than ethanol. The amended regulations did the same thing, but identified a list of oxygenates, including methanol, that were conditionally banned from use. The tribunal correctly held that any loss or damage incurred as a result of the regulations arose out of the regulations as originally enacted.

²⁷ If, for instance, a law were amended so that it placed a burden only on Canadian-owned companies, this could give rise to a national treatment claim that was not present before the law was amended.

²⁸ *Methanex* Final Award, Part II, Ch. F at ¶ 26 (“An essential component of [Articles 1116 and 1117] is a claim that the investor/enterprise has incurred loss or damage by reason of or arising out of the breach Articles 1116 and 1117 [] requir[e] a claim of loss or damage that originates in the measure adopted or maintained by the NAFTA Party.”).

²⁹ In each of the cases relied on by claimants to support the proposition that a loss may occur after the time of the breach, the breach and the loss both emanated from the same measure, and the breach also was found to have occurred within the relevant limitations period. See, e.g., *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award ¶ 95 (May 29, 2003) (resolution, which denied renewal of permit, was adopted within the limitations period, found to have breached the NAFTA, and was the “exclusive cause” of claimants’ damage); *Mondev Int’l Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award ¶ 87 (Oct. 11, 2002) (conduct of U.S. courts, which took place within the limitations period – but not conduct of government entities which pre-dated the limitations period – were only measures that could be considered by tribunal to have breached the NAFTA or caused claimant damage); *Lauder v. Czech Republic*, 2001 WL 34786000 (Sept. 3) (Final Award), at ¶ 235 (claim denied where only breach of treaty was found to have occurred in 1993, but only damage to claimant was found to have been caused by 1999 action, which did not constitute a breach of the treaty); *CME v. Czech Republic*, 2001 WL 34786542 (Sept. 13) (Partial Award), at ¶ 601 (claim upheld on same facts upon which claim was denied in *Lauder*, where tribunal found that 1999 action, which was a cause of claimant’s loss, also gave rise to a breach of the treaty).

II. Claimants' Proposed Amendment Falls Outside Of The Tribunal's Jurisdiction And Must Be Denied

In addition to exercising its discretion to deny claimants' motion to amend for the reasons stated above, the Tribunal must deny claimants' motion in accordance with UNCITRAL Article 20 because the amended claim falls outside of the Tribunal's jurisdiction. Claimants' proposed amendment would fail for the same reasons that their originally pleaded claim fails for lack of jurisdiction: it is time-barred.

As the *Methanex* tribunal recognized:

Pursuant to Article 20 of the UNCITRAL Rules, a claim may not be amended in such a manner that the amended claim falls outside of the scope of the arbitration clause, in this case, Section B of Chapter 11. In seeking to introduce a new claim relying on [an amendment] as a measure for the purposes of Article 1101(1) NAFTA, in the Tribunal's view, [the claimant] fails to meet the essential requirements for bringing a claim under Section B of Chapter 11 and Article 20 of the UNCITRAL Rules.³⁰

In that case, the tribunal denied claimant's motion to amend on the grounds, among others, that such an amendment would fall outside of its jurisdiction. Specifically, the tribunal found that, in order to submit a claim, loss or damage must arise out of the challenged measure and Methanex could not demonstrate that it had incurred any loss or damage arising out of the amended regulations.³¹

Similarly, claimants' motion to amend must be denied because its amended claim suffers from the same jurisdictional defect as its original claim. Determining whether a claim under the NAFTA is time-barred is not simply a matter of examining the date of enactment of the piece of legislation that is the subject of the challenge. Rather, as Articles 1116 and 1117 provide, the Tribunal must identify the breaches and losses alleged.³² If, as is the case here, the claimant first knew or first should have known of the breach and that it had incurred loss or damage arising out of that breach more than three years before it submitted its claim to arbitration, the claim is time-barred. Claimants are attempting to amend their claim to add the allegation that they first incurred loss or damage as a result of the allegedly discriminatory treatment they received as a result of the MSA and the originally-enacted Escrow Statutes only when the allocable share

³⁰ *Methanex* Final Awd. Part II, Ch. F at ¶ 21.

³¹ *Id.* at ¶ 27.

³² For this same reason, claimants' identification of the Complementary Legislation as a challenged measure does not save their claims from being time-barred. As the United States has demonstrated in its written and oral submissions, the Complementary Legislation imposes no new payment obligations on claimants. It thus does not give rise to any of claimants' allegations of breach or loss and, therefore, the fact that it was enacted less than three years before claimants' submitted their claim to arbitration is immaterial. See *Grand River v. United States of America*, Objection to Jurisdiction (Dec. 5, 2005) ("Objection"), at 50; *Grand River v. United States of America*, Reply on Jurisdiction (Feb. 6, 2006) ("Reply"), at 10-11; Tr. Vol. 1 at 209:10-22.

amendments to those Escrow Statutes were adopted. As noted in our written and oral submissions, and as the *Mondev* tribunal recognized, a loss or damage may be incurred even if the full extent of the damage is not yet realized.³³ In this case, claimants first incurred loss or damage as a result of not having obtained the payment exemption accorded to Grandfathered SPMs as soon as they became legally obligated to make a payment into escrow in any state where their cigarettes were sold. This occurred in 1999.³⁴

In support of their new allegation, claimants offer a single hypothetical. At the hearing, claimants postulated that a Grandfathered SPM whose sales exceeded its 1998 market share, would have to make per-cigarette payments under the MSA greater than the payments by an NPM with sales in only a few states, taking into account the release of escrow payments that NPM would have received under the allocable share provision in the pre-amendment Escrow Statutes.³⁵ As the United States demonstrated at the hearing, however, that analysis is flawed.³⁶ In every instance where a Grandfathered SPM's sales did not exceed its grandfathered share, that Grandfathered SPM would make no payments whatsoever under the MSA as a result of the payment exemption it received. An NPM, like Grand River, on the other hand, would have to make payments into escrow. Even if the amount ultimately retained in escrow was diminished as a result of the releases obtained under the allocable share provision, the NPM would have *first* incurred loss or damage as a result of the different treatment it received vis-à-vis the Grandfathered SPM as soon as it became liable for making *any* payments into escrow. The allocable share amendments merely affected the amounts retained in escrow: they did not alter the time at which claimants first incurred loss or damage as a result of the Escrow Statutes. Claimants themselves have conceded, both in their written and oral submissions, that this is the case.³⁷ Consequently, even if the amendment were accepted, claimants' claims are time-barred. Their new allegation that they did not incur loss or damage with respect to their Article 1102 and 1103 claims until the allocable share amendments were adopted does not cure the jurisdictional defect in their claim.

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³³ See Objection at 48 n.191; Reply at 11-12 & 12 n.36; Tr. Vol. 1 at 220:15-221:7; *id.* at 222:18-223:23.

³⁴ See Reply at 8; Tr. Vol. 1 at 92:19-93:2; *id.* at 99:22-100:10.

³⁵ Tr. Vol. 2 at 585:17-587:12.

³⁶ See Tr. Vol. 3 at 1082:6-1083:24.

³⁷ See *Grand River v. United States of America*, Reply to Respondent's Objection to Jurisdiction (Jan. 16, 2006), at 13 (claiming that claimants were able "to mitigate, to some extent" the damage they incurred under the MSA and Escrow Statutes by limiting the number of states in which their cigarettes would be sold and obtaining allocable share releases in those states); *id.* at 14 (claiming that the allocable share amendments have "caused new and deeper harm to the Claimants"); Tr. Vol. 2 at 719:16-18 (claiming that under the Escrow Statutes pre-amendment, Grand River was able "to effectively lower its national escrow burden"); *id.* at 823:20-25 (citing reference in expert report that damages calculations did not take into account "the refunds that are due").

Claimants' proposed amended claim would be both inappropriate and beyond the jurisdiction of the Tribunal. Claimants' challenge to the Escrow Statutes as originally enacted is time-barred. In an attempt to avoid dismissal of their claims, claimants have belatedly alleged that their discrimination claim under Articles 1102 and 1103 did not ripen until the allocable share amendments were adopted, which is when they now allege they first incurred loss or damage. This allegation is not only new, it also contradicts representations in claimants' statement of claim and in their expert report, and, if accepted, would fundamentally change the nature of their claim. Claimants have offered no justifiable explanation for failing to make such allegations earlier; indeed, the allocable share amendments had been enacted in almost all of the states prior to claimants' filing of their statement of claim. Instead, it is clear that claimants sought to amend only when the misrepresentation upon which their original claim was founded was revealed. Under these circumstances, allowing such an amendment would prejudice the United States and would undermine both fairness and efficiency. In any event, any such amended claim would fail for lack of jurisdiction because it is time-barred. For all of these reasons, the United States respectfully requests that claimants' oral motion to amend be denied.

Respectfully submitted,

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