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2 IN THE ARBITRATION UNDER CHAPTER ELEVEN
3 OF THE NORTH AMERICAN FREE TRADE AGREEMENT
4 AND THE UNCITRAL ARBITRATION RULES BETWEEN

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8

9 GRAND RIVER ENTERPRISES SIX NATIONS, LTD.,
10 JERRY MONTOUR, KENNETH HILL AND ARTHUR
11 MONTOUR, JR.,

12

13 CLAIMANTS/INVESTORS,

14

15 V.

16

17 UNITED STATES OF AMERICA,

18

19 RESPONDENT/PARTY.

20 -----

21

VOLUME III

22

ARBITRATION HEARING

23

24

25

0957

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2 TRANSCRIPT of the stenographic
3 notes of the proceedings in the
4 above-entitled matter, as taken by and
5 before TAB PREWETT, a Registered
6 Professional Reporter, a Certified
7 Shorthand Reporter of the State of New
8 Jersey, and Notary Public of the State of
9 New Jersey, held at the Offices of the
10 American Arbitration Association,
11 International Centre for Dispute
12 Resolution, 1633 Broadway, New York, New
13 York, on Saturday, March 25, 2006,
14 commencing at 9:12 a.m.

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1 A P P E A R A N C E S:

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MEMBERS OF THE TRIBUNAL:

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MR. FALI S. NARIMAN, PRESIDENT

4 PROFESSOR JAMES ANAYA

MR. JOHN R. CROOK

5

6 SECRETARY OF THE TRIBUNAL:

7 UCHEORA ONWUAMAEGBU, ICSID

8

9 ATTENDING ON BEHALF OF CLAIMANTS:

10 LEONARD VIOLI, ESQ.

ROBERT J. LUDDY, ESQ.

11 CHANTELL MACINNES MONTOUR, ESQ.

TODD WEILER, ESQ.

12

13

ATTENDING ON BEHALF OF THE UNITED STATES:

14

MARK A. CLODFELTER, ESQ.

15 ANDREA T. MENAKER, ESQ.

CARRIELYN D. GUYMON, ESQ.

16 WILLIAM LIEBLICH, ESQ.

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2 I N D E X

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4 CLOSING STATEMENTS
5 FOR THE UNITED STATES

6

7 BY MR. CLODFELTER 964
8 BY MS. MENAKER 1019
9 BY MS. GUYMON 1087

10

11 FOR THE CLAIMANTS

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13 BY MR. VIOLI 1134
14 BY MR. WEILER 1173

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1 Grand River Arbitration
2 PROCEEDINGS.

3 (There was a discussion off the
4 record.)

5 MR. VIOLI: We are discussing
6 US federal government documents for
7 Native Tobacco Direct -- Native
8 Wholesale Supply, Native Tobacco
9 Direct which show addresses, and as
10 well as federal -- Canadian federal
11 government documents which show
12 addresses for Grand River, and the --

13 PRESIDENT NARIMAN: Of what
14 dates?

15 MR. VIOLI: As of the dates
16 that have been mentioned in the
17 complaint -- '99, 2000, and -- in the
18 pleadings, and, excuse me, and in the
19 hearings. 1999, 2000, 2001, and --

20 PRESIDENT NARIMAN: You say
21 that this corroborates what?

22 MR. VIOLI: Yes, it
23 corroborates -- the only thing I would

24 add is -- Mr. Montour had to leave
25 last night, but he wanted to -- there

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1 Grand River Arbitration
2 was one change in one of the documents
3 on a supplemental application where it
4 says, January 2000. That is supposed
5 to be November 2000, so he could
6 correct that by pen.

7 That has to do with -- he was
8 the assistant to the president who was
9 Cyrus Schindler. The president in
10 January of 2000 was a fellow by the
11 name of Dwayne Ray, of the
12 Seneca Nation, who was actually the
13 running opponent to Cyrus Schindler.
14 But Mr. Montour is an associate with
15 Cyrus Schindler, not Dwayne Ray. And
16 he said this date January 2000 is
17 November -- it's supposed to be
18 November 2000.

19 MR. CROOK: Mr. Violi, just in
20 the interests of avoiding confusion,
21 maybe you could --

22 MR. VIOLI: Do that later?

23 MR. CROOK: -- make the change
24 for us and do that in the copies you
25 hand to us and the other parties just

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1 Grand River Arbitration
2 so we don't get all confused.

3 MR. VIOLI: All right. We can
4 do that --

5 MR. CLODFELTER: So the
6 original form was filled out by
7 Mr. Montour; was it not?

8 MR. VIOLI: Yes.

9 MR. CLODFELTER: So he put down
10 the wrong date when he filled it out
11 then?

12 MR. VIOLI: Correct -- well,
13 actually, see, it was filled out in
14 2002. In 2002, the president of the
15 Seneca Nation in 2002 was
16 Cyrus Schindler, who -- I believe
17 Arthur Montour ran his campaign, or

18 whatever -- but that's who -- that is
19 who the president was. And he was
20 never the assistant to Dwayne Ray,
21 who, apparently actually started in
22 November of '98 the election in the
23 Seneca Nation.

24 MR. CLODFELTER: This is all
25 fine, but he filled this form out. So
0963

1 Grand River Arbitration
2 he is the one who represented those
3 dates. Okay. I just wanted to
4 clarify that -- and nobody else.

5 MR. VIOLI: And he would have
6 been -- instead of me, he would have
7 been here, but he had to leave. He
8 was here for two days, was going to
9 give the explanation yesterday
10 afternoon. You had asked for these
11 documents, but you didn't get a chance
12 to refer to them, or you didn't have
13 them or you said you weren't going to
14 refer to them -- are you going to
15 refer to them today?

16 MS. GUYMON: Yes, I was.

17 MR. VIOLI: Okay. So he did
18 want to have a chance to speak to
19 them, but he had to leave. He would
20 have spoken to it yesterday. I
21 will -- I will change this to November
22 of 2000 and send it around. But this
23 is my hand, as his attorney.

24 MR. CROOK: Understood. Thank
25 you.

0964

1 Grand River Arbitration

2 PRESIDENT NARIMAN: Shall we
3 start?

4

5 CLOSING STATEMENT BY MR. CLODFELTER

6

7 MR. CLODFELTER: Yes,
8 Mr. President. Are we ready.
9 Mr. President, I will begin our
10 presentation, and we will proceed in
11 the order that we proceeded in on

12 Thursday. And I will address two
13 issues.

14 I want to address the enormous
15 changes that have taken place in
16 Claimants' case since they first pled
17 it and how that affects the issue
18 before you today. And, secondly, I
19 want to walk through the terms of
20 articles 1116(2) and article 1117(2).
21 Then I will turn the floor over to
22 Ms. Menaker.

23 Now, we heard a lot of
24 astounding things yesterday throughout
25 the day, but I guess none is more

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1 Grand River Arbitration
2 astounding than Mr. Violi's statement
3 that they had not minted anything in
4 this case for the limitations defense.
5 At page 371 of the transcript -- of
6 the partial transcript, lines 2 to 11,
7 he said:

8 "The point I am trying to" --
9 and I think it's -- "focus on is that
10 none of our arguments are minted for
11 allocation" -- I think that means
12 "limitation" -- "Everything we have
13 said since day one, 2000, has been 100
14 percent consistent in this case. The
15 first we noticed -- we received
16 notice, not knowledge, was March of
17 2001. We are not coming to you saying
18 we are trying to back date the dates."

19 This is our first slide, an
20 excerpt from that:

21 "Everything we have said since
22 day one has been 100 percent
23 consistent in this case."

24 The truth is everything about
25 their case has changed continually

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1 Grand River Arbitration
2 from day one. Ever since we announced
3 that we were going to raise the
4 limitations defense, it's clear that
5 these changes were made for the very

6 purpose to accommodate their case to
7 the limitations defense to avoid
8 application of the three-year time
9 period limitation.

10 The case we heard yesterday was
11 very different from the case that was
12 pled in this matter. The arguments
13 that we heard yesterday we heard in
14 many cases. If not most cases, for
15 the very first time. And it was in
16 large part based upon documents that
17 we have only very recently seen, and
18 which were explained for the first
19 time yesterday.

20 It's clear to us, that, in
21 fact, everything about their new claim
22 has, in fact, been minted for the very
23 purpose of avoiding this defense.

24 That includes their position on the
25 date of loss, their position on what

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1 Grand River Arbitration
2 measures are at issue here, and even
3 the most central of their allegations,
4 that they have wrongfully denied an
5 opportunity to become an exempt SPM.

6 If you could look at the third
7 slide in your set, what we have laid
8 out here are excerpts from the notice
9 of arbitration, the statement of
10 claim, their response to our
11 objection, and their rejoinder to our
12 reply, laying out what they have said
13 about when they incurred loss.

14 Now, the notice of arbitration
15 is not express on the point. You have
16 to infer it by how they describe the
17 cause of their loss. And it's clear,
18 however, throughout the notice of
19 arbitration, the sense is very much
20 that their loss was immediate upon
21 these measures coming into effect.

22 This is exemplified by
23 paragraph 65, where they said,
24 operation and effect of the MSA,
25 escrow statutes, and contraband laws

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1 Grand River Arbitration
2 has compromised the ability to compete
3 and operate their businesses and
4 caused them financial loss. So it's
5 the operation of the MSA which even
6 preceded the escrow statutes, for
7 example, caused them financial loss.

8 That changed after we had our
9 organizational meeting last year and
10 we indicated that we were going to
11 object on the basis of the limitation
12 period, and it continued to change
13 after that point.

14 In the statement of claim at
15 paragraph 15, for all claims, they
16 said the date on which they first had
17 knowledge of loss was the day upon
18 which counsel was retained to advise
19 and defend the defendants' claims with
20 respect to these measures. As we have
21 seen in the discussion yesterday, that
22 date continued to move forward --

23 PRESIDENT NARIMAN: This was
24 July 2002.

25 MR. CLODFELTER: Yes. In their

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1 Grand River Arbitration
2 response at page four, they said that
3 they didn't suffer a loss from
4 exemptions -- from the exemptions
5 granted during the grandfathering
6 window until, quote:

7 "MSA states enforced the
8 contraband laws and obtained judgments
9 purporting to mandate Claimants'
10 compliance with the escrow statutes
11 under pain of having Claimants'
12 products banned from sale in an MSA
13 state."

14 So, now, they have shifted the
15 date of loss to when MSA states
16 actually enforced the contraband laws
17 and obtained judgments to enforce the
18 escrow statutes.

19 But they went through in their

20 last submission, in their rejoinder at
21 pages ten and eleven, the date has
22 moved further. One of the claims,
23 again:

24 "Only after the MSA states
25 obtained judicial decrees banning the

0970

1 Grand River Arbitration
2 sale of Claimants' products, banned
3 Claimants' products under the
4 contraband laws, and enforced
5 amendments to the escrow statutes'
6 allocable share release provisions."

7 So on the issue of when
8 Claimants suffered loss and knew they
9 suffered loss, their arguments have
10 been anything but 100 percent
11 consistent since day one. And the
12 same obtains to their identification
13 of the measures at issue.

14 Yesterday, we heard that every
15 single enforcement action was a
16 separate measure, and that culminates
17 a continual shift by Claimants in
18 their identification of the measures
19 at issue in this case.

20 If you look at my next slide we
21 have excerpts from their pleadings
22 related to this issue. In notice of
23 arbitration, paragraphs 19 and 20,
24 what they identified was that the
25 MSA's payment scheme, which they say

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1 Grand River Arbitration
2 is "expressly made applicable to the
3 Majors' competitors," including them,
4 "the Majors' competitors through two
5 interrelated provisions of the MSA."
6 And that's the gravamen of their
7 claim. After we announced the
8 limitation defense, that became
9 something very different.

10 Paragraph ten of the statement
11 of claim, as you pointed out
12 yesterday, Mr. President, speaks of
13 the existence and enforcement of the

14 escrow statutes, the contraband laws,
15 and the equity assessment laws. So
16 existence and enforcement of those
17 measures -- that changed in their
18 response to our objection at page four
19 where they spoke --

20 PRESIDENT NARIMAN: Your
21 objection to jurisdiction came after
22 the statement of claim?

23 MR. CLODFELTER: Yes.

24 PRESIDENT NARIMAN: Yes.

25 MR. CLODFELTER: At page four

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1 Grand River Arbitration

2 of their response, suddenly, they are
3 only speaking of the enforcement of
4 the escrow statutes and the
5 enforcement of the contraband laws.
6 And they add then the existence --
7 they don't say the existence, but they
8 say the new equity assessment laws,
9 the law themselves, apparently.

10 And then, finally, in their
11 last submission, their rejoinder, they
12 cite the judicial decrees entered
13 under the escrow statutes, and the
14 unilateral bans imposed by various
15 attorneys general in operation of the
16 contraband laws, and then, for the
17 first time, amendments adopted to the
18 escrow statutes' allocable share
19 release provisions, and heard for the
20 first time their explanation of how
21 suddenly that became the measure which
22 caused discrimination.

23 So you can see that they have
24 constantly changed their claim.

25 Now, we have argued that every

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1 Grand River Arbitration

2 loss in this claim flows from the MSA
3 itself and have identified it as
4 necessarily being one of the measures
5 they challenge because of the nature
6 of their allegations, and that the
7 MSA's implementation through the

8 escrow statute is clearly also a
9 measure.

10 Now, they, of course, have
11 rejected this characterization. And
12 if you look at the next slide number,
13 page five, some of the things they
14 said yesterday about whether or not
15 the MSA was the measure upon which
16 they base their case. Mr. Violi said
17 at page 27, line five: "The MSA can't
18 be a measure."

19 You asked, Mr. President, at
20 page 200, line 17 to 20:

21 "I just want to know that if
22 MSA and the escrow statutes are also
23 part of your cause of action."

24 And Mr. Violi said: "MSA, no."

25 And later in the day,

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1 Grand River Arbitration

2 Mr. Weiler explained. At page 266,
3 lines 14 to 20, he said:

4 "Measure is defined in article
5 201 as any law, regulation, practice,
6 what have you. It doesn't say
7 anything about an agreement between
8 private parties and a bunch of states.
9 It doesn't cover that kind of thing.

10 That is not a measure."

11 This is how they rejected and
12 walked away from the MSA since we
13 announced our limitation defense; but,
14 of course, it's clear from their
15 notice of arbitration that the MSA is
16 at the heart of this case. And we are
17 not alone in that assessment because,
18 before they understood the impact of
19 that conclusion on their case, they
20 shared that conclusion.

21 And if you look at the next
22 slide, these are excerpts from the
23 hearing that we had last year, the
24 organizational meeting. I think all
25 of us have the voice recording of that

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1 Grand River Arbitration

2 on CD. You have the citations to the
3 CD numbering -- is that right --
4 there.

5 Procedural hearing, Mr. Violi
6 said, quote:

7 "The legislation says that you
8 can join the MSA or put the escrow in.
9 Either way you have to pay the same
10 amount because the legislation says
11 you have to put it into escrow, the
12 amount you would pay if you join the
13 MSA."

14 So the measures are connected.
15 And he's talking clearly about the MSA
16 and the escrow statutes. The measures
17 are connected.

18 PRESIDENT NARIMAN: Is this
19 part of the record?

20 MR. CLODFELTER: It's the
21 recording of last year's hearing, yes.

22 PRESIDENT NARIMAN: We must
23 have that. I don't. That's not in
24 part of the minutes.

25 MS. MENAKER: We didn't get a
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1 Grand River Arbitration
2 written transcript, but we got a CD
3 audio recording that was sent around
4 to all of the parties.

5 PRESIDENT NARIMAN: Can there
6 be a written transcript of that?

7 MR. ONWUAMAEGBU: We could.

8 PRESIDENT NARIMAN: I think
9 that would be better if you circulated
10 it among the parties. Yes, thank you.
11 Proceed.

12 MR. CLODFELTER: The final
13 moment is in some -- in sharp contrast
14 to his statement yesterday, Mr. Weiler
15 said the following:

16 "To be clear, the measure in
17 this case is the MSA, the legislation
18 brought to implement the MSA, and then
19 the enforcement of that legislation.
20 The program -- the measure is a
21 program" -- then it's somewhat

22 garbled -- "that falls in and
23 constitutes the whole package."
24 MR. VIOLI: He corrected
25 himself when he said MSA. If you read
0977

1 Grand River Arbitration
2 it like that, Mark --
3 MR. CLODFELTER: It's the whole
4 package. You are welcome to listen to
5 it. You are free to listen to it.
6 It's pretty clear.

7 MR. VIOLI: When he said that,
8 he said MSA --

9 MR. CLODFELTER: Did you
10 misspeak when you said the measures
11 are connected when you talked about
12 the MSA and the escrow statutes?

13 MR. VIOLI: He was talking
14 about the allocable share amendment.
15 That is the only time the SPM pays the
16 same amount as an NPM.

17 MR. WEILER: Go ahead and let
18 him finish.

19 MR. VIOLI: I will take care of
20 it on rebuttal. That's fine.

21 PRESIDENT NARIMAN: Procedural
22 hearing means what.

23 MR. CROOK: 1 hour, 18 minutes.

24 PRESIDENT NARIMAN: The hearing
25 on what date.

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1 Grand River Arbitration

2 MR. CROOK: Back in March of
3 last year.

4 PRESIDENT NARIMAN: March of
5 2005.

6 MR. CLODFELTER: Well, we
7 welcome the Tribunal to listen to it,
8 because there is no -- there is no
9 dispute; there is no ambiguity about
10 what they were saying. Their claim
11 was based on the MSA as they stated in
12 the notice of arbitration.

13 PRESIDENT NARIMAN: I would
14 like to see it in transcript. I don't
15 like to listen to them.

16 MR. CLODFELTER: Sure, I
17 encourage that.

18 PRESIDENT NARIMAN: Thank you.

19 MR. CLODFELTER: Of course,
20 their analysis of what can constitute
21 a measure and is totally wrong; and it
22 would come as a shock to many
23 investors if they could not challenge
24 conduct of state officials in, for
25 example, obligating their states to

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1 Grand River Arbitration
2 take certain detrimental measures, and
3 in doing other things.

4 But the conduct of the state
5 officials here in entering into the
6 MSA, negotiating the MSA, as they say,
7 secretly negotiating with others and
8 so on, were the measures that they
9 identified. And, of course, conduct
10 of state officials can't very much be
11 a measure, and is by no means outside
12 the definition, which is not an
13 exclusive definition, of "measure" in
14 article 102 of NAFTA.

15 It's hard to see how this claim
16 has been 100 percent consistent from
17 day one. In fact, this is a very
18 different claim from the one pled and
19 the one which we argue was untimely
20 offered to this Tribunal.

21 Now, the third area I want to
22 talk about where there have been
23 monumental changes in the position of
24 the claimant relates to their
25 complaint regarding their exclusion

0980

1 Grand River Arbitration
2 from the exemption, their exclusion
3 from the grandfathered SPM status.
4 And some very surprising things were
5 said about this yesterday.

6 Now, as you know, the
7 Claimants' so-called exclusion from
8 the possibility of exempt status has
9 been central to their case from the

10 very beginning. It is very much the
11 gravamen of everything that they have
12 alleged in this case.

13 You can see that in one of the
14 excerpts I have set forth in the next
15 slide, page seven. This is paragraph
16 34 of the notice of arbitration, which
17 is, I believe, verbatim of paragraph
18 53 of the statement of claim at
19 page 13. So this, at least, they
20 maintain as far as the statement of
21 claim, where they said:

22 "Notice of the foregoing
23 negotiations or an invitation to join
24 as an exempt SPM was never given to
25 the investors, nor to their investment

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1 Grand River Arbitration
2 enterprises, and no explanation exists
3 for the MSA states' failure to do so.
4 In short, the Majors and the MSA
5 states selected an exclusive group of
6 smaller competitors with whom they
7 would negotiate privately and secretly
8 to obtain this favorable treatment.
9 The MSA states did so to the exclusion
10 and considerable detriment of all
11 other smaller competitors, including
12 the investors and their investments."

13 That was the key allegation of
14 their entire notice of arbitration and
15 statement of claim.

16 PRESIDENT NARIMAN: According
17 to you this predates even the
18 conclusion of the MSA?

19 MR. CLODFELTER: Yes, very much
20 so, the negotiation, the secret
21 negotiations, and so on.

22 PRESIDENT NARIMAN: And you say
23 this is a measure itself? This
24 constitutes a measure.

25 MR. CLODFELTER: That's what

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1 Grand River Arbitration
2 they said in the notice of
3 arbitration. Yes.

4 It was their exclusion. It was
5 the secret negotiations. It was the
6 selection of the small group that, as
7 they said, caused considerable
8 detriment to the investors and their
9 investments.

10 There were two remarkable
11 things about what we heard yesterday.
12 First, finally, after side-stepping
13 and evading and obfuscating throughout
14 the pleadings about the role of Grand
15 River and its relationship to the MSA,
16 we finally heard a representation by
17 counsel yesterday admitting that Grand
18 River was not manufacturing
19 cigarettes, was not a cigarette
20 manufacturer at the time of the MSA.

21 MR. VIOLI: That's not what I
22 said.

23 MR. CLODFELTER: For the entire
24 90-day period.

25 MR. VIOLI: For the United

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1 Grand River Arbitration
2 States, Mark, United States.

3 MR. CLODFELTER: With intent to
4 sell for the United States -- well,
5 you know, we hear the rest -- but --
6 yes -- Grand River did not manufacture
7 cigarettes with intent to sell to the
8 United States.

9 MR. VIOLI: That were imported
10 into the United States in '97, '98.

11 MR. CLODFELTER: Until 1999.
12 That's right. This is at the
13 transcript, lines 15 to 24.

14 Nowhere in the submissions is
15 there any allegation that the Claimant
16 Jerry Montour, Claimant Kenneth Hill,
17 or Claimant Arthur Montour
18 manufactured cigarettes for sale in
19 the United States at the time of the
20 MSA or the exemption period.

21 No allegation is found in any
22 of the pleadings that Claimants'
23 investments -- Native Wholesale Direct

24 [sic] and Native Wholesale Supply --
25 manufactured cigarettes with intent
0984

1 Grand River Arbitration
2 for sale in the United States at the
3 time of the MSA.

4 Grand River's -- as you know,
5 the exemption limits the exempt SPMs
6 to their market shares in 1997 and
7 '98. Grand River's market share in
8 those years was zero percent. Jerry
9 Montour's market share was zero
10 percent. Mr. Hill's and Mr. Arthur
11 Montour's market share was zero
12 percent. Their investments' market
13 shares were zero percent. Thus, none
14 of the Claimants or their investments
15 could have been grandfathered into the
16 MSA and become exempt SPMs.

17 So now --

18 PROFESSOR ANAYA: This goes to
19 the merits, I guess.

20 PRESIDENT NARIMAN: It's a
21 point of prejudice, according to him.

22 MR. CLODFELTER: It's more than
23 that. It goes to when they suffered
24 their breach and loss, because --
25 well, let me explain it in a second.

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1 Grand River Arbitration
2 I am going to make my second point
3 first.

4 The point is that, when they
5 told you in their statement of claim
6 and notice of arbitration that no
7 explanation exists for the MSA states'
8 failure to do so, we now have that
9 explanation, and it's an explanation
10 they have known all along.

11 PRESIDENT NARIMAN: That's on
12 merits. You are right. That is a
13 point you could possibly raise with
14 some force when the merits come in.

15 Was it also admitted, Mr.
16 Violi, because we were not sure about
17 this yesterday, that, when you

18 mentioned that -- that after 1999, the
19 Seneca brand of cigarettes were, in
20 fact, manufactured for sale by Grand
21 River for sale in the United States?
22 Is that an admitted position?
23 MR. VIOLI: If the --
24 PRESIDENT NARIMAN: I want to
25 make that very clear.

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1 Grand River Arbitration
2 MR. VIOLI: Yes, I don't know
3 if they manufactured Seneca brand
4 before 1999. We know that, beginning
5 in early 1999, Seneca brand out of the
6 Canadian facility was being shipped to
7 the US.
8 PRESIDENT NARIMAN: My question
9 is not that. My question was that --
10 I thought -- that is what I told my
11 co-arbitrator yesterday -- that you
12 said that the Seneca brand of
13 cigarettes were manufactured by Grand
14 River from 1999, which constituted
15 about 80 percent of the manufacture
16 for sale in the United States. Is
17 that a correct statement?
18 MR. VIOLI: Yes. That is
19 correct.
20 PRESIDENT NARIMAN: All right.
21 MR. CLODFELTER: I want to go
22 ahead and make my second point, which
23 is also relevant to the merits, but
24 it's also relevant to the limitations
25 issue.

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1 Grand River Arbitration
2 The second point, of course, is
3 the Claimants now maintain that,
4 instead of causing them detriment,
5 their exclusion from exempt status was
6 actually in their interests. It was
7 not in their interests, they told us
8 yesterday, for them to become exempt
9 SPMs anyway. This is in the exchange,
10 Mr. Chairman, between you and
11 Mr. Violi, which begins at the

12 transcript, page lines -- transcript
13 page 44, line 6 to 13.

14 PRESIDENT NARIMAN: Which page
15 of your --

16 MR. CROOK: He doesn't have a
17 slide. He is giving you a transcript
18 reference.

19 MR. CLODFELTER: I'm sorry.
20 Line 6:

21 Mr. Violi: "That is correct.
22 There is no discrimination and just --
23 there is no discrimination until the
24 allocable share comes into effect."

25 President Nariman: "No

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1 Grand River Arbitration
2 discrimination?"

3 Mr. Violi: "Until the
4 allocable share amendment."

5 Moreover, at transcript page
6 94, line 3, Mr. President, you said:

7 "The Claimants -- if the
8 Claimants manufactured cigarettes and
9 sold them in the United States prior
10 to 1999 and this was '97, '98 this
11 would have been an ideal bargain and
12 they would have opted. Many do, I
13 understand."

14 Mr. Violi: "Not necessarily,
15 Mr. President. I will tell you why."

16 And then he gave his
17 explanation of why financially it
18 would have been -- it was in their
19 interests to proceed as
20 nonparticipating members in preference
21 to the status as an exempt SPM.

22 "So you are asking me would it
23 be a good deal? No, if you didn't
24 have the market share."

25 That's what Mr. Violi said at

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1 Grand River Arbitration
2 page 95, lines 20 to 21.

3 MR. VIOLI: I didn't say they
4 didn't have the market share.

5 MR. CLODFELTER: We know they

6 didn't.

7 So the central allegation of
8 their entire case has turned out to be
9 false. They were never eligible for
10 grandfather status, and it never hurt
11 them that they weren't, they tell us
12 now. It now happens to suit their
13 need to change their claim.

14 PRESIDENT NARIMAN: They were
15 never eligible for grandfather status
16 because they never manufactured in
17 '97, '98. That's what you are saying.

18 MR. CLODFELTER: The
19 investments didn't even exist. And
20 Grand River didn't begin manufacturing
21 for sale in the United States until
22 1999. It happens now to suit their
23 need to survive the limitation
24 challenge, to change the entire basis
25 of the claim, to move forward the date

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1 Grand River Arbitration
2 on which the allocable share treatment
3 has affected them -- I'm sorry -- the
4 exempt -- exclusion of exempt status
5 has affected them, to the time of the
6 allocable share amendments.

7 It's also relevant because it
8 raises real questions about the
9 credibility of the other changes they
10 have made to their claims. Let me
11 move, Mr. President, to the question
12 of -- that you put mostly and other
13 members put regarding the terms of
14 articles 1116 and article 1117.

15 I have slide eight which just
16 has article 1116(2) on it. As you
17 know, the language is identical except
18 for reference to the enterprises in
19 article 1117. It provides that:

20 "An investor may not make a
21 claim if more than three years have
22 elapsed from the date on which the
23 investor first acquired or should have
24 first acquired knowledge of the
25 alleged breach and knowledge that the

0991

1 Grand River Arbitration
2 investor has incurred loss or damage."

3 We talked about the terms that
4 were raised yesterday.

5 First of all, let me address
6 your question of why there was a
7 three-year period. On Thursday, I
8 indicated I doubted that there was
9 anything in the travaux, and there's
10 not much in the travaux.

11 But we did look, and we have
12 one set of the travaux. This is the
13 rolling text of the drafts of chapter
14 11 that were exchanged by the parties.
15 It's online, and it's available to
16 everybody. And I will make this
17 available to Uche, and you all can
18 look it later. As I say it's online,
19 and there is a reference to where it
20 is online. And we can make copies for
21 the Claimants if they wish.

22 Just two points that can be
23 derived from the rolling text -- well,
24 three points. One is that the
25 original language was proposed by the

0992

1 Grand River Arbitration
2 Government of Canada, Claimants'
3 government. And in the original
4 proposal, they proposed a two-year
5 limitation. That was expanded to
6 three years.

7 PRESIDENT NARIMAN: Canada
8 proposed two years.

9 MR. CLODFELTER: Yes. And tied
10 the limitation to the date of breach,
11 the knowledge of breach, not to loss.
12 The reference to date of loss was
13 added later, and, eventually, of
14 course, the current statute provides
15 for three years and is referenced to
16 knowledge or constructive knowledge of
17 both breach and loss.

18 I think it might be helpful
19 to -- I do have another hand-out

20 here -- no, I'm sorry. This is not --
21 no I don't have this hand-out. I have
22 to read it to you. Excuse me.

23 Let's look at another example
24 of a limitation period in a treaty,
25 and the example I have is the 1971

0993

1 Grand River Arbitration
2 convention on international liability
3 for damage caused by space objects.

4 PRESIDENT NARIMAN: 1971
5 convention --

6 MR. CLODFELTER: Yes.

7 PRESIDENT NARIMAN: UN
8 convention?

9 MR. CLODFELTER: Yes.

10 PRESIDENT NARIMAN: Damage
11 caused to space --

12 MR. CLODFELTER: And the
13 citation is that is UNTS volume 961.

14 PRESIDENT NARIMAN: UN.

15 MR. CLODFELTER: UNTS, to the
16 United Nation Treaty Series, volume
17 961, page 187.

18 The limitation period in
19 article ten of the treaty or that
20 convention provides:

21 "A claim for compensation of
22 damage may be presented to a launching
23 state" -- the state that has launched
24 the object into space -- "not later
25 than one year following the date of

0994

1 Grand River Arbitration
2 the occurrence of the damage or the
3 identification of the launching state
4 which is liable."

5 So one year from any of those
6 dates, the occurrence of the damage,
7 the identification of the launching
8 state, or the occurrence. And it goes
9 on, and it says:

10 "If, however, a state does not
11 know of the occurrence of the damage
12 or has not been able to identify the
13 launching state which is liable, it

14 may present a claim within one year
15 following the date on which it learned
16 of the aforementioned facts. However,
17 this period shall in no event exceed
18 one year following the date on which
19 the state could reasonably be expected
20 to have learned of the facts through
21 the exercise of due diligence."

22 So it is "could reasonably be
23 expected to have learned of the facts
24 through the exercise of due
25 diligence."

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1 Grand River Arbitration

2 The point I want to make here,
3 in talking about the three-year
4 limitation, is that the convention on
5 objects from space limited the right
6 to bring a claim to a much smaller
7 period of time.

8 And so in answer to your
9 question, why three years, I don't
10 have a direct answer. It was expanded
11 over the original proposal, and it's
12 longer than some other conventions.
13 And I think I can represent fairly
14 confidently that many municipal law
15 periods of limitation also are three
16 years. So I don't think there is
17 anything unusual about it.

18 I think for the arguments made
19 the other day about the goals of such
20 limitation apply equally, and even the
21 notion of a stale claim. Of course,
22 the longer a claimant delays, the
23 staler its claim becomes. And in the
24 20-year period you mentioned
25 yesterday, it certainly wouldn't

0996

1 Grand River Arbitration

2 render a claim stale.

3 But even three years can be a
4 very long time in terms of the ability
5 of the parties to reconstruct the
6 facts for a Tribunal. So I think we
7 would argue that staleness is still a

8 goal to be avoided by limitation
9 periods, as well as the need for
10 governments for legal peace and
11 certainty in their operations.

12 So those are the comments I
13 wanted to make. You asked about the
14 term three years. You asked about the
15 term "first acquired."

16 PROFESSOR ANAYA: You also make
17 some connection between the wording of
18 should have known?

19 MR. CLODFELTER: Yes, I read
20 further than I intended to. I will
21 get to that actually. But on the term
22 "first acquired," you asked about
23 that.

24 And it's our position that it's
25 knowledge -- it's first acquired a

0997

1 Grand River Arbitration
2 breach and loss by measure. You have
3 to look at each measure and look at
4 when the knowledge of the breach
5 caused by that measure occurred and
6 was known to have occurred or should
7 have been known to have occurred. And
8 by measure you look at the loss
9 suffered or incurred as a result of
10 that measure.

11 PRESIDENT NARIMAN: Each
12 measure, that was the argument.
13 That's what I am a little confused
14 about. I don't know. How do you
15 assimilate all of that?

16 MR. CLODFELTER: It speaks of a
17 measure breaching an obligation. And
18 it's hard to avoid the conclusion that
19 you don't have -- if there are
20 multiple measures, you don't have to
21 look at each measure.

22 So we would maintain here, for
23 example, because the measures are the
24 MSA and the escrow statutes, that you
25 look at when there was a breach and

0998

1 Grand River Arbitration

2 knowledge of breach, and loss and
3 knowledge of loss resulting from the
4 conclusion, negotiation of the MSA,
5 with respect to the detriment alleged
6 originally from exclusion from exempt
7 status, and then the imposition of the
8 obligation to pay into escrow that was
9 triggered upon the sale of cigarettes
10 in any MSA state.

11 So with respect to those two
12 measures, we would look individually
13 at them; and those were the
14 conclusions that we would draw for
15 this case. That is when the
16 Claimants -- that is when the breach
17 and loss occurred, and that is when
18 the Claimants knew or should have
19 known when the breach or loss
20 occurred.

21 PROFESSOR ANAYA: How about the
22 argument that their -- that each
23 state's escrow statute constitutes a
24 distinct measure?

25 MR. CLODFELTER: We would argue
0999

1 Grand River Arbitration
2 here that the escrow statutes as a
3 whole are a single measure of the
4 United States, which is the Respondent
5 here. And the earliest escrow statute
6 would be the measure. And we build
7 this upon the Claimants' own pleading
8 in their case.

9 PRESIDENT NARIMAN: No, you
10 are -- sorry, you say that -- you say
11 that the claim in this case is not
12 against the individual states. It's
13 against the United States. How is
14 that -- how do they maintain a claim
15 against the United States vis-a-vis
16 the 46 settling states having enacted
17 distinct and separate escrow statutes?
18 Do you follow what I am saying.

19 MR. CLODFELTER: You mean the
20 general principle of attributability
21 in the NAFTA?

22 PRESIDENT NARIMAN: To bring it
23 into this 1116(2). It's the
24 United States may not make a claim --
25 not against the states; we are not

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1 Grand River Arbitration
2 concerned with the -- it's against
3 you, because you are a party to the
4 treaty -- that is all -- may not make
5 a claim against you if more than three
6 years have elapsed.

7 So is it your case that, by
8 reason of the fact that you may not
9 have enacted the statutes, suppose you
10 had enacted a series of statutes, it
11 may have been different. But if the
12 states have enacted statutes pursuant
13 to an MSA, as contemplated by the MSA,
14 then it is the totality of those
15 statutes with which you are sought to
16 be affected.

17 MR. CLODFELTER: Yes, the
18 conduct of the states which breached
19 the NAFTA was the first -- well, the
20 MSA itself is alleged, and then the
21 first escrow statutes.

22 PRESIDENT NARIMAN: The
23 question that was put to you is, why
24 not plead separate escrow statutes?
25 That's the point -- that is what the

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1 Grand River Arbitration
2 professor put to you. See, because
3 that's the argument. The argument is
4 that:

5 "Look here. Look what happened
6 in Wisconsin. Look what happened in
7 Oregon," and so on and so forth.

8 MR. CLODFELTER: There are
9 two points. One is, as I mentioned,
10 we are dealing with their case as pled
11 and what their position has been. And
12 their position has been the imposition
13 of this regime upon them.

14 And the first instances of that
15 qualify for starting the three-year

16 period. As Ms. Menaker reminds me,
17 article 1116 doesn't speak of measure.
18 It speaks of breach, so it's the first
19 breach that is of concern under
20 article 1116.

21 And in this case, depending on
22 the measure, the first breach of the
23 loss attributable to the MSA -- was
24 the MSA; and the first breach
25 attributable to the implementation of

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1 Grand River Arbitration
2 the MSA is the enactment of the first
3 escrow statute.

4 PRESIDENT NARIMAN: So would
5 you say that what "first acquired"
6 knowledge of the alleged breach, would
7 necessarily mean first acquired
8 knowledge of the first alleged breach?

9 MR. CLODFELTER: Exactly.

10 MR. CROOK: Mr. Clodfelter,
11 could we go back to the first of your
12 points? Is it then your position
13 that -- and we will go back and look
14 at how Claimants have pleaded this
15 thing, but that they did not plead
16 this in terms of individual state
17 actions; they pleaded it as a
18 collective, and you are therefore able
19 to respond to it as pleaded.

20 MR. CLODFELTER: We have to.
21 And it's our job to respond as
22 pleaded. It's, of course, the
23 Tribunal's responsibility to deal with
24 the case as pleaded, and that's what
25 the defense goes to. I went to three

1003

1 Grand River Arbitration
2 areas of change as the pleadings have
3 morphed over time.

4 Another one is exactly on
5 whether or not -- how they break down
6 the measures. We heard yesterday for
7 the first time, for example, that now
8 they are making a separate
9 expropriation claim for every state

10 because of the taking of their market
11 share in any particular state. You
12 won't find that in any of the
13 pleadings. That is not an accurate
14 portrayal of the effect of 1116.

15 PROFESSOR ANAYA: I am just
16 wondering, you know, going to this
17 issue of pleading, what your position
18 is on whether or not we can take the
19 facts that appear in the pleadings,
20 regardless of -- not necessarily
21 regardless of -- without focusing so
22 much on how they -- what they
23 characterize as a breach or measure,
24 but just take the facts as they are
25 pleaded and come up ourselves with an

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1 Grand River Arbitration
2 assessment of what the measures are,
3 what the breach is, what the loss is,
4 and those kinds of things? What is
5 your position on that?

6 MR. CLODFELTER: That's part of
7 interpreting what their claim is by
8 looking at the facts alleged, and
9 that's what we walked through on
10 Thursday. If you look at the facts
11 and the loss that they identify -- and
12 that's why we made the argument that
13 all of those losses flow from the MSA,
14 and then the first implementation of
15 it, and then the enactment of the
16 escrow statutes.

17 PROFESSOR ANAYA: So it's not
18 simply a matter of how they pled.

19 MR. CLODFELTER: We would argue
20 that is their pleading as well. The
21 fact that they pled as well as what
22 they specifically label as the
23 measures -- sorry.

24 Clearly, it's the facts as
25 pled, not the facts as they have been

1005

1 Grand River Arbitration
2 altered to accommodate the defense.

3 PROFESSOR ANAYA: We are going

4 to look carefully at the -- go back to
5 the notice of claim and arbitration.
6 MR. CLODFELTER: Sure.
7 And, of course, it's the
8 Claimants' responsibility to make out
9 the argument of breach; and then you
10 have to identify what it is that is
11 the action of the state, which would
12 qualify as a measure, cause the --
13 breach the NAFTA and cause the loss.

14 So, yes, you can look at the
15 facts. You can't look at the facts in
16 isolation of their allegation of
17 breach and loss. But in interpreting
18 what is the measure upon which they
19 are relying for breach and loss, you
20 can certainly look at the facts.

21 You can't make up a measure
22 when they have not pled one based on
23 the facts alone. But you can better
24 interpret the measure at issue in the
25 case by considering the facts.

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1 Grand River Arbitration

2 MS. MENAKER: If I could just
3 supplement, nor is the Tribunal in our
4 view entitled to look at the facts and
5 then create a new claim on behalf of
6 Claimants, to say:

7 "Well, you know, given these
8 facts, I know they didn't plead an
9 expropriation because of XYZ, or I
10 know that they didn't make this claim.
11 But, you know, if I were the attorney,
12 this would have been the claim that I
13 would have brought," and create the
14 claim for them.

15 I mean, their claims are what
16 appear in their notice of arbitration.

17 PROFESSOR ANAYA: I understand
18 that. I don't necessarily disagree
19 with that. I want to know why that is
20 true. Obviously, this is my first
21 arbitration of this kind. I am
22 familiar with state and federal
23 litigation, and that's not necessarily

24 the standard in the federal and state
25 litigation in the US.

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1 Grand River Arbitration

2 And I am wondering why it's
3 different here.

4 MR. CLODFELTER: It's the
5 responsibility of the Claimants to
6 make a limitations claim.

7 PROFESSOR ANAYA: Where is
8 that?

9 MR. CLODFELTER: Article 1116,
10 the terms itself require the
11 identification of an obligation that
12 is breached, and identification of the
13 losses resulting from that breach.
14 That's the obligation of the claimant.

15 MS. MENAKER: Certainly, it's
16 an unfairness --

17 MR. CLODFELTER: The Claimant
18 may not make a case unless -- sorry.
19 Go ahead.

20 MS. MENAKER: Certainly, it's
21 an unfairness to the Respondent should
22 the Tribunal create a claim that was
23 not pled by the Claimants just out of
24 the facts as alleged; and then, of
25 course, we are denied the opportunity

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1 Grand River Arbitration

2 to fully defend against that claim
3 because that is not the claim that has
4 been presented.

5 And there are procedural
6 requirements and procedural
7 prerequisites for placing a claim, for
8 submitting a claim to arbitration that
9 need to be complied with. So the
10 claim can't be varied without those
11 procedural requirements.

12 PROFESSOR ANAYA: I understand
13 that's your position; but, I mean, why
14 is that? I understand the fairness
15 argument. And you point to the
16 language which is -- I can say the
17 same thing about language of federal

18 states that give a cause of right of
19 action. You still have notice of
20 pleading.

21 MR. CLODFELTER: You still have
22 notice of pleading, but I think we
23 would take issue with the idea that US
24 judges have any greater latitude or
25 any significantly greater latitude to

1009

1 Grand River Arbitration
2 construct a claim.

3 PROFESSOR ANAYA: So you are
4 saying it's similar.

5 MR. CLODFELTER: I think it's
6 similar. For example, in a recent
7 case in the DC circuit, the Aker case,
8 the Tribunal required the plaintiff to
9 identify its cause of action, and,
10 when they couldn't do it, felt
11 compelled to dismiss the case, because
12 it's Claimants' responsibility to do
13 that.

14 It was a harsh opinion because
15 Claimant was put on the spot in oral
16 argument to identify their case of
17 action. Being unable to do so, the DC
18 circuit dismissed the action. It
19 happens to be a very controversial
20 case involving victims of terrorism
21 against Iraq. And so we are
22 monitoring it very closely.

23 So -- and, of course, not
24 pretending any expertise on this
25 question, but my experience on it in

1010

1 Grand River Arbitration
2 this case would suggest that courts
3 also can't just make up a claim.

4 PROFESSOR ANAYA: I'm not
5 suggesting to make up a claim, but I
6 am saying that, you know, it's
7 generally sufficient to allege facts
8 that constitute a claim.

9 MR. CROOK: The uncontrolled
10 rule is relevant here.

11 PROFESSOR ANAYA: Right, and I

12 am not saying there is not a different
13 standard. I am just be trying to be
14 educated.

15 MR. CROOK: Can I have a moment
16 to consult with my colleagues here
17 about something.

18 (There was a discussion off the
19 record.)

20 PRESIDENT NARIMAN: Go on,
21 please.

22 MR. CLODFELTER: Let me add one
23 other element that Ms. Menaker pointed
24 out to me. There may be a
25 difference -- to the extent there

1011

1 Grand River Arbitration
2 is -- in the latitude of the decision
3 maker to construct a claim out of the
4 notice pleading, which is not much
5 different than we have here,
6 actually -- the notice of pleading in
7 UNCITRAL -- is that the authority of
8 the arbitrators in arbitration, of
9 course, depends entirely upon the
10 consent of the parties, whereas a
11 litigant-in-court's ability to pursue
12 a claim is based entirely upon law.

13 And the state parties to
14 investment treaties do not consent to
15 the arbitration of claims that do not
16 fall within the four corners of the
17 arbitration hearing, and that might
18 inform the question of your latitude
19 in that respect.

20 PRESIDENT NARIMAN: Yes. Okay.
21 Please proceed.

22 MR. CLODFELTER: The next term
23 I wanted to mention is the term
24 "should" and "should have first
25 acquired." The parties are in

1012

1 Grand River Arbitration
2 agreement that the constructive
3 knowledge standard applies both to the
4 breach and the loss, and so there is
5 no difference here on that. And,

6 yesterday, the -- I'm sorry -- on
7 Thursday, Mr. Crook explored the
8 dimensions of that and what that
9 meant.

10 And our position is that a
11 party is responsible for knowing both
12 things -- that it has a duty to know
13 the content of law, its legal
14 responsibilities, and so on, as well
15 as things that it's reasonable to
16 expect the person in those
17 circumstances would come to know.

18 And, Professor Anaya, this is
19 the portion of the space object treaty
20 that I read that you referred to
21 earlier. And it's instructive, I
22 think, to look at how the drafters
23 there put greater detail on the same
24 concept that we are dealing with here.

25 And that is, when they made the
1013

1 Grand River Arbitration
2 one-year period the outside limit,
3 following the date on which the state
4 could reasonably be expected to have
5 learned of the facts through the
6 exercise of due diligence, that mixes
7 kind of the two, is a duty-based one
8 because it requires due diligence,
9 and -- but it also talks about "could
10 reasonably have been expected to
11 learn."

12 And we would argue that the
13 requirement of "should have known" in
14 article 1116 and article 1117 would
15 include both of those notions.

16 The next term that was raised
17 was the term "incurred" and what it
18 means. Of course, the Claimants have
19 attempted to give it as narrow a
20 meaning as possible, but I would just
21 refer you to my slide nine, which is a
22 dictionary definition we pulled off
23 from Webster's online for "incur," but
24 it's instructive.

25 It says:

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1 Grand River Arbitration
2 "Incur, of the verb, make
3 oneself subject to; bring upon
4 oneself; become liable to" -- and
5 there is a quotation missing here.

6 The example they gave
7 ironically is:
8 "People who smoke incur a great
9 danger to their health."

10 This notion is of "incur" in a
11 very broad sense. It has support in
12 American jurisprudence, at the very
13 least; and we have given you in slide
14 ten an excerpt from the case of United
15 States versus Laney, a 1999 Ninth
16 Circuit case, where the court said:

17 "To incur means to, quote,
18 become liable or subject to. And a
19 person, quote, may become subject to
20 an expense before she actually
21 disburses any funds."

22 So very much the idea that,
23 when a liability accrues, you have
24 incurred a loss.

25 The last term you asked about

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1 Grand River Arbitration
2 was the term "loss and damage." And
3 here, again, the Claimants have urged
4 upon you the narrowest possible
5 concept of "loss" to so limit the
6 circumstances to the latest stage
7 possible, so that they can escape the
8 implications of the limitation.

9 And I have to point to this as
10 another example of Claimants' minting
11 their case, Mr. Violi's term, to fit
12 the defense. At page 336 of the
13 transcript of yesterday, lines 11 and
14 24, there was a discussion between
15 Professor Anaya and Messrs. Weiler and
16 Violi.

17 Mr. Weiler stated:
18 "Loss in my submission, loss or
19 damage, is an actual honest to gosh

20 loss. It's a physical actual loss.
21 Either you have incurred liability or
22 you have" -- and then Professor Anaya
23 pointed out he had just admitted that
24 incurring liability is a loss -- "you
25 just said" -- and it's kind of

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1 Grand River Arbitration
2 garbled -- not the rated way to say --
3 "not the right way" -- I think he
4 said -- "I don't mean a legal
5 liability you have incurred" -- maybe
6 scrambled in the transcript.

7 But Mr. Violi jumped in and
8 said: "You have paid."

9 And Mr. Weiler agreed:

10 "You have paid. You have paid
11 something, or your ability to make
12 something has been taken away."

13 So very, very narrow notion of
14 what constitutes a loss, and this is a
15 change as well in their position.

16 If you look at their response
17 at page 26 -- and this is my last
18 slide, at page 11, where Claimants
19 argued:

20 "The terms, quote, loss,
21 unquote, and, quote, damage, unquote,
22 are generic terms, whose use together
23 demonstrates that an investor can make
24 a claim on the basis of any sort of
25 loss, from deprivation of access to

1017

1 Grand River Arbitration
2 market, to simple out-of-pocket cost,
3 to any sort of cost, where they are
4 urging upon you a broad notion of
5 loss.

6 Obviously, there is a tension
7 in their position, because, if the
8 case ever gets to a damage phase, they
9 will seek the most expansive notion of
10 "loss" as possible. And our view is
11 that "loss" is a broader term, and --
12 than they have suggested.

13 It most certainly includes the

14 notion of liability. Now, the
15 liability that the Claimants incurred
16 or -- as manufacturers under the
17 escrow statutes to pay into escrow was
18 affected immediately upon triggering
19 of the application of the statute when
20 the cigarettes they manufactured were
21 sold in MSA states.

22 That is not a contingent
23 liability. It's incorrect to describe
24 it as such. It's just not
25 contingent upon a future event at all.

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1 Grand River Arbitration

2 It's an existing legal liability.

3 The fact that you can challenge
4 something later does not make the
5 effect of the law contingent. We
6 would add one other thing. That is --
7 and I would pass this out as well.

8 It's not a slide, but it's an
9 excerpt from the Canadian Statement of
10 Implementation, and Canada's comments
11 on article 1116 which are in the
12 second page of the hand-out.

13 I just lost my reference here.
14 In the second full paragraph, on the
15 second page, the paragraph beginning
16 under article 1116, describes the
17 effect as follows:

18 "Under article 1116 a claim may
19 be submitted to arbitration under this
20 section, an investor believes that
21 another party, et cetera, has breached
22 an obligation," and it lists the
23 obligations section, "inconsistent
24 with the party's obligations under
25 section A, and that investor has

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1 Grand River Arbitration

2 incurred a loss or damage as a result
3 of the alleged breach."

4 So the Canadian's government
5 view is consistent with our position
6 of this case, that once any loss -- a
7 loss has been sustained, as a result

8 of the breach, and it becomes known or
9 should have known by the Claimants,
10 that three-year period is triggered.

11 So, Mr. President, we believe
12 that, properly interpreted, the terms
13 of articles 1116 and 1117 clearly
14 exclude this claim. With that, I will
15 conclude and ask Ms. Menaker to
16 present.

17 PRESIDENT NARIMAN: Thank you.
18 Ms. Menaker.

19
20 CLOSING STATEMENT BY MS. MENAKER

21
22 MS. MENAKER: Thank you. Good
23 morning.

24 What I will do, as I did in the
25 opening, was to make a few closing

1020

1 Grand River Arbitration
2 remarks on the timing, on when -- at
3 which Claimants first incurred loss or
4 damage arising out of the breaches
5 which they allege. And then
6 Ms. Guymon will talk about the
7 knowledge, both on constructive and
8 actual knowledge to respond to those
9 points.

10 So one preliminary point, as I
11 discussed the other day, what 1116 and
12 1117 requires is that the claim be
13 brought within three years of the time
14 that the investor first knew or should
15 have known of the alleged breach, and
16 that it had incurred loss or damage.

17 So regardless of how Claimants
18 characterize their claim, by stating
19 what measures are at issue or
20 identifying the measures, that doesn't
21 matter. What one needs to look at are
22 the breaches that have been alleged,
23 and that is why in my presentation the
24 other day I went through the national
25 treatment claim, and said: What is

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1 Grand River Arbitration

2 their breach regarding national
3 treatment? Where did they allege that
4 they had been accorded less favorable
5 treatment?

6 And then I talked about what
7 measures gave rise to that breach. In
8 that case it was the MSA which
9 differentiated between the exempt, the
10 grandfathered SPMs, and Claimants as
11 NPMs, and then said:

12 Did they incur a loss or damage
13 arising from that breach, which, in
14 fact, they alleged that they had?

15 And I isolated the time at
16 which that loss or damage occurred,
17 which, in that case, was when their
18 opportunity to become a grandfathered
19 SPM expired.

20 And then, further, other claims
21 as well, the 1105 claim, in
22 particular, their claims dealt with
23 both the alleged lack of transparency
24 in the negotiation of the MSA. Again,
25 any damage that they sustained as a

1022

1 Grand River Arbitration
2 result of that breach would have
3 arisen as soon as they were denied the
4 opportunity to become the
5 grandfathered SPM, because that is why
6 the transparency was purportedly
7 important, so that they had that
8 opportunity and they were denied it.

9 I also talked about the fact
10 that they make allegations that there
11 is a violation of 1105, because, even
12 though they were not found liable for
13 the same wrongdoing as OPMs, they have
14 to make these escrow payments.

15 So that is another allegation
16 of a breach. And when did the first
17 loss or damage arise out of that
18 breach? It arises when they incur a
19 liability to make an escrow payment.

20 And so -- and that -- and,
21 similarly, with their expropriation

22 claim, if you look at their notice of
23 arbitration, the statement of claim,
24 it makes clear that their
25 expropriation claim -- their

1023

1 Grand River Arbitration
2 allegations of breach is alleged -- is
3 based upon a purported diminution in
4 market share or diminution in
5 profitability based on the fact that
6 the escrow statutes -- the obligation
7 to pay into escrow, and not having the
8 grandfathered SPM status has made it
9 more expensive for them to stay in
10 business.

11 And in some cases, they allege
12 has not allowed them to do business in
13 any state whatsoever. And they say it
14 has actually destroyed their business.

15 So, again, looking at the
16 breach, saying, what gave rise to
17 that, were the obligations that they
18 incurred under the escrow statutes.

19 And, again, there, that is not
20 a state-by-state analysis, so to
21 speak. It is not pled that way to
22 begin with. Looking at their claim,
23 one could not even surmise what that
24 claim would be. We have had facts
25 that have filtered in over time with

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1 Grand River Arbitration
2 respect to their activities within a
3 particular state, and whether there
4 were -- they had sales, whether there
5 were enforcement actions.

6 But like I said, that has
7 trickled in over time. There would be
8 no way to look at the claim and to
9 even see what they had pled with
10 respect to any particular state.

11 But, again, that is not
12 necessary, and it's really a red
13 herring for them to allege -- or for
14 them to argue that their claim is
15 somehow based on each individual

16 escrow statute, because, again,
17 looking at the breaches themselves,
18 the breach that they allege is the
19 fact that they are required to make
20 these payments into escrow when
21 grandfathered SPMs are not.

22 And when is the first time they
23 incurred loss or damage arising out of
24 that breach? Well, the first time
25 that they incurred that was when they

1025

1 Grand River Arbitration
2 incurred the legal liability to make
3 an escrow payment.

4 So the only other preliminary
5 remark that I want to make is that, as
6 Mr. Clodfelter said, there has been
7 some shifting in the claims, and I
8 would think this would go without
9 saying -- but since it was argued
10 yesterday, I think, two times -- I
11 just want to make absolutely clear:

12 The United States, of course,
13 we took a reservation of rights, which
14 is very common to say that, although
15 we are talking here about the breaches
16 and losses, we, of course, don't
17 concede liability.

18 If this were to go to the
19 merits, we do not concede that there
20 has been a breach. We do not concede
21 that there has been a loss. My
22 hearing yesterday was that Claimants
23 were somehow stating that this was
24 inconsistent; but, of course, it would
25 not make sense that you would have to

1026

1 Grand River Arbitration
2 concede liability to make a time
3 limitations defense. And I don't
4 think there is any confusion on the
5 Tribunal's part, but I just wanted to
6 make that clear.

7 So I will make -- discuss four
8 things today with respect to
9 Claimants' arguments regarding the

10 timing of when the first loss
11 incurred.

12 And the first argument is in
13 response to Claimants' argument that
14 they did not sustain a loss before
15 March 12, 2001, because of the
16 ambiguity in the system. And there
17 were two sections of that.

18 First, the ambiguity on the
19 face of the laws, on the face of the
20 escrow statutes; and, two, the
21 ambiguity in the application of those
22 statutes.

23 The second point that I will
24 address is their argument that there
25 was no loss incurred until enforcement

1027

1 Grand River Arbitration
2 efforts were commenced and/or
3 concluded. And then I will comment
4 thirdly briefly on their argument with
5 respect to the complementary
6 legislation, and finally make a few
7 comments with respect to their
8 arguments concerning the allocable
9 share amendments.

10 So with respect to Claimants'
11 arguments that they did not first
12 incur loss before the jurisdictional
13 cut-off date because of some ambiguity
14 with respect to the escrow statutes on
15 their face and with respect to their
16 application, this was recognized by
17 the Tribunal yesterday, but there is
18 an internal contradiction in this
19 argument.

20 They say when asked in response
21 to a direct question by
22 Professor Anaya:

23 "Was it whether you didn't know
24 about the escrow statutes, or was it
25 that you knew about them, but you

1028

1 Grand River Arbitration
2 thought they did not apply?"

3 And the response was:

4 "We didn't know about it."
5 And that can be found -- this
6 is a rough transcript, but it was
7 Mr. Violi at or about page 41 to 42.

8 So the contradiction is that
9 how could they have had a good faith
10 belief that the escrow statutes did
11 not apply to them, and they are
12 alleging that that is the case. They
13 are pointing out all of these
14 ambiguities in the text and in the
15 application and, yet, maintain that
16 they did not know about the
17 provisions.

18 It's just inconsistent. Either
19 you knew about the provisions. They
20 say they knew about the MSA as soon as
21 it was concluded. Yet, they did not
22 read it because they had no reason to
23 believe that it pertained to them.
24 And Ms. Guymon will talk about that.

25 But that is what they

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1 Grand River Arbitration
2 suggested. They did not know that it
3 had this provision regarding
4 grandfathered SPMs, that it had
5 anything to do with NPMs, that it
6 could impact them at all. So they did
7 not look at that. The other reports
8 that were out there did not give them
9 notice of these provisions. They were
10 simply unaware of that.

11 So then all of their arguments
12 regarding the perceived ambiguity in
13 the statute or the statute's
14 applications are simply irrelevant.
15 It all comes down to whether they
16 should have known about these
17 provisions, or whether they, in fact,
18 did know about these provisions.

19 But, nevertheless, let me make
20 a few comments, because Claimants
21 spent a lot of time arguing if, in
22 fact, the Tribunal were to find that,
23 despite their protests that they did

24 not know about the provisions that, in
25 fact, they did know about them, and

1030

1 Grand River Arbitration
2 then find that, despite their saying
3 they didn't know about them, we are
4 going to say they did know about them
5 and address the issue of whether they
6 nevertheless confused about them or
7 had a good faith belief that they did
8 didn't apply because of the ambiguity.
9 I will go on to address those
10 arguments.

11 There is another very
12 inconsistent argument when they are
13 talking about the ambiguities of the
14 statute, because their purported good
15 faith belief that the escrow statutes
16 didn't apply to them is premised on
17 their having knowledge of several
18 sources that are far less known to the
19 public than the MSA provisions were
20 themselves.

21 They are talking about very --
22 for instance, the first document that
23 Mr. Violi introduced into evidence
24 yesterday was a draft of the MSA, a
25 draft of the definition of "tobacco

1031

1 Grand River Arbitration
2 product manufacturer," never
3 distributed to the public. How could
4 his good faith understanding or --
5 excuse me -- Claimants' good faith
6 understand of the applicability of the
7 escrow statutes be premised on a draft
8 of the MSA, if he says -- he says he
9 didn't even know of the MSA when it
10 was concluded.

11 How would he have known about a
12 draft definition that was drafted and
13 rejected? So that certainly can't
14 corroborate or can't support any
15 notion that they had that there is
16 ambiguity.

17 Second, they say that they know

18 of the fact that importers rather than
19 manufacturers are being called
20 manufacturers, are being held liable
21 under the escrow statutes; but, again,
22 how can that be squared? They did not
23 know enough about the provisions to
24 know that they applied to
25 manufacturers; yet, they knew in what

1032

1 Grand River Arbitration
2 way they were being applied. They
3 were being applied to importers.

4 And, again, they are saying
5 that they did not know about
6 enforcement efforts; yet, they somehow
7 knew enough about the discontent over
8 a purported lack of enforcement of the
9 escrow statutes as shown by, you know,
10 letters from industry people
11 complaining about lack of enforcement.

12 So, in essence, I think that it
13 can't be maintained that Claimants at
14 one time can be completely ignorant of
15 the MSA regime and at the same time
16 have a good faith belief that is
17 premised on a really nuanced
18 understanding of its drafting history
19 and its state-by-state application.

20 Now, with respect to some of
21 the specific points that Claimants
22 made regarding the ambiguity of the
23 escrow statutes themselves.

24 The first point that I want to
25 make -- and if we could just circulate

1033

1 Grand River Arbitration
2 the exhibit -- is that Claimants
3 referred yesterday to some problems
4 that they said with the wording of
5 some of the escrow statutes, and
6 suggested that they -- some of those
7 statutes weren't fixed until after the
8 jurisdictional cut-off date, and said
9 that that means that some of the
10 escrow statutes that were in place
11 were not, you know, in the model

12 statute form. They weren't qualified
13 statutes.

14 And this is based on a letter
15 that was placed into evidence
16 yesterday. And they said that, you
17 know, they required amendments after
18 the time bar, so suggesting that there
19 was some sort of confusion as to what
20 the model -- what the escrow statutes
21 provided. And as you can see from the
22 exhibit that is circulating, you will
23 see here that this is a letter from
24 NAAG, the National Association of
25 Attorneys General, dated February 7,

1034

1 Grand River Arbitration
2 2001, signed by the AGs for the
3 settling states, and --

4 PRESIDENT NARIMAN: This was
5 let in by Violi.

6 MR. VIOLI: No, I've never seen
7 it.

8 MS. MENAKER: No, this is put
9 in -- this is rebuttal evidence to the
10 evidence that he put in yesterday for
11 the first time.

12 PRESIDENT NARIMAN: What was
13 that evidence?

14 MS. MENAKER: The evidence that
15 he put in was in his -- it's in his
16 new folder of evidence.

17 MR. VIOLI: February 7th
18 letter.

19 PRESIDENT NARIMAN: February.

20 MR. VIOLI: February 7th
21 letter. 2001.

22 PRESIDENT NARIMAN: This is
23 also February 7th. This is
24 February 7th. That's why I am a
25 little confused.

1035

1 Grand River Arbitration

2 MR. VIOLI: The Greenwall memo
3 is February 7th.

4 MR. CROOK: That NAAG memo,
5 Mr. Violi, in your book here is

6 February 1st.
7 MR. VIOLI: February 1st -- is
8 that it -- and then March 20 -- no,
9 it's February 7th, see.

10 MR. CROOK: It's that one we
11 are talking about.

12 MR. VIOLI: The same date, but
13 it's not the same memo.

14 MS. MENAKER: Show me the
15 exhibit number.

16 MR. VIOLI: 18B,
17 Mr. Clodfelter.

18 Just for the record I am happy
19 to find out that you have free access
20 to documents that I only had access to
21 three weeks ago.

22 MR. CROOK: Mr. Violi, can you
23 hold that up.

24 MR. VIOLI: It's February 7,
25 2001, 18B. That's the first memo that
1036

1 Grand River Arbitration
2 talked about the statutes, and then
3 there is the March --

4 MS. MENAKER: This is 18E.

5 MR. VIOLI: No, there are two,
6 February 7th, and 18B and then 18E --
7 is that what you said? 18E.

8 PRESIDENT NARIMAN: What is it?

9 MS. MENAKER: So I apologize
10 for the confusion. This is in
11 response to the evidence that
12 Claimants introduced yesterday that
13 can be found at tab 18E. And in this
14 March 21, 2001 letter.

15 PRESIDENT NARIMAN: 18B.

16 MS. MENAKER: E as if Eagle.

17 PRESIDENT NARIMAN: Where is E?

18 MR. CROOK: It's right here.

19 MS. MENAKER: And you will
20 recall that yesterday Mr. Violi talked
21 about this letter and said here that
22 46 states had enacted the escrow
23 statutes, but then it said with
24 respect to five states, namely,
25 Connecticut, Iowa, Kansas, Maryland,

1037

1 Grand River Arbitration
2 and Rhode Island, the agreement
3 required the enactment of certain
4 amendments.

5 It said three of the states are
6 going to make these amendments by
7 April 1, 2001, which he noted was
8 after the jurisdictional cut-off date;
9 and Connecticut and Maryland will
10 enact the specified changes by
11 April 15th.

12 And then it says that
13 Connecticut and Maryland's NPM
14 statutes will be considered model
15 statutes within the meaning of the MSA
16 statutes' original effective dates
17 provided that they make the changes by
18 February 7th. And --

19 PRESIDENT NARIMAN: This is tab
20 18.

21 MS. MENAKER: Tab 18E, yes.

22 PRESIDENT NARIMAN: Thanks.

23 MS. MENAKER: And Mr. Violi
24 suggested that this meant that there
25 were some amendments being made to

1038

1 Grand River Arbitration
2 these escrow statutes, that they were
3 not all the same. There was some
4 uncertainty even going into April of
5 2001.

6 And the letter that I have sent
7 to you, which you now see, discusses
8 the fact that the states have all
9 enacted escrow statutes, and then it
10 says, that the OPMs say that five of
11 the states didn't do it exactly right.
12 They have to make some amendments.
13 And it says that -- and this is in
14 paragraph two on the second page -- it
15 says:

16 "Without prejudice to these
17 contentions that there are these
18 alleged deformities, with respect to
19 each of the five states that enact

20 legislation by and within an effective
21 date, not later than April 1st,
22 amending its statute, that the -- it
23 will be deemed a model statute and the
24 amendment will relate back to the
25 statute's original effective date to

1039

1 Grand River Arbitration
2 cure any problem."

3 But just as important, really,
4 very important point that I want to
5 show you, is that, if you look through
6 this -- and we won't go
7 page-by-page -- it is a red line of
8 the changes that are required. And
9 these are typographical errors. That
10 is all, that each of the model
11 statutes is verbatim like one another.

12 So people actually went through
13 and said:

14 Okay, provided -- and oops.
15 You forgot a `that' and added a
16 `that.'"

17 These are all typographical,
18 non-substantive changes. And, you
19 know, in one place there is a typo
20 where it says one million. Then the
21 numbers numerically following it, it's
22 clear that it is 1 billion, so the "M"
23 is changed to a "B." But that is all
24 these are.

25 PRESIDENT NARIMAN: What is tab

1040

1 Grand River Arbitration
2 number that you are referring to?

3 MS. MENAKER: This is a new
4 exhibit.

5 PRESIDENT NARIMAN: You have to
6 put a number on it.

7 MS. MENAKER: Let me check. We
8 will check.

9 So while we check that, the
10 point is that there is no ambiguity
11 there. The escrow statutes were all
12 enacted. They were all identical.
13 These amendments did nothing to change

14 that, did nothing create any ambiguity
15 or uncertainty regarding the escrow
16 statutes.

17 PRESIDENT NARIMAN: Yes.

18 MS. MENAKER: As far as the
19 last exhibit number, do we have --

20 MS. GUYMON: We have 149.

21 MS. MENAKER: This will be
22 number 149.

23 PRESIDENT NARIMAN: Yes, go on.

24 MS. MENAKER: So the second
25 thing, the slide, the next slide in

1041

1 Grand River Arbitration
2 your package is just a definition of
3 "tobacco product manufacturer" in the
4 MSA, the model statute. And this is
5 the same definition you have seen many
6 times already, that is adopted in each
7 of the escrow statutes.

8 And here Claimants have not
9 said how this definition -- how this
10 is at all ambiguous. And you will
11 recall, if you look at the next slide,
12 yesterday, Claimants acknowledged that
13 GRE manufactured Seneca brand
14 cigarettes. They said, in fact, that
15 that is 100 percent of their
16 production today, that back in --

17 PRESIDENT NARIMAN: What page
18 is that?

19 MS. MENAKER: This is the next
20 slide that is on page 14, although
21 they are misnumbered.

22 PRESIDENT NARIMAN: Yes.

23 MS. MENAKER: Okay. So
24 Claimants yesterday, like I said they
25 acknowledged that Grand River

1042

1 Grand River Arbitration
2 manufactured Seneca brand cigarettes.
3 They said that that constitutes
4 100 percent of their current
5 production. Back in 1999, 1999, they
6 estimated it was anywhere from 50 to
7 80 percent of their production, which

8 accounted for approximately 400
9 million cigarettes, a significant
10 amount.

11 They also conceded that, which
12 is not surprisingly, that Grand River
13 intends for the Seneca brand
14 cigarettes to be sold in the
15 United States.

16 So if you look at this,
17 "tobacco product manufacturer" means
18 an entity that manufactures cigarettes
19 anywhere that such manufacturer
20 intends to be sold in the
21 United States. Claimants have never
22 explained how that is at all
23 ambiguous. Given their very
24 straightforward acknowledgments
25 yesterday, that "Yes, we do

1043

1 Grand River Arbitration
2 manufacture cigarettes. Yes, we do
3 intend for them to be sold in the
4 United States," there is no ambiguity
5 in these escrow statutes as regards
6 their applicability to Grand River.

7 Now, Claimants yesterday
8 mentioned another source of purported
9 ambiguity. They pointed to some
10 documents -- and, yes, I won't
11 reference the documents specifically;
12 but let me tell you generally what
13 they stated. Thank you.

14 It was at Exhibit 17B when they
15 were talking about this -- it was this
16 NAAG memorandum. You might remember.
17 It was the one that had all the
18 different colored highlighting.

19 PRESIDENT NARIMAN: Yes.

20 MS. MENAKER: They were saying
21 there:

22 "Look, there is this confusion
23 as to what a participating -- what a
24 tobacco manufacturer is."

25 And the first point is that, of

1044

1 Grand River Arbitration

2 course, this is a discussion
3 memorandum. It was not made public.
4 This confusion should not have
5 informed their knowledge.

6 But anyway the context of this
7 is that this is in the context of
8 identifying the tobacco product
9 manufacturer who can be a Subsequent
10 Participating Manufacturer, who can
11 sign onto the MSA. Now, granted the
12 definitions of "tobacco product
13 manufacturer" are identical in -- for
14 the MSA and for the escrow statutes.

15 But the context in which this
16 discussion arose was very different,
17 because there the NAAG, when they are
18 talking with the OPMs and the SPMs are
19 merely trying to identify:

20 "Okay. Who is going to sign
21 on? Who is going to sign onto the MSA
22 and make the payments?"

23 And so it -- they don't -- they
24 want to make sure of two things.
25 First, as Mr. Crook pointed out

1045

1 Grand River Arbitration
2 yesterday, that there is not double
3 payments, or a penalty that you don't
4 get two people signing on and making
5 the payments. By the same token as
6 Claimants referred to yesterday, there
7 can be some machinations as to how the
8 businesses are done, and they want to
9 make sure that the payments are being
10 made the proper way, that one person
11 is making the payments and it is
12 covering everything that it ought to
13 be covering.

14 And who gets the grandfathered
15 exemption? They want to make sure
16 that that is going to the correct
17 entity. But, here, the fact that
18 someone else might be considered a
19 participating manufacturer, for
20 purposes of the SPM exemption, should
21 not inform their understanding of the

22 definition of "tobacco product
23 manufacturer" under the escrow
24 statutes.

25 And, particularly, let me just

1046

1 Grand River Arbitration
2 make that more clear because -- and
3 they alluded to the fact that some
4 states have allowed importers rather
5 than manufacturers to become SPMs.
6 And that is true, but that is done
7 deliberately. That is done pursuant
8 to an amendment to the MSA where the
9 importer says:

10 "I will take on the burden of
11 making the payments, so I will pay for
12 you."

13 And this is -- I will pass
14 these around, just two examples,
15 because Mr. Violi yesterday referred
16 to both Premiere and also to GTI slash
17 VIGO, and said: "Look, these are
18 importers they are not manufacturers.
19 So there was some" -- he was asking
20 you -- suggesting that there is some
21 ambiguity as to who the statute should
22 apply to because it looks like it was
23 applying to the importer rather than
24 the manufacturer.

25 That is not the case at all.

1047

1 Grand River Arbitration
2 It's very clear that this statute
3 applies to the manufacturer. However,
4 there is a mechanism for the MSA if
5 you want to become a Subsequent
6 Participating Manufacturer. You can
7 in some cases designate another entity
8 to make those payments for you, but
9 that is done pursuant to an amendment.

10 And you will see that, I think,
11 Claimants, when they attached the MSA
12 to their statement of claim, attached
13 amendments like one through 19, or
14 something along those lines, and these
15 are a few amendments -- a few numbers

16 after that. I just sent this out as
17 an example that --
18 PRESIDENT NARIMAN: This is the
19 amendment to the Master Settlement
20 Agreement.
21 MS. MENAKER: Yes.
22 PRESIDENT NARIMAN: How many
23 were there?
24 MS. MENAKER: There are -- when
25 Subsequent Participating Manufacturers

1048

1 Grand River Arbitration
2 sign on, sometimes you have amendments
3 like this. It is just to put someone
4 else in the shoes of the manufacturer
5 for purposes of making the payment,
6 and there are about -- well --

7 MR. VIOLI: 26 or 27.

8 MR. LIEBLICH: Well, not every
9 amendment --

10 MS. MENAKER: Of course, not
11 all the amendments relate to this
12 issue. As you recall amendment number
13 one was changing 60 days to 90 days
14 for the window to join.

15 PRESIDENT NARIMAN: How many
16 amendments were there to the Master
17 Settlement Agreement? I mean, get us
18 as a common ground. Give us a common
19 ground.

20 MS. MENAKER: At least 24, but
21 I do not know.

22 PRESIDENT NARIMAN: At least
23 24.

24 MR. CROOK: This is number 24.

25 PRESIDENT NARIMAN: No, I am

1049

1 Grand River Arbitration
2 asking him, how many were there.

3 MR. VIOLI: I believe it's over
4 30.

5 PRESIDENT NARIMAN: Over 30.
6 So there were amendments to the Master
7 Settlement Agreement --

8 MR. VIOLI: Right.

9 PRESIDENT NARIMAN: But you

10 have annexed to your statement of
11 claim up to what amendment?

12 MR. CROOK: Eight, I believe.

13 MR. VIOLI: Whatever was
14 available, Mr. President, but there
15 are more. There was an amendment to
16 allow the allocable share statute.
17 There is quite a few.

18 MS. MENAKER: To the master
19 statement.

20 MR. VIOLI: There is an
21 amendment.

22 PRESIDENT NARIMAN: Oh, there
23 was an amendment to the Master
24 Settlement Agreement to allow for an
25 allocable share.

1050

1 Grand River Arbitration

2 MS. MENAKER: That's not in the
3 record at all.

4 MR. VIOLI: Because I can't get
5 it. That is the problem.

6 MR. LIEBLICH: Any amendment is
7 available online.

8 MR. VIOLI: It's on online now.
9 The NAAG web site went down about six
10 months ago, I was told.

11 PRESIDENT NARIMAN: Okay.

12 MS. MENAKER: Then, also, I
13 would just note in the same content of
14 this argument --

15 PRESIDENT NARIMAN: This is
16 becoming like a Hindi film. You get
17 to know things only by the time the
18 ending comes. I never knew that there
19 were any amendments to the Master
20 Settlement Agreement.

21 MS. MENAKER: Well, these are
22 not -- these are not -- these are not
23 amendments sometimes in the sense that
24 you may be thinking of amendments as
25 in they don't change the terms of the

1051

1 Grand River Arbitration

2 Master Settlement Agreement. These
3 that I have put in -- and about a

4 dozen of the 24, I believe, fall into
5 this category.

6 It's just making clear that the
7 manufacturer is the one who is
8 supposed to join, but at the end of
9 the day, if someone else wants to take
10 up that payment obligation, they allow
11 them to. They do it --

12 PRESIDENT NARIMAN: I follow
13 you.

14 MS. MENAKER: And in this
15 context yesterday, Claimants discussed
16 a default judgment in North Carolina,
17 and I believe they also suggested
18 there was ambiguity or confusion
19 because Tobaccoville, their
20 distributor --

21 PRESIDENT NARIMAN: This is at
22 tab 150, yes.

23 MS. MENAKER: -- that
24 Tobaccoville their distributor was
25 making the payments to that state.

1052

1 Grand River Arbitration
2 And what I have passed out now, which
3 can be Exhibit 151, is the default
4 judgment. And it makes clear that the
5 default judgment was rendered against
6 Grand River Enterprises, because they
7 are the manufacturer, so no ambiguity
8 there..

9 MR. UCHE: Point of
10 clarification, the two amendments
11 would be one number.

12 PRESIDENT NARIMAN: One number.

13 MS. MENAKER: Yes, please.

14 MR. CROOK: Could I have that.

15 PRESIDENT NARIMAN: This is in
16 answer to what he said. That's all.

17 MS. MENAKER: That's correct.

18 PRESIDENT NARIMAN: That's what
19 you are saying.

20 MS. MENAKER: Because he
21 suggested yesterday there was
22 ambiguity because he said Tobaccoville
23 is the importer.

24 PRESIDENT NARIMAN: He said no
25 ambiguity as it went along and where

1053

1 Grand River Arbitration
2 others said: "Well, let us also
3 participate or not participate."

4 MS. MENAKER: Not participate
5 separately. They are just taking on
6 the obligation of the manufacturer.

7 PRESIDENT NARIMAN: Obligation
8 of the manufacturer, whoever took on
9 the obligation by an amendment, they
10 said that: "Yes, you are also
11 treated." So it wasn't an ambiguity
12 in the original agreement --

13 MS. MENAKER: Precisely.

14 PRESIDENT NARIMAN: That's your
15 point.

16 MS. MENAKER: Precisely.

17 Then Claimants said, well, with
18 respect to NPMs, which they are one
19 here:

20 "It's ambiguous because
21 Tobaccoville is our distributor -- is
22 the importer, and yet they are making
23 payments to North Carolina."

24 I showed this document to show
25 you that the default judgment entered

1054

1 Grand River Arbitration
2 was entered against Grand River
3 Enterprises who is the manufacturer.
4 Now, it is our understanding that
5 Tobaccoville is actually making the
6 escrow payments to the state now.
7 But, again, that does not change who
8 has the legal liability.

9 Right, if my father, as in
10 years ago --

11 PRESIDENT NARIMAN: That's
12 correct.

13 MS. MENAKER: -- a long time
14 ago used to take it upon himself to
15 pay my credit card bills, but, now, if
16 he does that, that doesn't change the
17 fact that I am liable for that. The

18 bank is just as happy to receive the
19 money from him; but if he changes his
20 mind and doesn't pay the bill. It's
21 still my legal liability.

22 PRESIDENT NARIMAN: Yes, we
23 follow that. What is the next point?

24 MS. MENAKER: Now, then in the
25 same NAAG memo that I talked about

1055

1 Grand River Arbitration
2 with all of the different colored
3 highlighting, the factors that
4 Claimants pointed to to suggest that
5 there was ambiguity in this
6 definition, you will recall that
7 Mr. Crook and Claimants had a dialogue
8 about this ad said:

9 "Okay. Well, where does this
10 ambiguity rest? If you looked at each
11 of these factors, who would be the
12 manufacturer?"

13 And a number of those factors,
14 even though this is not in a statute,
15 but a number of those factors pointed
16 to Native Wholesale Supply. So there
17 are two points with respect to that.

18 First, it's ironic that, if
19 they are saying:

20 "Well, look if we apply these
21 factors, it's Native Wholesale
22 Supply."

23 Yet, when Native Wholesale
24 Supply received the March 14, 2001
25 letter, in response to your Chairman's

1056

1 Grand River Arbitration
2 question as to why didn't they do
3 something, why didn't they respond,
4 they said because "it was clear the
5 liability wasn't on us."

6 So, again, if there is
7 confusion because they think that the
8 definition of "manufacturer" is
9 somehow uncertain, that these factors
10 may be showing -- maybe show
11 uncertainty, the application of those

12 factors point to Native Wholesale
13 Supply, then why are they saying it's
14 so clear it's not Native Wholesale
15 Supply?

16 But, second, at the end of the
17 day, it doesn't matter because all
18 they are saying is there ambiguity in
19 their minds between who should be
20 liable -- Native Wholesale Supply,
21 Grand River Enterprises, the investor
22 or the investment. It doesn't matter.
23 Regardless of who is liable, Claimants
24 first incurred a loss when that entity
25 incurred a legal liability, because it

1057

1 Grand River Arbitration
2 was one of the two.

3 And, finally, the last point,
4 is the suggestion -- or not even a
5 suggestion that -- the comment made
6 yesterday about, perhaps, a supposed
7 ambiguity because of their Indian
8 status or certain treaties. That has
9 simply not been pled.

10 And it's just -- it is too late
11 now for Claimants to first raise the
12 issue that somehow there is ambiguity
13 because of their understanding of
14 their treaties. And I completely
15 understand that it's an interesting
16 question.

17 But how can Claimants possibly
18 say that they had a good faith belief
19 that the escrow statutes did not apply
20 to them somehow because of these
21 treaties when they could not even
22 articulate yesterday at the hearing on
23 jurisdiction -- years after this claim
24 has been brought, they could not even
25 articulate on what basis that belief

1058

1 Grand River Arbitration
2 was founded.

3 They couldn't articulate the
4 argument. And then we heard the
5 suggestion that:

6 "Well, if it turns out that
7 they are post-hearing submissions, we
8 will elaborate."

9 We are not talking about an
10 elaboration here. I don't know on
11 what basis they are talking about.
12 What treaty? What provision? What is
13 the argument? It has not been made.

14 That simply could not have
15 informed a good faith basis for their
16 belief that these statutes were
17 somehow ambiguous or did not apply to
18 them.

19 And, again, insofar as what
20 they are saying, if they are saying a
21 general broad sweep, "Well, we are not
22 subject to any tax laws," we know that
23 was not their good faith belief. We
24 have in the record the letters from
25 Chantell Montour on behalf of White
1059

1 Grand River Arbitration
2 River Distributors showing that Grand
3 River knew that its cigarettes were
4 being distributed and that were being
5 subjected to excise taxes. She is
6 asking for a license for that. We
7 have the letter from Arthur Montour
8 reporting to the State of Missouri.

9 PRESIDENT NARIMAN: What is
10 that exhibit, license for excise tax?

11 MS. MENAKER: Sorry, it's not a
12 license for excise tax. It's a
13 license to -- for a distribution, for
14 distribution.

15 MR. VIOLI: For White River's
16 distribution.

17 MS. MENAKER: For White River.

18 MR. VIOLI: Before the escrow
19 statute was enacted in Missouri.

20 MS. GUYMON: And I am going to
21 address that in my presentation,
22 Mr. Violi. That is not the case.

23 MS. MENAKER: Okay. Then we
24 have the letter from Arthur Montour to
25 the State of Missouri, which was in

1060

1 Grand River Arbitration
2 1999, tab 15, where he is reporting to
3 the State of Missouri.

4 PRESIDENT NARIMAN: Tab 15 of
5 the United States.

6 MS. MENAKER: Of the
7 United States.

8 PRESIDENT NARIMAN: Yes.

9 MS. MENAKER: Where he is
10 reporting that there were no sales
11 made in that certain period and thus
12 no taxes were paid, again, showing
13 that -- his understanding where taxes
14 would have been paid had there been
15 sales.

16 PRESIDENT NARIMAN: The other
17 tab was what, White River.

18 MS. GUYMON: Ms. Montour's
19 letters -- there are several of
20 them -- tabs 133, 134 and 135 in the
21 US appendices.

22 PRESIDENT NARIMAN: Thank you.
23 Go on.

24 MS. MENAKER: Now, I would just
25 make a few brief comments on their

1061

1 Grand River Arbitration
2 arguments regarding ambiguity with
3 respect to enforcement.

4 PRESIDENT NARIMAN: Yes.

5 MS. MENAKER: So, first, the
6 fact that they point to
7 under-enforcement or what they term a
8 lack of enforcement is irrelevant for
9 the reasons I stated earlier. The law
10 does not become less effective because
11 a certain prosecution has not been
12 brought or because the states take
13 awhile in order to prosecute
14 offenders.

15 If that were not the case, I
16 mean, states simply couldn't enforce
17 their laws because the bureaucracies
18 are large. It takes time, and the
19 economics of this also play a part.

20 Of course, if someone misses escrow
21 sales, escrow payment for the first
22 year, there is a little amount of, you
23 know, damage to the state. They
24 may -- you know, in the second year,
25 of course, it's going to increase.

1062

1 Grand River Arbitration
2 It's going to be more on their radar
3 screen as years go by, and it becomes
4 more prevalent that someone is not
5 making the payments.

6 So that nothing can be drawn
7 from that fact, nor from the fact that
8 OPMs and SPMs were writing letters
9 complaining to NAAG. Of course, it
10 was in their self-interests to do so.

11 If you look at the MSA, there
12 is a provision. And this is in
13 section nine, which is a section we
14 have been looking at under B, where
15 there is an obligation.

16 It's also -- sorry -- it's
17 D2B -- there are lots of subsections.

18 But there is an obligation on
19 the states to quote-unquote diligently
20 enforce their escrow statutes. Now,
21 if they don't, then the state's -- the
22 state's payments under the MSA are
23 going to be decreased, because that is
24 how the whole system worked as we
25 explained earlier.

1063

1 Grand River Arbitration
2 It was a regime that was
3 dependent upon having the NPMs pay in
4 one way or the other, either by
5 joining as an SPM or paying into
6 escrow. And the whole regime
7 collapses if that's not the case. So
8 it wasn't an empty obligation here.

9 So, of course, it is in their
10 self-interest to get as much
11 enforcement as possible; but that,
12 again, nothing can be taken from that.

13 Now, Claimants talk about a

14 number of cases, and they don't
15 support the proposition that this was
16 at all ambiguous.

17 First, we have already
18 discussed in the Missouri lawsuit how
19 they were numerous co-defendants named
20 because it was unclear to the state
21 who the manufacturer was. When it
22 determined that Grand River was the
23 manufacturer, it voluntarily dismissed
24 all the other defendants from the
25 case.

1064

1 Grand River Arbitration

2 It wasn't unclear because of
3 the definition. It was unclear
4 because of the facts. The facts were
5 not known to the state at that time.

6 New Mexico now has sued Native
7 Wholesale Supply, but in the petition
8 it says Native Wholesale Supply is the
9 manufacturer. Mistaken fact. The
10 fact that that is years later is not
11 surprising. The states -- I mean, why
12 should they necessarily have found out
13 a certain fact? I mean, if they are
14 unable to discover who the
15 manufacturer is, that may happen.

16 The Jash decision, which was
17 discussed for the first time
18 yesterday, Mr. Violi said that
19 Pennsylvania sued the importer. But
20 what happened to that case? The case
21 was dismissed because it was brought
22 against the wrong person. It should
23 have been the manufacturer.

24 So at the end of the day all
25 they have is this Wisconsin action.

1065

1 Grand River Arbitration

2 Now, the Wisconsin -- the Wisconsin
3 action, we said, was dismissed for
4 lack of personal jurisdiction.

5 PRESIDENT NARIMAN: That you
6 mentioned.

7 MS. MENAKER: We mentioned

8 that, and we have an affidavit we are
9 prepared to present from the assistant
10 attorney general who handled the case.

11 But at the same time, I don't
12 want to -- if you find it helpful
13 to -- it basically just attests to
14 what I have said, is that the grounds
15 on which the dismissal was made was
16 lack of personal jurisdiction.

17 PRESIDENT NARIMAN: That's what
18 he said, also. There is no need for
19 that. Go ahead.

20 MS. MENAKER: Because the
21 evidence presented by the AG's office
22 to support jurisdiction was hearsay.
23 You recall that I said that, and you
24 will recall that. That is what this
25 says.

1066

1 Grand River Arbitration

2 MR. VIOLI: I will cut right to
3 the chase. I have a copy of the
4 transcript of the hearing. There was
5 an objection on hearsay, but it was
6 never sustained as a hearsay
7 objection. I have a copy of the
8 transcript.

9 PRESIDENT NARIMAN: We don't
10 want anymore.

11 MR. VIOLI: An affidavit now
12 from this attorney general as to
13 what -- no.

14 MR. CLODFELTER: It's not
15 surprising that we haven't heard about
16 the transcript until now.

17 MR. VIOLI: You could have
18 gotten it. You gave the paper.

19 PRESIDENT NARIMAN: Come on.
20 Wait until your time.

21 MS. MENAKER: So, again, and
22 that dismissal in no way vindicates
23 their belief that they were not a
24 manufacturer or subject to the escrow
25 statutes.

1067

1 Grand River Arbitration

2 So, now, let me move to my next
3 point, which is Claimants' argument
4 that they did not incur loss until
5 enforcement. And this is with respect
6 to all of their claims.

7 And, here, let me make three
8 points, first accepting such an
9 argument is contrary to fundamental
10 policy concerns, just if you think for
11 one moment about the implication of
12 that argument, there would be no
13 limitations period for these types of
14 actions at all, because, if it doesn't
15 run until enforcement, a defendant
16 could always challenge legislation
17 when that defendant was sued.

18 And that action would never be
19 time barred because the date of the
20 loss would never be earlier than the
21 date that he was sued. And so you
22 would never have legal peace for
23 respondents. And legislation would
24 always be subject to challenge by
25 every person against whom it was

1068

1 Grand River Arbitration
2 enforced.

3 And that simply is not the way
4 time limitations work and would run
5 contrary to their objectives.

6 Second, it contradicts their
7 own statements. I will just refer the
8 Tribunal to paragraph ten of the
9 statement of claim, where they
10 complain about the existence and
11 enforcement of the measures, not
12 merely the enforcement of the
13 measures.

14 And, third it's contrary to the
15 law. It's not the case that a loss
16 arises only when you are found liable
17 or only when a court orders payment.
18 Now, they conceded yesterday that
19 liability might arise at the time
20 that -- of the escrow statute's
21 enactment. But they said that just

22 wasn't a loss.

23 And, again, if you think about
24 an analogy in the tax field, if you
25 don't pay your taxes because you think

1069

1 Grand River Arbitration
2 that you don't have to pay them, and
3 that doesn't mean that you don't have
4 to pay unless and until you get a
5 court order to pay.

6 If you go to court and the
7 Court tells you, "you are wrong; you
8 have to pay," penalties will date back
9 from the time when your liability
10 arose and when you didn't pay.

11 PRESIDENT NARIMAN: Is there
12 any decision on this points? I just
13 want to know.

14 MS. MENAKER: Yes.

15 PRESIDENT NARIMAN: Is there
16 any US court, any other court decision
17 on this, that your liability to --
18 arises by virtue of the enactment of
19 the statute, not when it is enforced?
20 Is there any decision generally on tax
21 statutes?

22 MS. MENAKER: I will point you
23 to a footnote in our reply -- then you
24 can reference those cases -- where we
25 basically talk about a few cases. One

1070

1 Grand River Arbitration
2 of them for instance, I recall, is a
3 case concerning a company's pension
4 plan.

5 And it was found that the date
6 that the -- you know, the liability
7 accrued was the date that the company
8 became responsible or accepted the
9 obligation to make those payments even
10 though the payments were not going to
11 be due until years later.

12 PRESIDENT NARIMAN: What is
13 that? Just give it to us.

14 MS. MENAKER: It is footnote 21
15 of our reply on jurisdiction.

16 PRESIDENT NARIMAN: Reply to
17 the Claimant.

18 MS. MENAKER: That's correct.

19 MR. CROOK: So this is your
20 second pleading on the jurisdiction.

21 MS. MENAKER: That's correct.

22 PRESIDENT NARIMAN: That's
23 right. Okay.

24 MS. MENAKER: And if you want,
25 I can just read very quickly the

1071

1 Grand River Arbitration
2 parenthetical. Here is a case saying
3 that:

4 "A debtor becomes liable for a
5 debt when a resource is consumed or a
6 service is provided."

7 Another quote from a different
8 case -- that one was from the Fifth
9 Circuit -- another one from the
10 Seventh Circuit:

11 "When a debtor uses the
12 utility, the debt is incurred at the
13 time the resource is consumed rather
14 than when the invoice is sent."

15 PRESIDENT NARIMAN: Right.

16 MS. MENAKER: And the last one
17 which I was just referring to, which
18 happens to be a Canadian case, says
19 that it found that:

20 "The company's existing
21 obligation to make future severance
22 payments, even if wasn't yet due and
23 payable" -- they are not due and
24 payable until the future, but that
25 constituted an obligation of the

1072

1 Grand River Arbitration
2 company.

3 And then they go on to say
4 that:

5 "A potential investor would
6 have considered that obligation when
7 assessing the financial health of the
8 company," thus stating that that
9 affected the value of the company

10 because it is an obligation to make a
11 future payment.

12 PRESIDENT NARIMAN: Yes. Okay.

13 MS. MENAKER: So, here,
14 Claimants yesterday said that: "Okay.
15 If the escrow statute" -- they concede
16 that they imposed a liability as soon
17 as it was enacted. But they say there
18 was no loss until enforcement actions
19 were taken.

20 But then, when Mr. Weiler was
21 speaking, he said:

22 "Yes if you pay into escrow,
23 that is a loss, so -- because that
24 would be an out-of-pocket expense."

25 So what they are saying then,

1073

1 Grand River Arbitration
2 if the statute is enacted, you incur a
3 liability. If you comply with a
4 statute and make the payment, you
5 incur a loss.

6 But if the statute is enacted,
7 you incur liability. And if you don't
8 make the payment, then you don't incur
9 a loss until enforcement actions are
10 taken against you.

11 And you will recall that we
12 said that, basically, such an
13 interpretation would be to favor or
14 encourage evasion of the law,
15 non-compliance with the law, because
16 then, basically, who gets the benefit
17 of the tolling of the statute of the
18 limitation -- you basically -- you
19 have a problem with the law. What do
20 you do? You don't comply and
21 challenge or you don't challenge
22 immediately. You just don't comply.

23 PRESIDENT NARIMAN: We follow.
24 There are two cases you have cited
25 under the word "incurred" -- US versus

1074

1 Grand River Arbitration
2 Nancy and Christoph versus US. Do you
3 have those cases? Would you send them

4 to Mr. Uche?
5 MS. MENAKER: We don't. We
6 will make copies.
7 PRESIDENT NARIMAN: Please make
8 copies and send them to us if you
9 don't mind. US versus Laney, not
10 Nancy, and Christoph versus US.
11 MS. MENAKER: We will have to
12 do during a break, though, because we
13 don't have them.
14 PRESIDENT NARIMAN: Whenever
15 you want.
16 MS. MENAKER: That's the last
17 thing I wanted to do, is to point you
18 to this case of the Christoph case as
19 with respect to when your -- when you
20 incur a loss. And let me just read
21 this quote to you. It says, quote --
22 in this case, we don't have the clean
23 copy because of the problem that we
24 had with the stuff last night.
25 PRESIDENT NARIMAN: Page 12.

1075

1 Grand River Arbitration
2 MS. MENAKER: Yes. Here the
3 background was a plaintiff succeeded
4 in a court action and sought to get
5 attorney fees, but to do so she had to
6 show that she quote/unquote had paid
7 or incurred attorney fees. The
8 defendant argued that she wasn't
9 entitled to recover the attorney fees
10 because they had not been paid; they
11 had not paid the attorney fees. And
12 he said:
13 "If you look at her financial
14 situation, we don't think that she
15 ever would have paid because we don't
16 think she had enough money to pay
17 them."
18 And this is what the Court said
19 in response, quote:
20 "This argument is a bit too
21 fanciful and attenuated to merit the
22 serious consideration of this Court.
23 While this court agrees that it has

24 not been shown that the plaintiff has
25 paid any attorney's fee, it appears

1076

1 Grand River Arbitration
2 abundantly clear that she has incurred
3 an attorney fee. Plaintiff has
4 rendered herself liable and subject to
5 payment of attorney fees. Thus,
6 plaintiffs have incurred a legal and
7 contractual obligation to pay their
8 attorney's fees. If, for example, the
9 plaintiff's husband were to escape --
10 somehow escape his responsibility to
11 pay those fees by moving to a small
12 island off of the coast of Bolivia,
13 then plaintiff's wife would remain
14 responsible for their payment."

15 PRESIDENT NARIMAN: He's very
16 imaginative.

17 PROFESSOR ANAYA: But he does
18 not have a good sense of geography.

19 MS. MENAKER: I was going to
20 look into a Chilean/Bolivian border
21 dispute to suggest that at the time of
22 this decision there was some -- it was
23 not completely landlocked.

24 MR. CROOK: Moving along.

25 MS. MENAKER: So that -- and

1077

1 Grand River Arbitration
2 then just briefly, let my comment on
3 the complementary legislation and the
4 allocable share amendments claim.

5 First, Claimants yesterday said
6 that the first time that they incurred
7 an expropriation a loss for the
8 expropriation, was when their
9 cigarettes were banned. But, again,
10 that is not the expropriation that
11 they allege in their statement of
12 claim, and I would just direct the
13 Tribunal's attention to those
14 paragraphs under expropriation which
15 began at paragraph 168, where here
16 they talk about, as a result of the
17 escrow statute regime, they have been

18 forced to abandon markets and that
19 they have been completely excluded
20 from some other markets, and their
21 market share that was existing at the
22 time has been tainted.

23 PRESIDENT NARIMAN: Not
24 contraband laws, that is what you are
25 saying.

1078

1 Grand River Arbitration

2 MS. MENAKER: It includes both
3 under the section, as a result of the
4 adoption of enforcement practices; so
5 enforcement practices could certainly
6 include the complementary legislation.
7 But, nevertheless, what they are
8 talking about is the -- they say here
9 they could not afford to bring
10 themselves into compliance with their
11 obligations, which are the obligations
12 imposed by the escrow statutes.

13 PRESIDENT NARIMAN: 168.

14 MS. MENAKER: Yes, 168 through
15 171. And so then they talk about,
16 because they could not afford to bring
17 themselves -- because they can't
18 comply with their escrow obligations,
19 they have been forced to abandon
20 markets or to do that, and that
21 constitutes a taking of their market
22 share. Now --

23 PRESIDENT NARIMAN: I think you
24 better wind up now.

25 MS. MENAKER: I will. Then

1079

1 Grand River Arbitration

2 here, again, I would just reiterate
3 what I said earlier, which is it
4 doesn't affect the time when they
5 first incurred a loss. All the
6 complementary legislation does is
7 affect the enforcement mechanism.

8 And Claimants yesterday said --
9 when you said, "What is the
10 difference? What the difference for
11 you?"

12 They said:
13 "Well, during the pendency of a
14 case, under the escrow statute, we
15 could continue to sell our cigarettes.
16 But if they are banned under the
17 contraband legislation, during the
18 pendency of that case, we are
19 enjoined."

20 But, again, that doesn't affect
21 the time when they first incurred the
22 loss, which was when they incurred the
23 penalty.

24 And, finally, the allocable
25 share amendment, and let me reiterate

1080

1 Grand River Arbitration
2 that the allocable share amendments
3 are not a part of the claim. They
4 just -- if you look through the
5 statement of claim, despite the
6 Claimants' attempt to say, "When we
7 referenced the escrow statutes, we
8 meant the way they were at the time,"
9 there is no mention of this provision.

10 If this were really the crux of
11 their claim, if it were true that they
12 would not have even brought an article
13 1102 claim but for the allocable share
14 amendment, you would expect that to be
15 front and center, at least quoted, at
16 least cited somewhere, but, no,
17 nowhere, no discussion of it.

18 Now, they also said, as
19 Mr. Clodfelter noted, that their claim
20 had not changed over time. It was
21 exactly the claim that they were
22 making in 2002 to the court in
23 New York. Remember that they sued the
24 31 attorney generals.

25 Now, there, at that time, the

1081

1 Grand River Arbitration
2 allocable share amendments had not
3 been adopted. Yet, they were -- you
4 know, they incurred harm, so here
5 how --

6 PRESIDENT NARIMAN: That
7 New York suit was before the
8 amendment.

9 MS. MENAKER: Yes, before the
10 amendment.

11 PRESIDENT NARIMAN: What is
12 that New York suit tab? Do you have
13 it ready.

14 MS. MENAKER: It was --

15 PRESIDENT NARIMAN: Mr. Violi,
16 do you have it?

17 MR. CROOK: They can give it to
18 you, Mr. Chairman.

19 MS. MENAKER: We will get it
20 for you at the break. So, again --
21 and you're aware of the -- I would
22 just look at paragraph 75 of their
23 statement of claim. There they talk
24 about the discrimination, their
25 discrimination claim because of their

1082

1 Grand River Arbitration
2 not having grandfathered SPM status,
3 no mention of the allocable share
4 amendment.

5 And I will just make
6 two points. Yesterday, Respondent --
7 or, excuse me -- Claimants laid out a
8 hypothetical to demonstrate in his
9 view why it was that they did not
10 incur loss until the allocable share
11 amendments with respect to this
12 discrimination claim.

13 The hypothetical he gave was,
14 if you were a grandfathered SPM, and
15 you sold over your market share, you
16 have to make payments for that
17 increase.

18 And if you were an -- this is
19 under the original escrow statutes,
20 pre-allocable share amendments -- for
21 that increase, you would have to pay.
22 But under the original escrow statute,
23 the NPM's payment would be lower, and
24 you will recall that he used numbers.
25 But here that is merely one

1083

1 Grand River Arbitration
2 hypothetical.
3 An equally plausible
4 hypothetical is that the SPM -- the
5 grandfathered SPM makes sales in any
6 given year not above its 1998 market
7 share. That means that the SPM, the
8 grandfathered SPM pays zero. The NPM
9 still pays into escrow. It has
10 suffered a loss as a result of that
11 difference in treatment.

12 That loss arose under the
13 original escrow statute. It did not
14 first arise under the allocable share
15 amendments. So it is wrong to say
16 that any difference in treatment
17 between grandfathered SPMs and NPMs --
18 and the loss for that only occurred
19 after allocable share, because that is
20 only under one hypothetical.

21 And an equally plausible one is
22 that, every time they made escrow
23 payments, grandfathered SPMs were
24 making no payments whatsoever.

25 And, finally, I just -- this is

1084

1 Grand River Arbitration
2 my very last point -- is that the
3 allocable share amendments, even if
4 you were to consider the claim, it is
5 not -- it is not a new -- it doesn't
6 give rise to a new breach or to a new
7 or different loss.

8 And we quoted the Mondev case
9 before, that said a claimant can
10 certainly know it has incurred a loss
11 even if the full quantification or the
12 extent of the loss is unknown.

13 And, now, I would just direct
14 the Tribunal's attention to slide 15,
15 which is my very last slide, where you
16 will see that at their response -- and
17 we have quoted this before -- they
18 say, quote:

19 "Respondent correctly notes

20 that the Claimants were able to
21 mitigate to some extent the damage
22 they began to incur as the MSA states
23 started to pass contraband laws and
24 obtain injunctions against the sale of
25 their products."

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1 Grand River Arbitration

2 And this reference is to the
3 allocable share amendments. And I
4 apologize that it's not in there.

5 This is when we said -- the allocable
6 share amendments, they said only
7 allowed them to mitigate to some
8 extent the damage. I reversed that.

9 The allocable share provision --

10 PRESIDENT NARIMAN: We follow.

11 MS. MENAKER: -- as originally
12 enacted.

13 And then he repeated that
14 yesterday. He said, quote:

15 "The allocable share provision
16 allowed Grand River to effectively
17 lower its national escrow burden."

18 So what did it do? It allowed
19 them to minimize their damages, to
20 lessen their damages. Once the
21 amendments were in place, the damages
22 increased; but that does id not mean
23 that they first incurred a loss or
24 damage when those amendments were in
25 place. They first incurred a loss or

1086

1 Grand River Arbitration

2 damage way back when they incurred the
3 escrow obligation. And with that I
4 will conclude.

5 PRESIDENT NARIMAN: Thank you.
6 Thank you.

7 MR. CLODFELTER: Mr. President,
8 Ms. Guymon has about 20 minutes, and I
9 apologize. We said we would aim for
10 90 minutes, but, obviously, we were
11 hit with an awful lot of material
12 yesterday from the other side.

13 PRESIDENT NARIMAN: Yes.

14 MR. CLODFELTER: Do you think
15 we should probably break and come back
16 to her?

17 MR. VIOLI: No, can we go
18 straight through?

19 (There was a discussion off the
20 record.)

21 MS. GUYMON: I am glad to
22 address you, again. As I said, I
23 will basically --

24 PRESIDENT NARIMAN: Try to make
25 it short.

1087

1 Grand River Arbitration
2 CLOSING STATEMENT BY MS. GUYMON
3

4 MS. GUYMON: Yes, I will. The
5 points that I did -- but just in the
6 way that they have been attacked
7 directly by the Claimants in their
8 presentation -- as you will recall, I
9 discussed both constructive and actual
10 knowledge.

11 And as to the MSA, I think we
12 have already -- we are all clear that
13 Claimants now admit that they knew
14 about the MSA at or about the time it
15 was concluded. They admit that the
16 industry knew about the MSA, that when
17 it was completed, it was very clear
18 that this monumental deal had been
19 concluded and they knew about that.

20 That's basically the first two
21 points on my first slide.

22 But the United States also --
23 there was a little nit-picking by
24 Claimants on the point that we never
25 said when the MSA was placed on the

1088

1 Grand River Arbitration
2 Internet. We have always said in our
3 pleadings that the MSA text was
4 available shortly after the MSA was
5 concluded and during the 90-day window
6 when it was open for grandfathered --
7 for SPMs to join and get

8 grandfathered -- am I going too fast
9 for the reporter?

10 THE REPORTER: A little fast.

11 MS. GUYMON: Okay. I will slow
12 down, but still move quickly.

13 And that's at our objection at
14 page 14. In our response at page
15 17 -- I'm sorry -- that's Claimants
16 response is where they attack us for
17 not closing it. And in our reply at
18 15 -- so clearly we have disclosed
19 that. Finally --

20 MR. VIOLI: Did you say a date?
21 I didn't hear, sorry. Did you say a
22 date, or did you just say shortly
23 after? I was trying to cite --

24 MS. GUYMON: Shortly after,
25 during the 90-day period. That is

1089

1 Grand River Arbitration
2 what we said.

3 The last point most importantly
4 about the MSA that I would like to
5 make is that Claimants insist that
6 that they knew about this MSA, but
7 that their understanding it was just
8 about the four Majors. It was just
9 about their big major competitors.

10 They had no interest whatsoever
11 in obtaining publicly available
12 information about how their biggest
13 competitors were going to have to
14 increase their prices. We find that
15 simply incredible.

16 They themselves alleged -- it's
17 in the transcript at page 86 -- that
18 the Majors had to raise their prices
19 by about 35 cents per pack as a result
20 of this agreement. They were not
21 interested, as they were entering into
22 this market, in knowing a pricing
23 strategy of their biggest competitors
24 with 98 percent of the market. That
25 is simply shocking.

1090

1 Grand River Arbitration

2 They would have read this
3 agreement. They would have wanted to
4 know.

5 PRESIDENT NARIMAN: Had to
6 raise the price by how much.

7 MS. GUYMON: In the transcript
8 it's 35 cents a pack.

9 PRESIDENT NARIMAN: At page?

10 MS. GUYMON: 86.

11 MR. VIOLI: What are you
12 referring to, page 86?

13 MS. GUYMON: The 35 cents a
14 pack statement that you made
15 yesterday.

16 MR. VIOLI: I'm sorry. Page 86
17 of what?

18 MS. GUYMON: The transcript of
19 yesterday's proceeding.

20 MR. VIOLI: It's not in the
21 MSA. I didn't hear what you were
22 saying. Sorry.

23 MS. GUYMON: So the US is not
24 articulating some industry standard
25 that requires an expert. The US is

1091

1 Grand River Arbitration
2 asking the Tribunal to consider what a
3 reasonable business in this position
4 entering into the US cigarette market
5 would find out and should find out.
6 And a reasonable business entering
7 into the US cigarette market should
8 find out publicly available
9 information about an impact on its
10 major competitors who were going to
11 incur these huge settlement payments
12 and very logically have to increase
13 their prices.

14 In addition, it was no surprise
15 that this major deal trying to involve
16 all of the states in the United States
17 would impact not only the OPMs, that
18 it would also impact NPMs.

19 As Mr. Crook pointed out, there
20 was an earlier effort to pass
21 nationwide federal legislation. That

22 effort failed. However, consideration
23 of that bill was on the public record.
24 And in consideration of that bill,
25 there was discussion of NPMs; that
1092

1 Grand River Arbitration
2 term actually was coined during the
3 process of formulating a possible
4 national bill.

5 And we have provided at tab 137
6 in our appendices an article --
7 sorry -- actually, a transcript of a
8 National Public Radio interview with
9 Bennett Lebo, the president of
10 Liggett, one of the smaller tobacco
11 companies, not one of the Majors.

12 PRESIDENT NARIMAN: Tab number.

13 MS. GUYMON: Tab number 137.

14 And I specifically -- it's a lengthy
15 transcript, so I direct you -- it's
16 the page that is numbered page 44.
17 There Mr. Lebo answers the question
18 because Mr. Lebo had commented that,
19 the proposed nationwide settlement was
20 unfair to the smaller companies.

21 Mr. Lebo said:

22 "In the settlement, in the
23 global settlement" -- this is talking
24 about the previous attempt at federal
25 settlement -- "there is whole page

1093

1 Grand River Arbitration
2 devoted to something called a
3 Nonparticipating Manufacturer."

4 So that term was in
5 circulation, was in the public record
6 in 1997 when the possible nationwide
7 federal legislation was being
8 considered. That legislation failed.
9 It did not gain Congressional
10 approval; that is what prompted these
11 attorneys general to enter into
12 separate negotiations and try to come
13 up with a deal on the state-by-state
14 basis.

15 So that is the MSA. Clearly,

16 they knew about it. Clearly, a
17 reasonable cigarette manufacturer
18 would have read it and studied it and
19 found out the impact on the industry.

20 Next, I'll move on. My next
21 slide is slide 18, to talk about the
22 escrow statutes.

23 Ms. Menaker has already touched
24 on the fact that the -- that purported
25 good faith belief, that has just been

1094

1 Grand River Arbitration
2 very belatedly and inarticulately
3 alluded to, is directly contradicted
4 by the evidence. And Ms. Menaker
5 already mentioned the Montour letter
6 at tab 15 -- I'm sorry -- the Arthur
7 Montour letter at tab 15, and the
8 Chantell Montour letters that are at
9 tab 133, 134, and 135.

10 And Mr. Violi interjected there
11 and said:

12 "Wait a minute. These Chantell
13 Montour letters were written before
14 there were escrow statutes."

15 In fact, that's not the case.
16 The Arkansas letter from September of
17 1999 was written after Arkansas had
18 already enacted its escrow statutes.
19 Arkansas -- would you look at our
20 tab six -- that includes a table
21 showing all the escrow statutes when
22 they were implemented, and behind that
23 table are the actual copies of each of
24 these state escrow statutes.

25 Arkansas enacted and its escrow

1095

1 Grand River Arbitration
2 statute took effect on April 6, 1999.
3 So that is five months before
4 Ms. Montour wrote her letter to the
5 State of Arkansas.

6 Mr. Violi also made an
7 interesting point about the Chantell
8 Montour letter. He said the
9 March 1999 letter should have prompted

10 the state to extend or make some sort
11 of exception to the 90-day window.
12 That argument is absolutely -- it
13 cannot be accepted.

14 The 90-day window had to close
15 at some point. It had already closed
16 before March when Ms. Chantell Montour
17 sent her letter. To suggest that it
18 should have been reopened every time a
19 new entrant appeared on the market is
20 the simply impractical.

21 Finally, Claimants have
22 contested actual knowledge of the
23 escrow statutes. Very clearly, as
24 Ms. Menaker said:

25 "We just didn't know. We just

1096

1 Grand River Arbitration
2 didn't know about these escrow
3 statutes."

4 So they have not made any
5 response to our constructive knowledge
6 argument. They have a responsibility
7 to know the law. They could easily
8 obtain the law. They could easily
9 read the law. As Ms. Menaker stated,
10 the law was not ambiguous. They
11 should have known.

12 Turning to our evidence of
13 actual knowledge, we have put in three
14 letters. Mr. Nariman, you asked, I
15 think, why this Oregon letter and some
16 of the other letters as well are also
17 called "reminders." And the reason
18 why these are called reminders is
19 because, as I just stated, the states
20 expected the recipients to already
21 know the law.

22 In the case of Oregon, in fact,
23 there was no prior letter, but Oregon
24 still called this a reminder because
25 Oregon and every other states expected

1097

1 Grand River Arbitration
2 these participants in the US cigarette
3 market to know laws applicable to the

4 sale of cigarettes in the US. The
5 Oregon letter has been acknowledged by
6 the Claimants to be a trigger for the
7 three-year period.

8 PRESIDENT NARIMAN: That was
9 correctly addressed.

10 MS. GUYMON: I'm sorry.

11 PRESIDENT NARIMAN: That was
12 correctly addressed to the correct
13 address, or is there a dispute?

14 MS. GUYMON: They received it.
15 We pointed out that that letter was
16 sent merely to Grand River on the Six
17 Nations of the Grand River territory,
18 Oshweken, Ontario, with no postal code
19 or number of any kind, and that that
20 was received.

21 PRESIDENT NARIMAN: They
22 dispute it.

23 MR. VIOLI: No, we received
24 that.

25 MS. GUYMON: We received that

1098

1 Grand River Arbitration
2 letter. They had the factory in
3 Oshweken at that time.

4 PRESIDENT NARIMAN: The letter
5 is dated.

6 MS. GUYMON: March 14, 2001.

7 MR. CROOK: Just after the
8 period.

9 PRESIDENT NARIMAN: That's -- I
10 follow. Okay.

11 MS. GUYMON: In the transcript
12 at page 297 --

13 PRESIDENT NARIMAN: But that
14 doesn't give you any advantage.

15 MS. GUYMON: No, this is my
16 point about the Oregon letter. In the
17 transcript at page 297, Mr. Weiler, I
18 believe, explained that Claimants --

19 PRESIDENT NARIMAN: Correct me
20 if I'm wrong.

21 MS. GUYMON: Yes.

22 PRESIDENT NARIMAN: You have --
23 out of this whole bundle of

24 correspondence, you have picked out
25 three letters of direct knowledge.

1099

1 Grand River Arbitration

2 MS. GUYMON: Yes.

3 PRESIDENT NARIMAN: Of two,
4 there is dispute about the address.

5 Correct me if I'm wrong.

6 MR. VIOLI: All three,
7 actually, all three.

8 PRESIDENT NARIMAN: No, no, of
9 two.

10 MS. GUYMON: Claimants dispute
11 the address of all three.

12 PRESIDENT NARIMAN: No, because
13 Oregon comes later. It comes
14 March 14, 2001.

15 MR. VIOLI: That's separate
16 from the three letters.

17 PRESIDENT NARIMAN: That's --

18 MS. GUYMON: Mr. Violi, can I
19 please make my presentation.

20 PRESIDENT NARIMAN: Yes, yes,
21 go ahead. Address us. Don't bother
22 about him.

23 MS. GUYMON: My point about the
24 Oregon letter, and then I will move on
25 to the other three letters.

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1 Grand River Arbitration

2 PRESIDENT NARIMAN: No, no,
3 please take care of my point if you
4 don't mind.

5 MS. GUYMON: Okay. Your point
6 is there were three letters that we
7 point to evidence of direct notice --

8 PRESIDENT NARIMAN: Yes, now,
9 is that -- are any of those three
10 letters -- is the address undisputed,
11 or received undisputed? I thought you
12 mentioned one when you opened.

13 MS. GUYMON: Yes, the letter to
14 Native Tobacco Direct is indisputably
15 sent to an address that was used by
16 Native Tobacco Direct that Claimants
17 have now identified as actually being

18 the home address of Native Tobacco
19 Direct.
20 PRESIDENT NARIMAN: Therefore,
21 thee is no dispute about the address.
22 But they don't admit that they
23 received that.
24 MR. VIOLI: That's correct.
25 PRESIDENT NARIMAN: They don't

1101

1 Grand River Arbitration
2 admit -- let's face it now these three
3 items.
4 MS. MENAKER: Let her --
5 MS. GUYMON: That --
6 PRESIDENT NARIMAN: You said
7 indisputable.
8 MS. GUYMON: That letter was
9 sent -- that letter was sent to a
10 valid address of the company's
11 president. We, therefore, stated that
12 that is -- that is, at least,
13 circumstantial evidence of actual
14 knowledge. That is evidence that the
15 letter went to the company.
16 PRESIDENT NARIMAN: No direct
17 evidence -- please follow this. There
18 is no direct evidence of receipt of
19 any letter prior to the March cut-off
20 date by them.
21 MS. GUYMON: Mr. President, we
22 as the Respondent cannot prove what
23 Claimants knew.
24 PRESIDENT NARIMAN: I'm not
25 saying yes or no -- please -- if you

1102

1 Grand River Arbitration
2 don't mind.
3 MR. CLODFELTER: He's asking,
4 is that direct.
5 MS. GUYMON: Yes.
6 PRESIDENT NARIMAN: I
7 understand all your points. We have
8 gone through this. Don't repeat it.
9 All I want to know is that there is no
10 dispute that, with regard -- they have
11 not -- there is not a single letter

12 which has been addressed by anybody to
13 them to show direct knowledge before
14 March 2001.

15 MS. GUYMON: That's not true.
16 The letter addressed to Native Tobacco
17 Direct that was received at the
18 home --

19 PRESIDENT NARIMAN: They don't
20 admit that.

21 MS. GUYMON: They don't admit
22 it. But we shouldn't have to rely on
23 only what they admit. If we have
24 circumstantial evidence that direct
25 notice was received, that makes the

1103

1 Grand River Arbitration
2 case of knew or should have known.

3 PRESIDENT NARIMAN: All right.
4 All right. That answers my question.
5 Thank you.

6 MS. GUYMON: What I want to
7 point out about the Oregon letter very
8 level is that Complaints acknowledge
9 that they scurried to file in time to
10 prevent that Oregon letter from
11 barring their claims. They saw that
12 as a trigger for a three-year period.
13 There is no mention of Oregon in their
14 statement of claim. And the
15 information in the Oregon letter had
16 been -- had previously been acquired
17 by the Claimants or should have
18 previously been acquired by the
19 Claimants.

20 The Oregon letter identified
21 the statute, pointed them to the
22 citation, briefly stated some of the
23 language. That's precisely what the
24 Iowa and Missouri letters to Grand
25 River did, and the Iowa letter to

1104

1 Grand River Arbitration
2 Native Tobacco Direct did.

3 There was nothing new in that
4 Oregon letter. And directing them to
5 the statute and reminding them that

6 they should have already known of it,
7 shows that they already had that
8 constructive knowledge of the statute
9 that had been enacted in all of the
10 states.

11 PRESIDENT NARIMAN: Absent all
12 the evidence on this point and cross
13 examination, we cannot assume -- let
14 me tell you very frankly -- we cannot
15 assume that what they are saying is
16 false or what you are saying is false.

17 So we have to accept what you
18 are saying is correct or they are
19 saying is correct. If they say, "We
20 haven't received it," they haven't
21 received it, because there is no other
22 evidence on this jurisdictional issue.
23 Nobody has led any oral evidence.
24 There has been no attempt to cross
25 examine anybody.

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1 Grand River Arbitration

2 MS. GUYMON: Mr. President --

3 PRESIDENT NARIMAN: I am making
4 that very plain to you, on direct
5 knowledge. Please follow this point.

6 MR. CROOK: I think,
7 Mr. Chairman, these may be matters on
8 which the panel might --

9 PRESIDENT NARIMAN: No, no, I
10 know -- I know -- I want to put it. I
11 am sorry. I want to put it to you
12 because I would like your response.
13 That's why I'm putting it to you, not
14 the panel will discuss what it wants
15 to discuss. I am putting it to you
16 now on direct knowledge.

17 MS. GUYMON: Right, yes. There
18 has been written testimony by
19 Claimants' president by Mr. Steve
20 Williams that he looked in the
21 company's files; and the earliest
22 letter he found was this March letter
23 from Oregon, March 2001, two days
24 later.

25 PRESIDENT NARIMAN: Which is

1106

1 Grand River Arbitration

2 after.

3 MS. GUYMON: Yes. But we have
4 pointed out through numerous reasons
5 which I will return to and add to
6 today, that that is not a credible
7 claim. We have effectively
8 cross-examined Mr. Williams, and he
9 has not come back and effectively
10 overcome the showing we've made on
11 our --

12 PRESIDENT NARIMAN: Therefore,
13 we have to disbelieve them. We have
14 to disbelieve them without oral
15 evidence.

16 MS. GUYMON: No, no, no --

17 PRESIDENT NARIMAN: Please
18 follow the point.

19 MS. GUYMON: You see, there is
20 also evidence from Mr. Teague, for
21 example. They chose not to examine
22 Mr. Teague on his affidavit. But you
23 have all the evidence before you.

24 Were we to cross examine them,
25 all we would say is, "Did you receive

1107

1 Grand River Arbitration

2 that?" They would say no.

3 PROFESSOR ANAYA: So we would
4 have to disbelieve them.

5 PRESIDENT NARIMAN: That's
6 right.

7 MS. GUYMON: You would have to
8 disbelieve --

9 PRESIDENT NARIMAN: Without
10 oral evidence.

11 MS. GUYMON: Based on all the
12 evidence that we have produced about
13 what was their actual address at a
14 certain time.

15 PROFESSOR ANAYA: We understand
16 that.

17 PRESIDENT NARIMAN: We
18 understand your point. Okay. What
19 else?

20 MS. GUYMON: Mr. Violi
21 downplays that we have only three
22 letters. We would need to have none
23 to be clear. These letters are
24 additional --

25 PRESIDENT NARIMAN: Yes, we
1108

1 Grand River Arbitration
2 follow that. We are only questioning
3 you on these three letters that you
4 mentioned.

5 MS. GUYMON: If you looked --
6 this is actually the TTB application
7 that Mr. Arthur Montour provided
8 consent. The Tribunal, I believe, has
9 copies.

10 PRESIDENT NARIMAN: What is
11 this?

12 MS. GUYMON: This is, if you
13 remember --

14 PRESIDENT NARIMAN: Tab 152.

15 MS. GUYMON: Mr. Crook asked us
16 what the status was of the consent to
17 release of this taxpayer information,
18 and we received that consent. And we
19 sent it and obtained the release of
20 this.

21 MR. VIOLI: I hate to voir
22 dire, but I just want to because it's
23 a composite exhibit. We have
24 something here --

25 MS. GUYMON: Can I explain it
1109

1 Grand River Arbitration
2 and then you will have a chance --

3 MR. VIOLI: No, no --

4 MR. CLODFELTER: Let her
5 explain it. It's our evidence.

6 MR. VIOLI: I just want to know
7 what these are.

8 MR. CLODFELTER: She's trying
9 to tell you.

10 MR. CROOK: Counsel, tell us
11 what this is, please.

12 MS. GUYMON: Yes, I would be
13 very happy to.

14 This is an application for a
15 permit under 26 USC chapter 52 for a
16 manufacturer of tobacco products or
17 proprietor of export warehouse. The
18 application was filed by Mr. Arthur
19 Montour. As you will see on page two,
20 that is his signature as
21 vice president of -- at the time I
22 believe it was Native Wholesale Supply
23 already.

24 The next page, the third
25 page -- it's the June 18, 2002 letter

1110

1 Grand River Arbitration
2 from counsel -- shows that, in
3 addition to this application, there
4 was a personnel question -- a personal
5 questionnaire, a supplement to the
6 application for the manufacturer's
7 permit.

8 Turning to the next page, the
9 first page of the personal
10 questionnaire, there are questions
11 there that we were interesting in
12 knowing the answer to, such as what
13 his citizenship was.

14 The next page shows the
15 information that Mr. Violi referred to
16 briefly earlier this morning, that
17 Mr. Arthur Montour listed some of his
18 positions, that, as of January 2002 to
19 the present, he was chairman of the
20 Seneca Nation; November, 2000, to the
21 present, he was Seneca Nation's
22 counselor; January 2000 to the
23 present, though -- I am unclear which
24 of these is to be amended.

25 MR. VIOLI: The November.

1111

1 Grand River Arbitration
2 MS. GUYMON: The November 2000
3 should also be amended --

4 MR. VIOLI: No, no,
5 January 2000 should be November 2000.

6 PRESIDENT NARIMAN: Where is
7 January 2000? I missed that.

8 MR. VIOLI: The third entry,
9 the third box.

10 PRESIDENT NARIMAN: Where --
11 January 2002 it says --

12 MR. VIOLI: On the top,
13 Mr. President, here. You see where
14 this black -- if you find this.

15 MR. CROOK: The one --

16 PRESIDENT NARIMAN: So
17 January 2000 should not be January --

18 MR. VIOLI: It's November 2000.

19 MS. GUYMON: And that we don't
20 have through any testimony.

21 PRESIDENT NARIMAN: Right.

22 MS. GUYMON: But moving down
23 beyond that, in the box numbered 11,
24 names and addresses for character
25 references, you will see that the

1112

1 Grand River Arbitration
2 third character business reference is
3 Grand River Enterprises, Jerry
4 Montour.

5 PRESIDENT NARIMAN: Yes.

6 MS. GUYMON: Read across that
7 line and see what the business name
8 address is for Grand River
9 Enterprises -- RR2 Oshweken, Ontario,
10 Canada, NOA 1MO.

11 PRESIDENT NARIMAN: What is the
12 date of this, please.

13 MS. GUYMON: 2002.

14 MR. CROOK: 2002.

15 MS. GUYMON: Mr. Williams'
16 affidavit insists that Claimants moved
17 away from this address in March of
18 2000. Yet, Arthur Montour, one of the
19 Claimants, used that address for Grand
20 River Enterprises in 2002. The
21 address for Grand River to which the
22 two letters were addressed --

23 PRESIDENT NARIMAN: So Montour
24 assumed that this was the correct
25 address.

1113

1 Grand River Arbitration

2 MS. GUYMON: Yes, Montour
3 represented to the United States
4 Government that this was the correct
5 address.

6 MR. VIOLI: He didn't represent
7 that it was a correct address.

8 MS. GUYMON: Excuse me.

9 MR. VIOLI: You are misstating
10 the evidence.

11 PRESIDENT NARIMAN: It doesn't
12 matter. Come on. Please carry on.
13 We are not listening to Mr. Violi; we
14 listen to you now.

15 MS. GUYMON: And Arthur Montour
16 should have known the address of the
17 company that manufactured the
18 cigarettes for which he was exclusive
19 importer --

20 PRESIDENT NARIMAN: Yes, we
21 follow your inference. I just want
22 you to know the date of this document
23 which is here. Can you tell us the
24 exact date of this document?

25 MS. GUYMON: It's in the cover

1114

1 Grand River Arbitration
2 letter -- in the cover letter June 18,
3 2002.

4 PRESIDENT NARIMAN: This letter
5 is of June 18, 2002.

6 MS. GUYMON: Yes.

7 PRESIDENT NARIMAN: Whereas
8 according to you their case was that
9 they are shifted on what date?

10 MS. GUYMON: Yes, March 15,
11 2000.

12 PRESIDENT NARIMAN: And
13 threatened to be shot and all that.

14 MS. GUYMON: Yes. As to the
15 three letters, Mr. Violi's argument
16 yesterday can be characterized as
17 nit-picking. He made some points that
18 the letters never indicated the
19 possibility of joining the MSA.

20 Well, there is good reason for
21 that. When Missouri and Iowa sent

22 their letters to Grand River saying,
23 "You need to pay into escrow for your
24 sales in 1999," there was no choice at
25 that point for Grand River to join the

1115

1 Grand River Arbitration
2 MSA as to this past sales.

3 If Grand River had joined the
4 MSA at that point, it would still have
5 had to make payment as an NPM for the
6 sales that had occurred in the past
7 year. There is no reason for the
8 states to indicate to Grand River the
9 possibility of joining the MSA, that
10 choice that is presented in the escrow
11 statutes.

12 Mr. Violi also insisted that
13 the Iowa letter to Native Tobacco
14 Direct, because it threatened to sue
15 Native Tobacco Direct if Native
16 Tobacco Direct didn't identify the
17 true manufacturer, is somehow suspect
18 because Iowa then proceeded not to
19 prosecute Native Tobacco Direct.

20 But as we have shown in our tab
21 45, Iowa actually prosecuted the
22 proper defendant, Grand River
23 Enterprises. All that shows is that,
24 in the interim of over a year, Iowa
25 was able to ascertain that Grand River

1116

1 Grand River Arbitration
2 was the manufacturer, and as
3 Ms. Menaker said, applied the statute
4 clearly as it's written on its face to
5 the correct defendant.

6 The spreadsheet is also
7 attacked by the Claimants as
8 identifying incorrectly that the NPM
9 was Native Tobacco Direct, and that
10 Grand River was an "other." This,
11 again, makes the same point, that the
12 state, as Ms. Menaker said, sometimes
13 didn't know all the facts, and
14 sometimes was not able to ascertain
15 who the manufacturer was.

16 That does not in any way
17 undermine the validity of this -- of
18 these letters. We have already
19 explained some of the other attacks,
20 the misunderstanding about the
21 North Dakota notice, and the
22 attachments to the October 2001
23 letter. And as requested by the
24 Tribunal, we have a complete copy of
25 Iowa's April 4, 2001 letter that

1117

1 Grand River Arbitration
2 included the previous October 2000
3 letter, and attached the 2001 version
4 of the statute.

5 Turning to the enforcement,
6 Claimants have insisted it's when the
7 enforcement happens that the loss and
8 breach actually occur. Well,
9 Claimants actually said yesterday,
10 that when the enforcement authority --
11 I'm sorry. This is what the Chair
12 said --

13 PRESIDENT NARIMAN: This is tab
14 153.

15 MS. GUYMON: Yes, I am sorry.
16 Tab 153 is the April 4, 2001 letter
17 from Iowa.

18 PRESIDENT NARIMAN: This is the
19 one which I requested you to please
20 give us with the annex to.

21 MS. GUYMON: Yes, yes, and I
22 won't take any time to discuss it.

23 PRESIDENT NARIMAN: No, no, no,
24 we followed it. But this has
25 reference to which tab if you don't

1118

1 Grand River Arbitration
2 mind, the earlier tab which had no
3 annex to --

4 MS. GUYMON: Yes.

5 PRESIDENT NARIMAN: -- the same
6 letter April 4th.

7 MS. MENAKER: If we could let
8 you know.

9 MS. GUYMON: I believe it was

10 132.

11 My next slide addresses
12 enforcement, and the admissions that
13 were made yesterday by the Claimants.

14 Claimants, in answer to a
15 question from the Chair, agreed that,
16 when the enforcing authority comes
17 forward and asks you to pay up, at
18 that point of time your liability gets
19 crystallized. Well, that happened
20 here before March of 2001.

21 The enforcement authority in
22 Missouri came and said:

23 "Claimants, you are liable. We
24 are suing you because you have not
25 made your payments."

1119

1 Grand River Arbitration

2 They also got letters from the
3 state saying essentially -- the
4 enforcement authority coming forward
5 and saying, "Pay up or you will be
6 liable, or "Pay up or we will
7 prosecute you."

8 Claimants state that knowledge
9 of loss arose when escrow statutes are
10 enforced. And Mr. Weiler, I believe,
11 in the transcript at page 304,
12 admitted that knowledge could be
13 acquired when the court case was
14 brought. That is exactly what we have
15 here. A court case was brought.

16 Missouri brought its lawsuit in
17 June of 2000 well in advance of the
18 jurisdictional cut-off. We
19 demonstrated several reasons, strong
20 circumstantial evidence that Claimants
21 knew about this lawsuit.

22 Number one among those points
23 was that the president of Grand River
24 himself was quoted in newspaper
25 articles about this lawsuit. This is

1120

1 Grand River Arbitration

2 unassailed evidence. Claimants did
3 not address this at all yesterday in

4 their presentation. They would like
5 you to forget about it, but that
6 article with the quote from the
7 president of Grand River himself --

8 PRESIDENT NARIMAN: Which
9 article, please.

10 MS. GUYMON: This is the Barlow
11 article, the Kate Barlow article.

12 PRESIDENT NARIMAN: The lady
13 who is no longer available and so on.

14 MS. GUYMON: Yes.

15 PRESIDENT NARIMAN: Please
16 proceed. Thank you.

17 MS. GUYMON: At a further point
18 in the transcript, at page 56,
19 Claimants acknowledge that they did
20 become aware of the Missouri
21 proceedings. They entered into and
22 actually participated in what was the
23 third lawsuit, the third petition
24 brought against Grand River for
25 failure to place funds into escrow.

1121

1 Grand River Arbitration

2 So they became aware at least
3 at that later point of the litigation
4 in Missouri and became aware of a
5 default judgment, the default judgment
6 that we provided to the Tribunal -- I
7 believe it was yesterday.

8 That default judgment made a
9 finding that Grand River knowingly
10 violated the statute.

11 PRESIDENT NARIMAN: That is
12 which tab.

13 MS. GUYMON: It's either 147 or
14 148 -- I believe, it's 148.

15 MR. VIOLI: The lawsuit was 48.

16 MS. GUYMON: No, the default
17 judgment that we provided yesterday.

18 MR. CROOK: That you gave us
19 yesterday.

20 PRESIDENT NARIMAN: Knowingly
21 violated, that's your case for the
22 year 1999, if I remember.

23 MS. GUYMON: It was 147.

24 PRESIDENT NARIMAN: Knowingly
25 violated for the year, it says 1999.

1122

1 Grand River Arbitration
2 MS. GUYMON: 1999. Claimants
3 are very energized by the fact they
4 were available to vacate a Wisconsin
5 default judgment. They have made no
6 effort to vacate this Missouri default
7 judgment. It stands -- its findings
8 stand that they were knowingly
9 violating Missouri's escrow statutes
10 in 1999.

11 PRESIDENT NARIMAN: What date
12 is this judgment, if you don't mind?

13 MS. GUYMON: The default
14 judgment is June 10, 2002.

15 PRESIDENT NARIMAN: Thanks.
16 Okay. Thanks. Are you finished?

17 MS. GUYMON: No, Mr. Violi made
18 another argument that because
19 RJ Reynolds didn't know about
20 enforcement proceedings against Grand
21 River, it's unfair to expect them to
22 know. The difference is, it's an
23 enforcement proceeding against Grand
24 River. RJ Reynolds has no duty, no
25 responsibility, no reasonable reason

1123

1 Grand River Arbitration
2 to find out about enforcement against
3 Grand River. It might have. It might
4 have tried to, but certainly the
5 responsibility for Grand River to know
6 about lawsuits against Grand River is
7 much higher than the responsibility of
8 RJ Reynolds. So that comparison is
9 without any value.

10 Lastly, there is no -- or two
11 more points actually on the Missouri
12 lawsuit. There is no denial by the
13 Claimants that Holley John received
14 service of the lawsuit. There is no
15 denial that Holley John told Ross
16 John, her husband.

17 Instead, there is a question

18 from Claimants:
19 "Well, why serve Holley John?
20 Why serve the 14411 Four Mile Level
21 Road Address instead of the 137
22 address?"

23 The reason for that is the
24 process server tried. The process
25 server tried to find someone who would

1124

1 Grand River Arbitration
2 accept service. And the place where
3 he finally found someone who would
4 accept service was Holley John; and he
5 served her. Another place where he
6 found someone who would accept service
7 was the Seneca Nation.

8 And I would just like to recap
9 the points as to why service on the
10 Seneca Nation signifies knowledge on
11 the part of Claimants. In the
12 Claimants' rejoinder at tab A, there
13 are lots of documents attached to the
14 affidavit of Arthur Montour, Junior.
15 And among those is the written --
16 handwritten minute order from the
17 Missouri Court, in which the
18 Seneca Nation agreed -- it was
19 recorded by the court that the
20 Seneca Nation was agreeing to assess
21 Missouri with service on its
22 co-defendants.

23 So Seneca was not hiding the
24 fact that these other defendants were
25 on the reservation and was willing to

1125

1 Grand River Arbitration
2 cooperate with the plaintiff,
3 Missouri's attorney general's office,
4 in serving these co-defendants. In
5 addition, the service on the
6 Seneca Nation, if we look at US tab
7 136 --

8 PRESIDENT NARIMAN: Why is this
9 relevant, service on Seneca Nation?

10 MS. GUYMON: That's what I am
11 explaining.

12 PRESIDENT NARIMAN: No, I mean,
13 in respect of which documents?

14 MS. GUYMON: Service of the
15 Missouri lawsuit.

16 PRESIDENT NARIMAN: On
17 Seneca Nation, that's an admitted
18 position.

19 MR. CROOK: Yes.

20 MS. GUYMON: Yes.

21 PRESIDENT NARIMAN: That's an
22 admitted position by you?

23 MR. VIOLI: The affidavit of
24 service, I will get the affidavit from
25 the president of the Seneca Nation.

1126

1 Grand River Arbitration

2 MR. CROOK: Is it common ground
3 that the parties agree that the
4 Seneca Nation was served?

5 PRESIDENT NARIMAN: That's what
6 I wanted to know.

7 MR. VIOLI: I believe the
8 president of the Seneca Nation was
9 handed a copy of it.

10 MR. CROOK: All right. It's
11 apparently not common ground. Go
12 ahead, Counsel.

13 PRESIDENT NARIMAN: Why don't
14 you say yes? If the president was
15 served, why don't you say yes? Why
16 were you --

17 MR. VIOLI: Because he fought
18 it to get the case dismissed that he
19 wasn't. Okay.

20 PRESIDENT NARIMAN: It doesn't
21 matter.

22 MR. CROOK: Seneca Nation
23 appeared as defendant.

24 MR. VIOLI: They did appear.

25 MS. GUYMON: The Seneca Nation,

1127

1 Grand River Arbitration

2 even though it could have argued it
3 was served improperly, agreed to
4 appear voluntarily.

5 PRESIDENT NARIMAN: In

6 connection with which tab?
7 MS. GUYMON: 136. If you look
8 at the actual certificate of service
9 there, it shows that service was made
10 on Dwayne Ray, President of
11 Seneca Nation, on June 15, 2000.

12 PRESIDENT NARIMAN: Yes.

13 MS. GUYMON: Mr. Violi's
14 argument yesterday was that this is
15 somehow suspect because the defendant
16 identified there is Native Tobacco
17 Direct.

18 Why did the State of Missouri
19 serve the Seneca Nation with a
20 complaint against Native Tobacco
21 Direct? I suggest there's a couple of
22 explanations for that. One is Native
23 Tobacco Direct was the first
24 plaintiff, and often the name of the
25 case is shortened to just gave the

1128

1 Grand River Arbitration
2 name of the first defendant.

3 But even if it was Native
4 Tobacco Direct that was trying to be
5 served with this, there may have been
6 a reason for that; and that is that,
7 as we started to discuss very briefly
8 using our exhibit, new exhibit
9 provided today -- what was the number
10 for the TTB application -- the
11 application -- the tax application
12 that we sent around.

13 MS. MENAKER: It's the tax
14 application.

15 PRESIDENT NARIMAN: Is this
16 your point that, by reason of their --
17 Seneca Nation being served in June 15,
18 2000, which is before the cut-off
19 date, they had knowledge?

20 MS. GUYMON: Yes, precisely.

21 PRESIDENT NARIMAN: How come?

22 MS. GUYMON: Because Arthur
23 Montour, Junior, has identified his
24 past positions and his present
25 positions as of 2002, that from

1129

1 Grand River Arbitration
2 sometime in 2000 to the present he was
3 assistant to the president of the
4 Seneca Nation. And that is who was
5 served here, is the president of the
6 Seneca Nation.

7 MR. VIOLI: Not the same
8 president, though.

9 MS. GUYMON: Arthur Montour,
10 Junior, had the position as the
11 assistant to the president of the
12 Seneca Nation, the president of the
13 Seneca Nation, who was the one who was
14 directly served.

15 PROFESSOR ANAYA: Was he
16 assistant at the time of the -- let
17 her answer.

18 PRESIDENT NARIMAN: Let her
19 answer.

20 MS. GUYMON: According to the
21 information that we obtained from TTB
22 with Arthur Montour's consent, he said
23 that January 2000 to the present, he
24 served as assistant to the president
25 of the Seneca Nation. I mentioned the

1130

1 Grand River Arbitration
2 service on the president of the
3 Seneca Nation was June 15th of 2000.
4 Arthur Montour certified when he
5 signed this document that it was true
6 under penalty of perjury on June 16,
7 2002.

8 PRESIDENT NARIMAN: No, no, but
9 why did he then say that
10 January should be changed to November?

11 MS. GUYMON: Because Arthur
12 Montour told him that yesterday.

13 PRESIDENT NARIMAN: How can we
14 change it just like that, because he
15 told you?

16 MS. GUYMON: I would submit we
17 cannot.

18 PRESIDENT NARIMAN: Of course,
19 not.

20 MS. GUYMON: The document
21 speaks for itself. It's signed and
22 certified.
23 PRESIDENT NARIMAN: Of course,
24 not. If he wants to get it changed,
25 it's at the tax office. Nobody stops

1131

1 Grand River Arbitration
2 him. Okay.

3 MS. GUYMON: That's certainly
4 true. I would like to point out one
5 thing about this document, just for
6 the Tribunal's information.

7 PRESIDENT NARIMAN: Why should
8 we have changed it? Why did you
9 consent to that?

10 MS. MENAKER: We did not
11 consent. We were just asking
12 Mr. Violi.

13 PRESIDENT NARIMAN: But then I
14 changed it. I thought you agreed.

15 MR. VIOLI: We can submit an
16 affidavit.

17 PRESIDENT NARIMAN: No, I don't
18 want any affidavit. Why should we
19 have an affidavit? This is a document
20 you got from the source, which is
21 unimpeachable. You won't have it
22 corrected -- no, no difficulty. That
23 is your problem. We can't entertain
24 applications like this. This is the
25 first we have seen of it,

1132

1 Grand River Arbitration
2 Mr. President.

3 MS. GUYMON: Because I won't
4 have a further opportunity to respond
5 to what Mr. Violi may say after I
6 complete my presentation. I would
7 just like to explain the stamp on the
8 front of it, withdrawn. If you go to
9 the very back, the very last page in
10 the exhibit, there is a letter from
11 Arthur Montour dated December 17,
12 2002, stating that Native Wholesale
13 Supply would like to voluntarily

14 withdraw this application for a
15 manufacturer's permit because they
16 have been informed that they don't
17 really -- they can't really be deemed
18 a manufacturer; and that request for
19 withdrawal was signed and approved.
20 So we should not hear Claimants to say
21 that the withdrawal had anything to
22 do.

23 PRESIDENT NARIMAN: Withdrawal
24 on the first page, we should write see
25 page 20.

1133

1 Grand River Arbitration

2 MS. GUYMON: That would be
3 fine.

4 PRESIDENT NARIMAN: I follow
5 you.

6 MS. GUYMON: Finally, the point
7 we also made briefly yesterday is that
8 in Claimants' own statement of
9 claim -- and I will just refer you
10 back to that paragraph, 49, in the
11 fact section, they suggested that
12 contact with the Seneca Nation would
13 have apprised aboriginal tobacco
14 producers of the MSA. So there is
15 also their suggestion that the
16 Seneca Nation would have been a viable
17 avenue for them to receive
18 information. So they don't contest
19 service on Holley John.

20 (There was a discussion off the
21 record.)

22 MS. GUYMON: We have shown
23 direct evidence of actual knowledge by
24 Claimants of the breach they allege.

25 PRESIDENT NARIMAN: No, no,

1134

1 Grand River Arbitration

2 your point is -- therefore, your point
3 is -- please correct me -- I'm sorry.
4 I thought this was some innocuous
5 thing from January changed to
6 November.

7 In January 2000, it is stated

8 that he was presently assistant --
9 that is, Montour was presently
10 assistant to the president of
11 Seneca Nation. And that is a -- which
12 is documented, and that has so far not
13 been corrected on the official record.

14 MS. GUYMON: Correct.

15 PRESIDENT NARIMAN: That is all
16 that you have.

17 MR. CLODFELTER: That concludes
18 our presentation.

19 PRESIDENT NARIMAN: We can
20 break now.

21 (Whereupon a short break is
22 taken.)

23

24 CLOSING STATEMENT BY MR. WEILER

25

1135

1 Grand River Arbitration

2 MR. WEILER: Thank you. What I
3 am going to do is answer to the best
4 of my ability the questions that the
5 Tribunal asked yesterday, and then
6 Mr. Violi will essentially do most of
7 the reply with regard to some of the
8 evidentiary and factual issues.

9 PRESIDENT NARIMAN: This is a
10 summing up.

11 MR. WEILER: Correct. First,
12 Mr. Nariman, you asked the question of
13 the meaning of the term "incurred." I
14 would give reference to the American
15 Heritage Dictionary of the English
16 Language.

17 The first reference in the
18 American Heritage dictionary is:

19 "Incur, to acquire or come into
20 something, bracket, usually something
21 undesirable, end bracket, sustained
22 incurred substantial losses in the
23 stock market crash."

24 The point is, though, I think
25 one can find -- one can find a

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1 Grand River Arbitration

2 dictionary definition that suits one
3 purpose. That one suited my purpose.
4 Mr. Clodfelter found one that suited
5 his purpose. But what I think would
6 be more useful would to look at the
7 usage of the term "incurred" in
8 international claims jurisprudence.

9 So last night I went to
10 Westlaw. I went to the Appleton dash
11 ISR database, which is a recent -- a
12 new database that has all of the big
13 decisions in it. And I just typed in
14 the word "incur," and hit "send" and
15 70 or so cases come up.

16 The first five, though, the
17 very first five, now, not selected in
18 order, the very first five I just have
19 some quotes from them.

20 EnCana versus Ecuador, quote:
21 "All costs incurred were
22 reimbursed."

23 That's at paragraph 25. At
24 paragraph 127:

25 "Once the company" -- it's

1137

1 Grand River Arbitration
2 actually OCA, but I put, "Once the
3 company was sold, the position
4 changed. No further losses could be
5 incurred by EnCana in that regard."

6 Salini versus Jordan, paragraph
7 102: "Including the expenses incurred
8 by the party."

9 Thunderbird versus Mexico, a
10 third case, paragraph 122 of the
11 separate opinion which was attached to
12 the award:

13 "The relevant expenditures
14 incurred in direct detrimental
15 reliance are therefore quite modest."

16 In the BITTVS case versus
17 Pakistan, case number four, the number
18 of cites, but the one I use is
19 paragraph 119:

20 "Pakistan did not dispute
21 Bayindir's allegation that it has

22 incurred bank commission charges in
23 excess of 11 million US dollars."

24 Finally, the fifth one, Vivendi
25 versus Argentina, paragraphs 123 to

1138

1 Grand River Arbitration

2 125:

3 "The committee ordered
4 Argentina to pay the entirety of the
5 fees and expenses incurred by the
6 committee."

7 So the point is that in all of
8 these cases the usage is very clear.
9 "Incurred" refers to something paid.
10 Speaking of -- and I am just going to
11 keep going right through it, because I
12 know we all want to get out.

13 Speaking of EnCana, the EnCana
14 case which I have copies here, it came
15 up in late, late February. So here
16 are some copies of the EnCana case.
17 You can find it on Investment claims
18 dot com, a hard copy for you. Here
19 are some copies for the Respondent.

20 PRESIDENT NARIMAN: One to
21 Uche.

22 MR. WEILER: I wanted to quote
23 into the record, because I think it's
24 quite useful, a couple of paragraphs
25 from this decision. This panel was

1139

1 Grand River Arbitration
2 chaired by Professor Crawford.

3 I think it sheds a bright light
4 upon exactly how provisions such as
5 NAFTA articles 1116 and 1117 should be
6 construed.

7 Paragraph 163, there are two
8 places in which I will paraphrase --
9 you will see why when you read them.

10 Paragraph 163:

11 "In principle investors state
12 arbitration under a BIT provision" --

13 MR. CROOK: Paragraph 163.

14 PRESIDENT NARIMAN: Thank you.

15 MR. WEILER: "In principle,

16 investors state arbitration under a
17 BIT provision must relate to a measure
18 in breach of the BIT, which has caused
19 loss to the Claimants by the time of
20 the commencement of the arbitration.
21 In terms of the relevant BIT
22 provision, the investor must, state,
23 quote, I'm sorry, state a quote, claim
24 that a measure taken or not taken by
25 the former contracting party is

1140

1 Grand River Arbitration
2 highlighted word in breach of this
3 agreement and that the investor has
4 highlighted word incurred loss or
5 damage by reason of or arising out of
6 the breach," end quote, emphasis added
7 in the original by the Tribunal.

8 "This does not mean that a
9 claim cannot be made for losses
10 incurred after the commencement of the
11 arbitration. Similarly, it does not
12 mean that factual developments
13 subsequent to the commencement of the
14 proceedings are irrelevant or cannot
15 be taken into consideration."

16 "For instance, such events
17 subsequent to the commencement of the
18 claim may relate to a continuing
19 breach and serve to confirm earlier
20 evidence of that breach. Or they may
21 constitute clear evidence of a breach
22 of a BIT, whereas earlier events,
23 which had occurred at the time of the
24 commencement of the claim equivocal
25 and on the borderline of constituting

1141

1 Grand River Arbitration
2 a breach, similarly, subsequent events
3 may affect the quantum of a breach of
4 a claim, which is raised, and can be
5 made out on facts existing at the time
6 of the commencement of the
7 arbitration."

8 Now, in footnote 116 in that
9 case, Professor Crawford mentioned

10 MetalClad, which I also mentioned in
11 our brief. And, again, in the
12 MetalClad case, the ecological decree,
13 the only measure which survived
14 judicial review, to therefore form the
15 basis of the liability in that case,
16 the ecological decree was made after
17 the arbitration commenced.

18 Nonetheless, the chairman --
19 the Tribunal, chaired by Sir Ely
20 Lauderpack [phonetic] found that it
21 may continue. The claim may go
22 forward; and, indeed, he found a
23 breach. I will now continue paragraph
24 164. This is the important paragraph
25 that Professor Crawford, I believe, is

1142

1 Grand River Arbitration
2 trying to teach:
3 "In sum a balance must be
4 struck between on the one hand
5 unreasonably requiring that new
6 proceedings be commenced where the
7 substance of the claim of breach of
8 the BIT may arguably have been made
9 out or very nearly made out, and
10 subsequent events put the question of
11 breach beyond doubt, and on the other
12 allowing what are in essence new
13 claims or new causes of action which
14 in reality have no real relation --
15 have no real relation to the events
16 initially relied upon, to be added
17 onto existing proceedings on the basis
18 of events subsequent to the
19 commencement of proceedings."

20 Now, yesterday, I mentioned a
21 TecMed case. I mentioned the Feldman
22 case. I mentioned the Quiller case,
23 as Mr. Violi, I believe, will note in
24 a moment, the Quiller case directly
25 answered the Chairman's question today

1143

1 Grand River Arbitration
2 as to whether a limitation arises as a
3 result of the breach or as of the date

4 of the loss. And we have that in our
5 materials. Today, I note the EnCana
6 and MetalClad case.

7 PRESIDENT NARIMAN: This
8 article 13 of this BIT which was cited
9 was not a limitation provision; was
10 it?

11 MR. WEILER: It's actually a
12 charging provision.

13 PRESIDENT NARIMAN: Not a
14 limitation.

15 MR. WEILER: 1116.

16 PRESIDENT NARIMAN: Not a
17 limitation provision.

18 MR. WEILER: I would submit --

19 PRESIDENT NARIMAN: I am just
20 asking you, is it a limitation
21 provision like this, that if you don't
22 bring a claim within such and such a
23 time, then you cannot bring it, like
24 that.

25 MR. WEILER: I would confirm

1144

1 Grand River Arbitration

2 before --

3 PRESIDENT NARIMAN: It doesn't
4 look like it.

5 MR. WEILER: I will take a peek
6 and make sure if it does or doesn't.

7 Mr. Violi just wants me to quote
8 Quiller now just to get it out of the
9 way.

10 PRESIDENT NARIMAN: Thank you.

11 MR. WEILER: Tab 22. And it's
12 paragraph 14. I'm sorry 114.

13 MR. VIOLI: Of Quiller, not
14 this case that you are reading now,
15 another case.

16 PRESIDENT NARIMAN: Which
17 refers to this article 13 -- I am just
18 asking you -- is article 13 a
19 limitation provision? That's all.

20 MR. WEILER: In answer to your
21 question, I will consult.

22 PRESIDENT NARIMAN: No problem.

23 MR. WEILER: I have

24 mentioned -- I have mentioned, TecMed,
25 Feldman, and Quiller -- just to

1145

1 Grand River Arbitration
2 confirm, I believe Quiller answers the
3 Chairman's question of earlier today
4 as to whether a limitation period
5 arises out of the result of a breach
6 or as a result of the loss. You asked
7 if there were any cases. This is a
8 European Court of Justice case.

9 PRESIDENT NARIMAN: This is
10 already on record.

11 MR. WEILER: Already on record
12 at tab 22.

13 PRESIDENT NARIMAN: Quiller.

14 MR. WEILER: Quiller, paragraph
15 114:

16 "The limitation period laid
17 down by article 43 of the statute" --
18 that statute is the statute of the
19 court.

20 PRESIDENT NARIMAN: What?

21 MR. VIOLI: 114.

22 PRESIDENT NARIMAN: Thank you.

23 MR. WEILER: "The limitation
24 period laid down by article 43 of the
25 statute of the Court of European

1146

1 Grand River Arbitration
2 Justice cannot begin to run before all
3 of the requirements governing the
4 obligation to make good the damage are
5 satisfied and, in particular, in cases
6 where liability stems from a
7 legislative measure, before the
8 injurious effect of the measures have
9 been produced."

10 PRESIDENT NARIMAN: This
11 Quiller -- is this Jan Paulsson, no?

12 MR. WEILER: No, this is just
13 Quiller, European Court of Justice.

14 PRESIDENT NARIMAN: Okay.

15 MR. WEILER: I will mention
16 though when we get to Mr. Crook's
17 questions, that issue.

18 Today, I note EnCana MetalClad.
19 There is a consistency here in the law
20 as the Mondev Tribunal, chaired again
21 by Professor Crawford, and which
22 included Judge Schwebel, concluded:
23 "International law does not
24 recognize form over substance. A
25 claim should not be dismissed merely

1147

1 Grand River Arbitration
2 because the measures at issue in the
3 claim were somehow modified after the
4 arbitration was commenced."

5 The same result occurred in the
6 Pope and Talbot case, where the
7 Tribunal understood that the claim was
8 in respect of a legislative agenda
9 that might change from year to year.

10 Now, I'll give you Pope and
11 Talbot cases to which I will refer.
12 So the same results occurred, so I
13 would like to read paragraph 24:

14 "Based on any fair reading of
15 the claim, it is patent that the
16 investor was challenging the
17 implementation of the softwood lumber
18 agreement as it affected its rights
19 under chapter 11 of NAFTA, and that
20 the regime changed from year to year
21 as" -- I'm sorry -- "as the regime
22 changed from year to year, those
23 effects might also change. In other
24 words, the claim asked the Tribunal to
25 consider the regime not as a static

1148

1 Grand River Arbitration
2 program, but as it evolved over the
3 years. Canada's counter-memorial
4 followed the very same approach
5 analyzing at some length the various
6 changes in the program over its life."

7 "In addition the -- in
8 addition, the circumstances
9 surrounding the implementation of the
10 super fee are set out in Canada's
11 historical account as another

12 development in the evolution of the
13 program in year four of the
14 agreement."

15 "For these reasons the Tribunal
16 concluded that the investor's
17 contention regarding the super fee are
18 not a new claim, but relate instead to
19 a new element that has recently been
20 grafted onto the overall regime. In
21 this respect, the super fee is akin to
22 the various changes in allocation
23 methodology, use of discretionary
24 quotas and the like, that have marked
25 the regime since its inception."

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1 Grand River Arbitration

2 The interesting thing about
3 this case -- and it's obviously very
4 similar to our present case --
5 softwood lumber agreement, of which
6 this Tribunal is speaking, was an
7 agreement between two states, Canada
8 and the United States.

9 And as I will describe in a
10 moment, Pope and Talbot, the Claimant,
11 did not challenge the agreement
12 itself, but rather the implementation
13 of the agreement.

14 It was understood by the
15 Tribunal that its original challenge
16 years before this grafted change came
17 into effect, the SFB base, that these
18 things would change from time to time.

19 And to be clear I will explain
20 what the SFB was. Luckily, I was also
21 counsel for the Claimants in Pope and
22 Talbot. In Pope and Talbot, there was
23 an agreement between the United States
24 and Canada to restrict softwood lumbar
25 exports from Canada to the

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1 Grand River Arbitration

2 United States. Canada that by way of
3 an export control regime. The export
4 control regime set three levels at
5 which wood could go across the border,

6 free, \$50, and \$100.

7 However, a couple of years
8 later, it was determined that another
9 level was needed for the Province of
10 British Columbia. And that was the
11 \$150 super fee base.

12 The Claimants claimed that the
13 super fee base -- by the way they were
14 unsuccessful ultimately on the
15 merits -- but the super fee base
16 should be included in the claim.

17 Canada said no. It can't
18 possibly be included because the \$150
19 fee base didn't exist when you made
20 your claim. And yet the Tribunal
21 said -- it looked at the picture and
22 said:

23 "Well, you're challenging the
24 implementation of an agreement. You
25 can't challenge the agreement between

1151

1 Grand River Arbitration
2 the two countries because that's not a
3 measure. You can challenge the
4 implementation because it was done by
5 way of measures."

6 PRESIDENT NARIMAN: Yes.

7 MR. WEILER: In that case, the
8 Tribunal was presented with arguments
9 from the United States exercising its
10 right of intervention under article
11 NAFTA 1128, that the NAFTA timing
12 requirements would not be respected if
13 the amendment -- if this amended
14 statute -- if this change, the SFB,
15 was considered by the Tribunal.

16 In dismissing this argument,
17 the Tribunal said at paragraph 26:

18 "Even if the Tribunal were to
19 concur with the United States that
20 article 1122 conditions, consent to
21 arbitration on the satisfaction of
22 each of the procedures set out in
23 articles 1116 to 1122, the Tribunal
24 has concluded in its previous
25 rulings" -- by the way which are

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1 Grand River Arbitration
2 included in our briefs already -- "the
3 Tribunal has concluded in its previous
4 ruling that those requirements have
5 been satisfied. In any case, as
6 rulings by this Tribunal and the Ethyl
7 Tribunal have found, strict adherence
8 to the letter of those NAFTA articles
9 is not necessarily a precondition to
10 arbitrability, but must be analyzed
11 with the context of the objective of
12 the NAFTA in establishing investment
13 dispute arbitrations. That objective
14 found in article 1115 is to provide a
15 mechanism for the settlement of
16 investment disputes that assures due
17 process before an impartial Tribunal.
18 Relating that process, there is a long
19 list of managed court preconditions
20 applicable without consideration of
21 the context would defeat that
22 objective, particularly if employed
23 with Draconian zeal."

24 I will mention very briefly the
25 Ethyl Tribunal. Pope Tribunal

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1 Grand River Arbitration
2 mentions the Ethyl case.
3 It's very simple. It was
4 brought by a former employer of mine.
5 They were concerned about the measure,
6 and they didn't really want the
7 measure to ever come into place. So
8 they launched the notice of intent
9 while the bill was still in second
10 reading.

11 They launched the arbitration
12 before the bill became law. Canada
13 filed what they thought was a very
14 strong jurisdictional challenge
15 saying:

16 "Wait a second. There is no
17 measure at the time you start the
18 arbitration because the bill is not
19 yet law. How can you possibly

20 challenge a measure that does not
21 exist. And you will fail to meet any
22 of the timely requirements in so
23 doing."

24 And the Tribunal in Ethyl said:
25 "No, we are not going to

1154

1 Grand River Arbitration
2 dismiss for these mere technicalities.
3 We are all here now. This is your
4 claim" --

5 PRESIDENT NARIMAN: Where is
6 this timely requirement? I don't find
7 time in paragraph 26. It is on waiver
8 of consent to arbitration.

9 MR. WEILER: It's actually 1121
10 is on waiver. 1126, the point is that
11 it refers to -- the argument is that
12 the consent provision means "I only
13 consent to a certain timing issue."

14 PRESIDENT NARIMAN: That was
15 one point that you raised yesterday.

16 MR. WEILER: So that issue --

17 PRESIDENT NARIMAN: That
18 answered that question.

19 MR. CLODFELTER: I am confused.
20 This goes to our other jurisdictional
21 argument that wasn't bifurcated. It
22 doesn't go to time of knowledge of
23 loss.

24 MR. WEILER: We will let them
25 decide.

1155

1 Grand River Arbitration

2 PRESIDENT NARIMAN: Come on.

3 MR. WEILER: Now, funny, next
4 text here, my friend Mr. Clodfelter
5 says that we constantly changed our
6 claim. He is wrong. He says that the
7 particularized statement of claim
8 which clearly does delineate the
9 individual measures at issue and which
10 implemented the MSA as the focus of
11 the claim is somehow new.

12 He says that we never spoke
13 about each state's measure before the

14 objection to jurisdiction arose.
15 However, he is contradicted by
16 paragraph 61 of the notice of
17 arbitration in this case, which
18 clearly indicates that Claimants'
19 understanding that the actions of,
20 quote, each state were relevant for
21 its claim.

22 Similarly, Ms. Menaker's
23 reading of page 68 to 69 of the
24 particularized statement of claim is
25 untenable. She says that we were

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1 Grand River Arbitration
2 complaining about one alleged measure
3 for purposes of expropriation, the
4 MSA. And, yet, she quotes us
5 correctly as saying that we lost
6 markets, state delineated markets. We
7 did not say that we were losing to
8 "the market," but rather to markets.

9 Mr. Clodfelter's problem is
10 that he does not understand or refuses
11 to understand the difference between a
12 measure and a private deal that
13 contemplated the establishment of
14 measures. The sum total of his
15 argument in his memorials is a
16 footnote that effectively says:

17 "We don't think the definition
18 of measure is relevant."

19 In the Pope and Talbot case,
20 there was an agreement, not
21 challengeable under the NAFTA, that
22 obliged the state to implement its
23 terms by way of legislative and
24 regulatory measures. In this case
25 there is an agreement, not

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1 Grand River Arbitration
2 challengeable under the NAFTA, that
3 obliges the state to implement its
4 terms by way of legislative and
5 regulatory measures. The Pope
6 Tribunal understood that the Claimants
7 were challenging the terms of a deal

8 made by Canada through the only
9 mechanism available to them under
10 chapter 11 by alleging the
11 implementation of that agreement
12 breached the NAFTA.

13 And the operative provision of
14 the Pope statement of claim is here.
15 You already have this, just because
16 it's easier than getting it out again.
17 This is the notice of arbitration in
18 this case. So the obvious provision
19 in the Pope statement of claim, in
20 other words -- just to make sure you
21 have it.

22 PRESIDENT NARIMAN: That's what
23 I wanted.

24 MR. WEILER: The operative
25 provision in the Pope statement, of

1158

1 Grand River Arbitration
2 claim, in other words their paragraph
3 15 from yesterday, states, quote:

4 "As a result of the
5 implementation" --

6 MR. CROOK: Sorry, the number
7 of the paragraph you are reading is?

8 MR. WEILER: It's right at the
9 beginning -- actually, it's on page
10 one. You only have a few pages. It's
11 at page one.

12 MR. CROOK: Sorry.

13 MR. WEILER: So it's their
14 paragraph 15, as we discussed
15 yesterday, the infamous paragraph 15.

16 "As a result of the
17 implementation of Canada's export
18 control regime in a manner that is
19 inconsistent with section A of chapter
20 11, the investor and investment have
21 suffered economic harm to interference
22 with the operations of the company."

23 Now, I'm sorry. That's
24 actually found at page 27.

25 At page one, they say:

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1 Grand River Arbitration

2 "This is a case about the
3 discriminatory application of a quota
4 scheme concerning exports from Canada.
5 The complaint arise from an effect,
6 perhaps accidental, perhaps
7 intentional, of Canada's
8 implementation of the most recent
9 settlement between the US and Canada
10 of their long-running controversy over
11 exports in softwood lumber."

12 At the bottom of that same
13 paragraph:

14 "This claim is not about the
15 legitimacy of the Canada/US softwood
16 lumber agreement per se, but is about
17 the specific and unfair manner in
18 which Canada chose to implement it."

19 So even though the impact of
20 the escrow statutes with the allocable
21 share mechanism removed was not
22 delineated particularly well in the
23 statement of claim, the particularized
24 statement of claim, they were the
25 measures at issue in this case by the

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1 Grand River Arbitration
2 time the arbitration was commenced.
3 And this Tribunal is entitled to hear
4 arguments in respect of them.

5 Finally, Ms. Menaker mentioned
6 today the potential prejudice that
7 would allegedly flow to the Respondent
8 if the Tribunal either considered the
9 allocable share amendments as part of
10 the claim or as amendments to this
11 NAFTA claim.

12 The Pope Tribunal indicated at
13 paragraph 28 of -- again, of its SLA
14 decision -- that it had decided to
15 hear the dispute "in respect of the
16 additional measure as an amendment to
17 the claim" -- I'm sorry -- that, "if
18 it had decided to hear the dispute in
19 respect of the additional measure as
20 an amendment to that claim, any
21 prejudice alleged by the Respondent

22 could have been remedied by an
23 extension of time to submit arguments
24 about it upon the merits."

25 The weight of international law

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1 Grand River Arbitration
2 authority strongly suggests that this
3 Tribunal should entertain arguments in
4 respect of these measures, even
5 though, when the first sign of trouble
6 arose for the Claimants on March 14th,
7 2001, the allocable share mechanisms
8 were still in place.

9 Alternatively, however, should
10 the Tribunal believe that it has no
11 jurisdiction to hear the claim in
12 respect of the allocable share
13 amendments, the Claimants hereby seek
14 leave to amend the claim to add them
15 as separate and distinct measures that
16 did not breach the NAFTA, nor cause
17 loss of damage until they came into
18 force.

19 And there is no surprise or
20 prejudice here. As the Respondent
21 themselves say, they claim there is no
22 additional damage. They claim it's
23 just the same thing. It's the same
24 measure. Well, they can't have it
25 both ways. They can't be prejudiced

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1 Grand River Arbitration
2 if they say it is still part of the
3 same mechanism.

4 MR. CLODFELTER: Isn't this the
5 other jurisdictional argument?

6 MR. WEILER: I'm sorry. I
7 don't recall asking you to speak.

8 United States cannot claim any
9 prejudice in respect of an amendment
10 to the claim as we have not even set a
11 date for the hearing on the merits.
12 The Claimants would be prepared to
13 consent to a suitable period of time
14 for the Respondent to prepare its case
15 as suggested by the Tribunal in the

16 Pope and Talbot case.
17 Finally, with respect to the
18 rolling text cited by Mr. Clodfelter,
19 it's obvious that there must be a
20 difference between breach and loss, if
21 the original text proposed by Canada
22 for the NAFTA only included breach as
23 the triggering event and it was later
24 changed to add as Mr. Clodfelter
25 admitted, loss. There is no

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1 Grand River Arbitration
2 difference, no need for a change.
3 Ms. Menaker says that loss
4 being triggered by enforcement cannot
5 work because the time limitation would
6 be open-ended. The time limitation is
7 indeed open-ended. As the Feldman
8 Tribunal demonstrated, enforcement of
9 a longstanding law can indeed
10 constitute a measure. The breach
11 arises out of the enforcement, not of
12 the law itself.

13 Ms. Menaker neglected to
14 mention that, when she quoted me
15 yesterday, I was speaking in the
16 alternative. I said that, even if the
17 breach could only arise upon enactment
18 of the measure rather than
19 enforcement, loss would not accrue
20 until losses were actually incurred.

21 Now, with respect to
22 Professor Anaya's question, which I
23 understand to have been: Can the
24 claim survive respect of the allocable
25 share amendments?

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1 Grand River Arbitration
2 If the Tribunal finds that the
3 loss took place as of the date of
4 enactment of the escrow -- to each
5 escrow statute, rather than
6 subsequently upon enforcement -- that
7 would be an accurate -- thank you -- I
8 hope that we have just demonstrated to
9 the Tribunal that it would find itself

10 swimming against the stream of
11 international jurisprudence on when
12 loss or damage occurs in respect to a
13 breach if it made such a finding.

14 Nonetheless, in answer to the
15 question, we have also demonstrated
16 that the Tribunal could grant the
17 Claimants' request, submitted in the
18 alternative, that their claim to be
19 amended to include the allocable share
20 amendment as distinct measures which
21 simultaneously breached the NAFTA and
22 caused loss or damage to the Claimants
23 upon their enactment.

24 It also remains to the
25 Tribunal, irrespective of the

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1 Grand River Arbitration
2 allocable share amendments, to
3 disallow the claim in respect of the
4 original escrow statutes, but proceed
5 with the claim in respect of the other
6 measures enacted after March 12, 2001;
7 that is, the contraband laws and the
8 equity assessment law.

9 I should also mention here that
10 today Ms. Guymon mistakenly said that
11 I admitted yesterday that knowledge of
12 loss could be affixed as of the date a
13 court case was brought. I never said
14 any such thing even in the
15 alternative.

16 What I said was, if a court
17 case was launched, loss could be known
18 either when the notice of the case was
19 effected upon the Claimants and they
20 took steps to fight it, or, when
21 judgment was obtained, effectively
22 ex parte, and knowledge of such
23 judgment was acquired by Claimants.

24 And now with respect to
25 Mr. Crook, you asked what -- if I cite

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1 Grand River Arbitration
2 Professor Paulsson. As a matter of
3 fact Professor Paulsson personally

4 provided me with that citation himself
5 in an E-Mail exchange I had with him
6 on February 4th. It's found -- I
7 didn't include it thought because I
8 had no --

9 MR. CROOK: Give me the page
10 number, please.

11 MR. WEILER: 223 to 224 of his
12 new book on Denial of Justice, which
13 contains an observation based upon --
14 it is found at pages 223 to 224 -- I
15 am thinking of my 3:45 flight -- of
16 his new book on Denial of Justice,
17 which contains an observation based
18 upon the principles found in the
19 Chorzow, C-h-o-r-z-o-w, Factory case.

20 PRESIDENT NARIMAN: Everybody
21 cites that.

22 MR. WEILER: It's cited at
23 footnote 11 on page 19 of the
24 rejoinder.

25 And, finally, here I would just

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1 Grand River Arbitration
2 like to remind the Tribunal what the
3 Mondev Tribunal actually had to say to
4 say about losses and the limitation
5 period in the NAFTA. Respondent
6 claims that the results in the Mondev
7 case support its arguments, but it
8 does not.

9 And I would refer to the
10 Tribunal to pages 31 to 32 of our
11 reply, and footnote 30 therein for
12 explanation.

13 Mr. Crook asked if there was a
14 waiver. I don't have the signed
15 waivers, but I did print out copies
16 of -- the other side may actually have
17 the signed waivers. I don't have the
18 signed waivers, but I do have indeed
19 the copies that appear in my hard
20 drive unsigned. I am giving you two
21 separate ones each.

22 (There was a discussion off the
23 record.)

24 MR. WEILER: I am supposed to
25 just remind you that it's tab 21 where

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1 Grand River Arbitration
2 you find Paulsson.

3 PRESIDENT NARIMAN: What is tab
4 21?

5 MR. WEILER: Tab 21 is where
6 Paulsson's --

7 MS. MONTOUR: The article is
8 there as an exhibit, tab 21.

9 PRESIDENT NARIMAN: The Chorzow
10 factory case.

11 MR. WEILER: His discussion of
12 the principles in that case is cited
13 in my reply and found at tab 21, tab
14 21.

15 PRESIDENT NARIMAN: Claimants.

16 MR. WEILER: Of Claimants' book
17 of the authorities.

18 Was there a waiver? Yes, there
19 was a waiver, two of them, governing
20 articles 1116 and 1117, the investment
21 enterprises and the Claimants. And
22 they conform completely with article
23 1121. In so doing they permit the
24 Claimants to seek injunctive relief
25 locally, and they envisage that the

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1 Grand River Arbitration
2 claim could contemplate "any measure
3 that is alleged to be a breach
4 referred to in article 1116."

5 As such, the waiver is
6 forward-looking, contemplating any
7 measure, not just the contraband and
8 equity assessment laws, and the escrow
9 statutes as they read prior to the
10 enactment of the allocable share
11 amendments. The waiver is broad, as
12 it must be, under article 1121.

13 PRESIDENT NARIMAN: Yes.

14 MR. WEILER: Is an amendment --
15 the final question -- I believe --
16 yes, the final question I have from
17 Mr. Crook -- is an amendment to the

18 claim necessary in respect of the
19 allocable share amendments? Yes. Any
20 thoughts on the import of the terms
21 knew or should have known --
22 MR. CROOK: I am assuming,
23 Mr. Weiler, you're saying that you
24 would take the position that an
25 amendment is necessary?

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1 Grand River Arbitration

2 MR. WEILER: No, no. I'm

3 sorry.

4 PRESIDENT NARIMAN: The
5 opposition is that it's already
6 pleaded.

7 MR. WEILER: I am saying
8 alternatively we would seek leave to
9 amend.

10 MR. VIOLI: Sorry, if the
11 Tribunal thought it was.

12 MR. CROOK: You are not saying
13 anything differently what you said
14 previously?

15 MR. WEILER: No.

16 MR. CROOK: Okay. Thank you.

17 PRESIDENT NARIMAN: Your case
18 as I understood it is that you have
19 already pleaded this -- you could have
20 perhaps pleaded it a little better.

21 MR. WEILER: It's in, and if
22 you believe it's not in, we seek leave
23 to amend.

24 PRESIDENT NARIMAN: We believe
25 we will leave it along.

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1 Grand River Arbitration

2 MR. WEILER: Any more thoughts
3 on the import of the terms "knew or
4 should have known." We have -- I have
5 one more comment -- Mr. Violi may have
6 more.

7 I have one more comment with
8 respect to the Respondent's arguments
9 concerning Claimant Arthur Montour,
10 concerning what he knew or should have
11 known about the breaches and losses

12 that affected him. They now say he
13 should have known, and, in fact, he
14 did know.

15 Interestingly enough, though,
16 at page four of the request for
17 bifurcation, the Respondent stated,
18 and I quote:

19 "Arthur Montour alleges
20 ownership interest in US enterprises
21 Native Wholesale Supply and Native
22 Tobacco Direct. The measures
23 challenged by Claimants, however,
24 relate to manufacturers of tobacco
25 products and in some cases

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1 Grand River Arbitration
2 distributors of those products that
3 are state authorized tax stamping
4 agents. Native Wholesale Supply and
5 Native Tobacco Direct are neither
6 manufacturers nor authorized tax
7 stamping agents. Therefore, in
8 accordance with article 1101 sub one
9 these claims are outside the
10 Tribunal's jurisdiction."

11 In other words, as of
12 August 29th, 2005, not even the
13 Respondent appeared to be aware of how
14 the measures at issue related to
15 Mr. Montour's companies. Native
16 Wholesale Supply and Native Tobacco
17 Direct.

18 His companies have been sued
19 under the escrow statutes, and they
20 have been subjected to contraband
21 laws. It is simply not credible for
22 the Respondent to argue in 2005 that
23 the escrow statutes, as one of the
24 measures in this claim, could not
25 apply to Arthur Montour's companies,

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1 Grand River Arbitration
2 while arguing today that he should
3 have known that each did indeed apply
4 to him.

5 Now, I turn the floor over to

6 Mr. Violi.
7 PRESIDENT NARIMAN: Thank you.

8
9 CLOSING STATEMENT BY MR. VIOLI

10
11 MR. VIOLI: I will try to be
12 brief and just try to summarize, I
13 think.

14 The Quiller case, what struck
15 me about the Quiller case was -- and
16 I'm paraphrasing -- a government's --
17 the limitation period of a government
18 cannot begin to run before all of the
19 requirements governing the obligation
20 to make good the damage are satisfied.
21 And in particular, in cases where
22 liability stems from a legislative
23 measure before the injurious effect --
24 the injurious effects of the measure
25 have been produced -- the injurious

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1 Grand River Arbitration
2 effect of the measures at issue were
3 not produced before, with respect to
4 these Claimants, before March 12th,
5 2001.

6 That is our position. That
7 is -- that was the definition I saw as
8 crystallizing or focusing on when this
9 loss or damage occurred.

10 And here we have a definition
11 in international law that says when
12 the injurious effects, not when
13 they -- if they would have said
14 enactment of the legislative measure,
15 the European Court of Justice would
16 have said that.

17 They would have said enactment.
18 They said, no, when the injurious
19 effect. And our position is that this
20 is not a credit card, someone going to
21 a store and paying something with a
22 credit card, something they are
23 buying. This is something where
24 someone engages in some activity.
25 Some other person or entity takes it

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1 Grand River Arbitration
2 somewhere, and then a state in that
3 remote location then goes back to the
4 first manufacturer.

5 When Ms. Menaker buys a suit
6 with her credit card or her dad's
7 credit card, the store does not charge
8 the manufacturer of the suit. It
9 charges Ms. Menaker, so these are just
10 general comments that I had with
11 respect to injury, loss.

12 I do not have the wealth or the
13 depth of knowledge that Mr. Weiler
14 does, but when I see something that
15 says injurious effect, that is how I
16 interpret it. I think it's a
17 reasonable interpretation. And if it
18 was supposed to be legislative
19 enactment, the case would have said
20 legislative enactment.

21 One other sort of general
22 matter is the statute of limitations.
23 Of course, statute of limitations is a
24 technical bar, and it has to be
25 enforced for certainty, and to make

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1 Grand River Arbitration
2 sure that the government doesn't have
3 to litigate stale claims.

4 And I would agree with that
5 wholeheartedly. But the policy -- the
6 idea of stale claims concerns or
7 connotes witness memory, documents,
8 long passage of time. At no time did
9 the MSA states -- in fact, the federal
10 government sued the tobacco companies
11 for sort of the same thing. They
12 lost, but they brought the same type
13 of MSA lawsuit. But the government
14 threw it out.

15 Remember, none of the other
16 cases under the MSA were finally
17 adjudged.

18 But I can -- it's not
19 acceptable that there was never a

20 controversy over the application of
21 these statutes at any point in time
22 when the claim was stale. We brought
23 our own claim in 2002, right, within
24 three years, roughly three years of
25 the MSA itself being negotiated.

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1 Grand River Arbitration
2 Others had brought it before us, and
3 many have brought it since. And we
4 have litigated these issues since.

5 And if documents were
6 destroyed, or memories faded, it
7 wasn't due to some staleness, so I
8 don't think that we will have a
9 situation where there is documents
10 destroyed.

11 We saw a document today,
12 another document that I had never seen
13 from the NAAG. Surely -- and we have
14 seen them that were produced in the
15 Kansas case recently. I don't think
16 that this is really the type of matter
17 as a general principle that falls
18 within what the policy of a statute of
19 limitations is supposed to serve.

20 But I will just get briefly to
21 some points and then a few of the
22 points that they raise.

23 PRESIDENT NARIMAN: One point
24 which I will like you to address very
25 briefly again and mention, because,

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1 Grand River Arbitration
2 suppose that the Tribunal comes to the
3 conclusion they are having with regard
4 to your existing statement of claim,
5 that you first became aware with
6 regard to -- you have pleaded that,
7 with reference to that March, 2001.
8 Now, I asked you this yesterday. I
9 didn't get a reply.

10 This was before the -- any
11 amendment to the escrow statutes in
12 any state.

13 MR. VIOLI: Correct,

14 March 2001.

15 PRESIDENT NARIMAN: Therefore,
16 you realize that you had suffered some
17 loss with respect to the original
18 escrow statutes. I am now making a
19 distinction between the original
20 escrow statutes and the amendment.

21 MR. VIOLI: Suffer or incur,
22 suffer or incur.

23 PRESIDENT NARIMAN: Oh, yes,
24 suffer and incur, whatever it is.

25 MR. VIOLI: Okay.

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1 Grand River Arbitration

2 PRESIDENT NARIMAN: You had
3 suffered. I agree. We will use that
4 expression as tautologous.

5 Now, suppose it is found that,
6 with respect to your claims, whatever
7 those claims are for breaches in
8 respect of the MSA, the escrow
9 statutes are barred. Suppose.

10 Is it possible for you to
11 agitate your claim as a separate item,
12 distinct item, for breaches of the
13 amended statutes, escrow statutes,
14 which amendments came in only after
15 March 2001?

16 MR. VIOLI: Yes. We could
17 under the discrimination principle.
18 That is correct.

19 PRESIDENT NARIMAN: No, I am
20 not on that. Could you on the
21 statement of claim -- I'm not talking
22 about amendments, et cetera -- your
23 existing statement of claim -- in your
24 existing statement of claim, you have
25 taken the position --

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1 Grand River Arbitration

2 MR. VIOLI: Can you sustain --

3 PRESIDENT NARIMAN: You have
4 taken the position that I have made a
5 claim both in respect of -- please, if
6 you don't mind; you can ask him
7 afterward -- you made a claim both in

8 respect to the escrow statutes as well
9 as the amendments to the escrow
10 statutes.

11 That is your substantive claim.
12 You have made that claim already.

13 When dealing with the
14 limitation provision, you have
15 specifically said that it first
16 arose -- first -- emphasis is on
17 first -- in the limitation
18 provision -- in March of 2001 when
19 enforcement was taken, under the
20 escrow statutes.

21 My question was, that
22 enforcement was of the escrow statutes
23 against you where you suffered loss
24 according to you before the amended --
25 amendment to the escrow statutes, any

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1 Grand River Arbitration
2 amendment to the escrow statutes --
3 please listen to it completely before
4 you answer.

5 Therefore, is it possible then
6 to say that, with reference to that
7 first date, the three-year limitation
8 period commenced -- please -- and,
9 therefore, any individual, separate
10 claim that you could make under the
11 amended escrow statutes by reason of
12 that -- what do you call that, clause?

13 MS. GUYMON: Allocable share.

14 PRESIDENT NARIMAN: Allocable
15 share clause, by reason only of that,
16 could still be sustained.

17 MR. VIOLI: Yes.

18 PRESIDENT NARIMAN: Because --
19 because that amendment comes in after
20 March of 2001.

21 MR. VIOLI: Yes, that is
22 correct. The claim -- as you said
23 there are multiple facets to the claim
24 and --

25 PRESIDENT NARIMAN: And your

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1 Grand River Arbitration

2 case is, "I have pleaded entirety."
3 MR. VIOLI: That's right.
4 PRESIDENT NARIMAN: "I don't
5 need to amend. I don't need to amend.
6 As it stands, it doesn't matter."
7 If somebody else says it needs
8 to amend, then you probably can think
9 of an amendment.

10 But your case is:
11 "I have pleaded everything. I
12 have pleaded the escrow statutes, the
13 amendments to the escrow statutes.
14 And I have first had knowledge of this
15 before any amendment to the escrow
16 statutes."

17 That's your claim.
18 MR. VIOLI: First knowledge
19 that there was a potential
20 application.

21 PRESIDENT NARIMAN: Yes, not
22 because it was enforced, according to
23 you.

24 MR. VIOLI: It was -- they sent
25 us a letter saying you may be.

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1 Grand River Arbitration
2 PRESIDENT NARIMAN: I am asking
3 you your plea.

4 MR. VIOLI: We say our first
5 loss or damage May of 2002.

6 PRESIDENT NARIMAN: March,
7 March 2001.

8 MR. VIOLI: No, no, the loss of
9 damage was May of 2002. We first
10 receive a letter -- notice is not
11 knowledge. If someone sends you a
12 letter --

13 PRESIDENT NARIMAN: Read your
14 paragraph 26, if you don't mind. It
15 is how you put it. You haven't
16 amended it so far. It doesn't matter
17 how you put it --

18 MR. VIOLI: Wait.

19 MR. WEILER: How we put it,
20 Mr. Chairman, is we had knowledge of
21 the potential brief.

22 PRESIDENT NARIMAN: No, please
23 read it. Please look at it, not what
24 you say about it. Look at your
25 statement of claim because I am a
1184

1 Grand River Arbitration
2 little worried about this part of the
3 case. Therefore, that's why I am
4 asking you -- even though time is of
5 the essence and all of that.

6 You look at the particularized
7 statement of claim and just see that
8 limitations provision, how you have
9 dealt with it, the statement of claim.

10 MR. WEILER: What page?

11 PRESIDENT NARIMAN: I don't
12 know what page.

13 PROFESSOR ANAYA: It's the
14 particularized claim?

15 PRESIDENT NARIMAN: The
16 particularized claim, not your notice
17 of arbitration. Please look at that.

18 MR. VIOLI: Page 26.

19 PRESIDENT NARIMAN: Paragraph
20 wherever, you have pleaded your
21 limitation provision. There is a
22 specific plea that the claim is not
23 barred.

24 Now, read that if you don't
25 mind about March of 2001.

1185

1 Grand River Arbitration

2 MR. VIOLI: The first time any
3 of the Claimants became aware that any
4 individual state intended to enforce
5 it s MSA laws against them was
6 March 2001. It says 2001, so
7 March 2001.

8 PRESIDENT NARIMAN: Read it
9 completely.

10 MR. VIOLI: When the investors
11 became aware of the institution of an
12 action to enforce these measures
13 against them.

14 PRESIDENT NARIMAN: Right,
15 continue.

16 MR. VIOLI: The first date upon
17 which any of the Claimants suffered
18 loss or damage was in May 2002. So
19 the damage -- we were first notified
20 of some kind of enforcement action by
21 them in March of 2001. We then found
22 out in May of 2002 of the loss. They
23 retained the attorneys and so forth.

24 PRESIDENT NARIMAN: And then
25 read the next paragraph.

1186

1 Grand River Arbitration

2 MR. VIOLI: The investors
3 launched this arbitration on March 12,
4 2004, within three years of
5 March 2001.

6 So we did launch the
7 arbitration within our first notice of
8 some type of enforcement measure, so
9 that -- yes.

10 MR. CROOK: Just for
11 clarification, what paragraph did you
12 just read?

13 MR. VIOLI: 15 and 16, page 25.

14 MR. CROOK: Of the
15 particularized statement of claim.

16 MR. VIOLI: Yes.

17 PRESIDENT NARIMAN: You are
18 making a distinction between the
19 knowledge, what is the first part, the
20 breach?

21 MR. VIOLI: Yes, the first part
22 is the notice. The second part was
23 the loss of damage, correct. The
24 first part was -- the first letter
25 that Grand River received or any of

1187

1 Grand River Arbitration

2 the Claimants received and acknowledge
3 receiving and, in fact, received was
4 March of 2001.

5 That's why the attorneys -- we
6 brought this claim in March of 2004,
7 because we knew we had three years.
8 We knew that -- if we had a letter
9 that was January --

10 PRESIDENT NARIMAN: My problem
11 is only this, that, if we come to the
12 conclusion that the enactment of the
13 statute -- if you don't mind --
14 that -- and not the enforcement,
15 because otherwise you are home; there
16 is no difficulty --

17 MR. VIOLI: Right.

18 PRESIDENT NARIMAN: The
19 enactment of the statute is the
20 relevant date on which you had to
21 comply, that you suffered liabilities,
22 et cetera, et cetera.

23 Suppose we do, suppose we do.
24 The problem I face at the moment is
25 what do I do with the amended escrow

1188

1 Grand River Arbitration
2 statutes, please, if you don't mind,
3 because I can't deny you that claim.
4 I can't say that you can't make that
5 claim at all. If at all, that is
6 covered within your statement of
7 claim. That is a claim that you can
8 make as a distinct separate claim.

9 Therefore, it can't that you
10 are totally shut out from making any
11 claim which is subsequent. Of course,
12 you can make these claims which are
13 subsequent -- according to me. I just
14 want to know what your position is
15 with regard -- if we take the view,
16 ultimately, that the relevant date is
17 the date of enactment -- please.

18 MR. VIOLI: Right.

19 PRESIDENT NARIMAN: Therefore,
20 would it be possible for us to say
21 that your claims which are before the
22 amended escrow statutes are all
23 barred, but your claim with regard to
24 the amendment to the escrow statutes,
25 whatever individual separate claim, is

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1 Grand River Arbitration
2 not barred? Is it possible for us to
3 say that?

4 MR. VIOLI: I would say yes
5 because then -- then you would have to
6 follow the logic. If you're saying
7 the enactment of the law causes a
8 breach and a loss at the same time and
9 triggers the statute of limitation --

10 PRESIDENT NARIMAN: It has to
11 be consistent.

12 MR. VIOLI: With the amendment,
13 when the enactment of the amendment,
14 that starts --

15 MR. WEILER: Which is what
16 EnCana says.

17 PRESIDENT NARIMAN: Which is
18 separate and distinct -- please
19 follow -- if we come to that
20 conclusion, you cannot then plead the
21 MSA caused you loss, caused you
22 damage, because if we come to the
23 conclusion that the escrow statute as
24 enacted caused you loss and damage by
25 virtue of the amendment, whatever loss

1190

1 Grand River Arbitration
2 or damage you have sustained under
3 whichever articles you wish to bring
4 it is, is a permissible claim, because
5 it comes after March 2001. How can
6 you be precluded from challenging a
7 statute which was not there in March
8 of 2001?

9 MR. VIOLI: Yes, precisely.

10 PRESIDENT NARIMAN: I am asking
11 you this.

12 MR. VIOLI: We would agree
13 because, if you say that it's
14 enactment, then it would have to be
15 enactment of the amendment, enactment
16 of the contraband law.

17 PRESIDENT NARIMAN: No, is your
18 position -- because the position of
19 theirs is different -- their position
20 is that you should be totally shut
21 out.

22 MR. VIOLI: Because they are
23 trying to link the amendment to the

24 original.

25 PRESIDENT NARIMAN: Yeah, yes,

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1 Grand River Arbitration

2 yes -- they totally shut out.

3 Is it your position that, if we
4 come to that finding, we are not
5 entitled to say this. We have to
6 permit you to agitate all of your
7 claims.

8 MR. VIOLI: If you come to the
9 finding that the amendment survives?

10 PRESIDENT NARIMAN: No, if we
11 come to the finding that the date, the
12 relevant date is the date of the
13 enactment of the statute, if we come
14 to that finding, at which you suffered
15 loss, et cetera, et cetera, then --
16 but that -- consistently with that
17 finding, the date of the amending
18 statute also constitutes a separate
19 cause of action -- can we separate
20 these causes of action? Or would you
21 say that, "No, no, no, you must permit
22 us to go ahead with the whole thing,"
23 notwithstanding you think that one
24 part is barred.

25 MR. VIOLI: It's our position

1192

1 Grand River Arbitration

2 they are severable.

3 PRESIDENT NARIMAN: That's
4 right. That's right.

5 MR. VIOLI: They are severable,
6 and it causes different, further,
7 additional, separate kind of damage
8 to.

9 PRESIDENT NARIMAN: Whatever it
10 causes, you can take into account the
11 loss or damage that you have suffered
12 from the original statute. I hope you
13 are making that clear.

14 MR. VIOLI: I am saying, if you
15 say that, it would be logically
16 consistent. If you say it's enactment
17 that breach and loss occurs upon

18 enactment, then the only logical thing
19 to say is that breach and loss occurs
20 on enactment of the amendment.

21 PRESIDENT NARIMAN: Because it
22 may be unfair to you to say that you
23 cannot make any claim whatever, even
24 under the amended statute. They
25 choose to amend it at any point in

1193

1 Grand River Arbitration
2 time; you have been barred forever
3 from making any claim on it although
4 it comes subsequent.

5 MR. VIOLI: Mr. President, that
6 would be true even for the contraband
7 law because the contraband law was
8 after March of 2001.

9 PRESIDENT NARIMAN: I agree
10 with you. I agree with you, all
11 subsequent --

12 MR. VIOLI: Right.

13 PRESIDENT NARIMAN: You see,
14 these are all subsequent. They can't
15 be held to be barred by limitation,
16 even if we take the view that they --
17 the date of enactment is the relevant
18 date because the date of the enactment
19 of those laws -- if it is the relevant
20 date, then that is the relevant date.

21 Can we bifurcate the claim, not
22 bifurcate the proceeding, bifurcate
23 the claim.

24 MR. VIOLI: Not anymore.
25 Claimants would -- it's their position

1194

1 Grand River Arbitration
2 that you can bifurcate the case.

3 PRESIDENT NARIMAN: I should
4 have thought so because this is a
5 peculiar situation --

6 MR. VIOLI: That kind of
7 situation --

8 PRESIDENT NARIMAN: -- a
9 peculiar situation. If we -- if we go
10 along with you, that it is only on
11 enforcement, that this is there, and

12 if we accept your position, then, of
13 course, your entire claim is in time.

14 But if we accept their
15 position, that, no, apart from
16 knowledge and so on, that all of
17 that -- all of that you say with
18 regard to the first thing is all
19 totally barred. MSA is also totally
20 barred. Negotiation of the MSA, it is
21 totally barred. Then a separate cause
22 of action can be carved out of the
23 existing statement of claim for which
24 you are entitled to pursue, by further
25 pleadings may be filed, may not be

1195

1 Grand River Arbitration
2 filed, et cetera.

3 MR. VIOLI: If you go with --
4 as I said before, that is not our
5 position that you can bar the first
6 one; but it is our position that they
7 are severable and distinct.

8 PRESIDENT NARIMAN: That's
9 right.

10 MR. VIOLI: So as I said
11 before, I think it's where the
12 effect -- where the injurious -- where
13 we suffer, but you are right.

14 MR. CROOK: With respect, Mr.
15 Chairman, should we let Mr. Violi get
16 on.

17 PRESIDENT NARIMAN: I want to
18 be -- I'm sorry it's delayed, but I
19 have to be clear in my mind at least.

20 MR. CROOK: I think some of
21 these are matters that we as a panel
22 should look at.

23 PRESIDENT NARIMAN: That's
24 okay, but I have first to clear my
25 mind.

1196

1 Grand River Arbitration

2 MR. CLODFELTER: I think we
3 would like to clarify one impression.
4 It's not our position that a
5 subsequent amendment can never be the

6 basis of a separate claim.
7 PRESIDENT NARIMAN: Yes.
8 MR. CLODFELTER: We are saying
9 the nature of the loss associated with
10 this amendment is already incurred.
11 That is the position.
12 PROFESSOR ANAYA: We
13 understand.
14 MR. WEILER: In answer to the
15 Chairman's question with regard to the
16 time limitation and whether or not
17 article 13 of the Ecuador Canada BIT
18 was a time limitation provision, the
19 answer is yes, article 13, sub 3 sub
20 D, has the exact same, not more.
21 PRESIDENT NARIMAN: Yes, but
22 they were dealing with article 13-1,
23 if you remember.
24 MR. WEILER: I think actually
25 they were talking about the entire --
1197

1 Grand River Arbitration
2 PRESIDENT NARIMAN: That's all
3 right. This case is sui generis.
4 This case -- it's all right to say
5 Pope and Talbot and this and that,
6 look at that fellow Mondev said
7 that -- we have to assess the whole
8 situation ourselves, I am afraid,
9 separately.
10 MR. VIOLI: I would like to
11 start with some --
12 PRESIDENT NARIMAN: Because you
13 see, we won't be able to get the --
14 MR. VIOLI: Sorry --
15 PRESIDENT NARIMAN: Sorry,
16 Mr. Crook, but we won't be able to get
17 the assistance of these people
18 anymore. So, of course, we will
19 deliver it, but I want to clear my
20 doubts.
21 MR. VIOLI: You asked
22 yesterday, Mr. President, about some
23 official documents that show
24 addresses. And the Respondent
25 referred to what Mr. Montour's

1198

1 Grand River Arbitration
2 recollection of Grand River's address
3 was three years after the fact of --
4 or the year after the fact on a move,
5 not with respect to his company, but
6 with another company.

7 But we have the official
8 licenses from Canada, showing the
9 addresses at the various points in
10 time. Here, let me pass these to the
11 Tribunal.

12 So I won't go through this in
13 detail. Basically, this will confirm
14 what Mr. Williams was attesting to in
15 his affidavit. We have -- if we go to
16 the second one -- I don't know -- it's
17 out of order -- May 29, 1997, is the
18 RR2 -- that was their original address
19 that was mentioned.

20 If we go to March 17, 2000, we
21 see the 1001 Highway 6, Caledonia; and
22 then in November 2000, we see 2176 --
23 this is not a construct of someone
24 trying to say they are shifting; they
25 are doing something. This is a

1199

1 Grand River Arbitration
2 manufacturing facility that has moved,
3 officially recorded in --

4 PRESIDENT NARIMAN: No, no, but
5 your antedating the November to
6 January orally yesterday --

7 MR. VIOLI: That is
8 Mr. Montour --

9 PRESIDENT NARIMAN: -- has made
10 me a little worried --

11 MR. VIOLI: No, no -- we
12 would --

13 PRESIDENT NARIMAN: -- because
14 this supports -- supports this,
15 because, you see, in November,
16 according to you, therefore, all
17 knowledge before November is to be
18 excluded. That's right. I didn't
19 like that.

20 MR. VIOLI: This is for Grand
21 River.

22 PRESIDENT NARIMAN: I don't
23 like that.

24 MR. VIOLI: No, no, what
25 happened was I asked -- I asked --

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1 Grand River Arbitration

2 PRESIDENT NARIMAN: I am not
3 saying you didn't ask. I am telling
4 you what my feeling is. I believe --

5 MR. VIOLI: The fellow who
6 wrote that document yesterday --

7 PRESIDENT NARIMAN: Okay.

8 MR. VIOLI: -- he was here, and
9 they asked him three days ago to sign
10 a waiver so they can get documents.
11 He was here to speak to those
12 documents. And last night I wanted
13 him to speak to the documents, but
14 they told me that they didn't have a
15 correct signature from him with
16 respect to a date. So they couldn't
17 use them. But Mr. Montour was here,
18 and I don't know -- they knew he was
19 here. He could have spoken to the
20 document --

21 PRESIDENT NARIMAN: Okay.

22 Okay. Okay.

23 MR. VIOLI: But I would like
24 the opportunity -- I would like the
25 opportunity --

1201

1 Grand River Arbitration

2 PRESIDENT NARIMAN: No, no --

3 MR. CROOK: Maybe --

4 MR. VIOLI: -- for Mr. Montour
5 to send a letter --

6 PRESIDENT NARIMAN: No, no, no,
7 nothing -- we conclude --

8 MR. VIOLI: This is the first
9 time we have seen it, Mr. President.
10 How can we not have a chance for a
11 response?

12 PRESIDENT NARIMAN: This is an
13 official record.

14 MR. VIOLI: No, no.
15 PRESIDENT NARIMAN: You get it
16 corrected and send it --
17 MR. VIOLI: Okay.
18 PRESIDENT NARIMAN: I have no
19 objection if this is to be corrected.
20 Then you convince the authorities and
21 have them amend it. I'm not going --
22 get it amended.
23 MR. VIOLI: That's fine. We
24 can do that.
25 PRESIDENT NARIMAN: You do what

1202

1 Grand River Arbitration
2 you like. I am not giving you any --
3 I am only telling you, we go by this
4 document which is there. It's an
5 official document. You want to get
6 the corrected document; you get it
7 corrected, and let the officials
8 correct it or not correct it, if they
9 want to correct it. We can't do it on
10 somebody's recollection, affidavit, or
11 not. We can't take -- sorry. It's
12 not proper.

13 MR. VIOLI: I would like to
14 hand out now -- that was for the
15 manufacturer. This is for the
16 importer. This is the permits --
17 additional permits, these are all
18 subject to confidentiality, not to be
19 disclosed beyond that proceedings.

20 PRESIDENT NARIMAN: Then don't
21 give it to us. No problem. I don't
22 want all of this confidentiality and
23 subject to this. You have to give it
24 to us or don't give it to us --

25 MR. VIOLI: This is a permit --

1203

1 Grand River Arbitration
2 PRESIDENT NARIMAN: Give it to
3 us if you want to. Don't give it to
4 us to if you don't want to. I am not
5 going to tell you --

6 MR. VIOLI: Confidential tax
7 documents that they said was

8 confidential.

9 PRESIDENT NARIMAN: I am not
10 bothered about what is confidential,
11 if somebody goes to see it.

12 MS. MENAKER: We can waive the
13 confidentiality -- if on your tax
14 documents, we don't have a problem
15 with that. It was just we could
16 not --

17 MR. VIOLI: What -- no -- these
18 are -- we are going to maintain the
19 same confidentiality with respect to
20 these documents. They are the similar
21 documents.

22 MR. CROOK: I'm sorry. If you
23 are maintaining those are confidential
24 documents, I don't know that I am
25 authorized to see them.

1204

1 Grand River Arbitration

2 PRESIDENT NARIMAN: That's
3 right. We can' --

4 MR. WEILER: We can waive --

5 MR. VIOLI: We can waive it.

6 Claimants can waive it.

7 MR. CROOK: If you're waiving
8 it, then let's --

9 MR. VIOLI: But only for
10 purposes of this proceeding, that's
11 what we are talking about. These are
12 the documents which you asked about
13 addresses -- remember when 14411 --
14 these documents show that, after
15 the -- with respect to the application
16 for the permit for importing and
17 subsequent to that, the addresses are,
18 as Mr. Montour attested to in his
19 affidavit, the addresses, the
20 locations are consistent with his
21 affidavit.

22 PRESIDENT NARIMAN: Okay.

23 MR. CROOK: I'm sorry. I don't
24 mean to be difficult here. But sort
25 of what are the ground rules under

1205

1 Grand River Arbitration

2 which the commission is to receive
3 these? What are the expectations you
4 have, Mr. Violi?

5 MR. VIOLI: There was a
6 question, Mr. President asked
7 yesterday: Do you have some kind of
8 official document that shows
9 addresses?

10 MR. CROOK: I understand what
11 the documents are. I just want to
12 know what the ground rules are under
13 which you are tendering. What do you
14 expect of us in terms of our use of
15 these documents?

16 PRESIDENT NARIMAN: I don't get
17 into undertaking about confidential.
18 I am not giving you any. You want to
19 tender the document, tender it. If
20 you don't want to tender it, don't
21 tender it. That's all I am telling
22 you. I am making it very clear.

23 MR. CROOK: You said you were
24 tendering it on grounds of
25 confidentiality. I want to know what

1206

1 Grand River Arbitration
2 that means, please.

3 MR. VIOLI: That means beyond
4 these proceedings.

5 PRESIDENT NARIMAN: We don't
6 know about beyond and so on.

7 MR. VIOLI: Just confidential
8 that can be used just for these
9 proceedings.

10 MR. CROOK: Can you refer to
11 them in an award.

12 PRESIDENT NARIMAN: Yeah, that
13 is the problem.

14 MR. VIOLI: If you refer to
15 their documents, the -- well, let me
16 back up.

17 The disclosure, the waiver that
18 Mr. Montour gave for the document that
19 is already handed to you by the
20 Respondent was not a disclosure for
21 purposes of being public. If you

22 issue an aware that mentions those
23 documents, it should be -- that part
24 either redacted or confidential.

25 MS. MENAKER: That's the
1207

1 Grand River Arbitration
2 problem we have -- we are having, is
3 that, when he signed that, he was
4 consenting to disclosure. We are
5 trying to find that paper --

6 MR. VIOLI: He signed it for
7 disclosure of these proceedings, not
8 for the world to see.

9 MS. MENAKER: No, no, it said
10 for the public record.

11 MR. VIOLI: It didn't -- that
12 wasn't what you sent to me, Andrea.

13 MS. MENAKER: No, it was the
14 identical thing -- I am not trying to
15 do anything -- but it's very important
16 to us, obviously, that we get this
17 right which is --

18 MR. VIOLI: Let's move on
19 because I don't have time for this.
20 We can do at the end.

21 MS. MENAKER: I think it's
22 important for our own protection.
23 That's why we took so long --

24 MR. VIOLI: So when you find
25 it, I'm not going to wait for it if

1208

1 Grand River Arbitration
2 you don't mind. I would like to go
3 on.

4 MS. MENAKER: All right. I
5 think the Tribunal needs to know how
6 to handle the document.

7 MR. VIOLI: This is the
8 affidavit from the president of the
9 Seneca Nation, who they tried to serve
10 apparently.

11 PRESIDENT NARIMAN: What does
12 he say?

13 MR. VIOLI: He says that --

14 PRESIDENT NARIMAN: How can we
15 take an affidavit at this stage? Then

16 they have to file another affidavit.

17 MR. VIOLI: But this is in
18 response to what they said this
19 morning.

20 PRESIDENT NARIMAN: But theirs
21 was a response to what you said the
22 day before.

23 MR. VIOLI: No, no, no, no.
24 This has to do with Seneca -- it's
25 something that they filed. And now

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1 Grand River Arbitration
2 they are referring to it. They
3 didn't -- they didn't bring this on in
4 their case-in-chief -- in rebuttal,
5 which isn't really rebuttal, they are
6 saying the Seneca Nation received
7 process. And it wasn't -- it was a
8 company they served called Seneca
9 Nations, Inc.

10 And they came to the office of
11 Seneca Nations, the tribe, and tried
12 to hand the chief of the
13 Seneca Nation, the chief, actually, a
14 summon and complaint. And here is his
15 affidavit with respect to that. And
16 he said to him:

17 "We are not the Seneca Nation
18 of Indians Inc.; there is no such
19 company. This process is invalid."

20 In fact, in Respondent's
21 documents, you will see that -- where
22 is the reference?

23 MR. CROOK: Mr. Violi, to cut
24 to the chase, it is the case, though,
25 that they waived whatever deficiency

1210

1 Grand River Arbitration
2 and appeared. It's not the case they
3 did not appear.

4 MR. VIOLI: No, they didn't.
5 No, they didn't waive it.

6 PRESIDENT NARIMAN: I thought
7 they appeared, the Seneca Nation.

8 MR. VIOLI: They appeared.
9 They didn't waive it.

10 MR. CROOK: All right.
11 MR. VIOLI: Actually, they
12 moved for summary judgment on it, and
13 it's in the record. If you would
14 like, I can get it for you. Someone
15 apparently took my document. So there
16 is a document in their -- in their
17 records which shows the Seneca Nations
18 of Indians Inc. actually came and
19 moved for summary judgment for lack of
20 service of process -- failure to serve
21 process and personal jurisdiction,
22 tribal sovereignty -- among others,
23 about eight of them.

24 MR. CROOK: Right.
25 MR. VIOLI: So they never came

1211

1 Grand River Arbitration
2 in and appeared generally. They came
3 specifically in to object.

4 MR. CROOK: So they entered a
5 limited appearance. They were
6 dismissed from the case. Okay.

7 MR. VIOLI: And they said they
8 were not properly served. And what
9 they are telling us is that, is:

10 "Well, that's -- okay, you
11 know, they came in and they agreed to
12 help with service of process on Native
13 Tobacco Direct, so there is
14 knowledge."

15 And, yesterday, they said,
16 because they were a member the
17 Seneca Nation, they should have known.

18 MR. CLODFELTER: No, we didn't,
19 Lynn. Come on.

20 PRESIDENT NARIMAN: Okay.
21 Carry on.

22 MR. VIOLI: The point is we
23 have this affidavit, and we would like
24 to submit it in the record, which
25 attests to the president at the time

1212

1 Grand River Arbitration
2 Mr. Dwayne Ray, who is not
3 Mr. Schindler --

4 PRESIDENT NARIMAN: Okay.
5 Let's get along now.

6 MR. VIOLI: Submit these in the
7 record in response.

8 The other thing -- the other
9 thing that Claimants -- excuse me --
10 Claimants -- Respondents said --
11 Respondents said was that the
12 Seneca Nation -- the Seneca Nation --
13 they acknowledged that they couldn't
14 serve the Claimants in this case.

15 In the Missouri action,
16 Mr. President, they acknowledged that
17 they couldn't serve --

18 PRESIDENT NARIMAN: Yes.

19 MR. VIOLI: On February 26 --
20 and this appears in Mr. Montour's
21 affidavit, which is in Claimants'
22 rejoinder, attached as Exhibit B, we
23 sese the minutes from the hearing on
24 February 26, 2001, which is two or
25 three weeks before -- three weeks

1213

1 Grand River Arbitration
2 before the statute of limitations
3 Respondent says -- Respondent says
4 expired. It says that the defendants
5 Ross John, Native Tobacco Direct are
6 in New York.

7 PRESIDENT NARIMAN: This
8 affidavit is of May 2001?

9 MR. VIOLI: Yes.

10 PRESIDENT NARIMAN: What is
11 this?

12 MR. VIOLI: The Seneca Nation,
13 the company --

14 PRESIDENT NARIMAN: I am just
15 asking you that this was dated for
16 what proceeding, not for this
17 arbitration.

18 MR. VIOLI: For the proceeding
19 that they mentioned.

20 PRESIDENT NARIMAN: You are
21 taking it there. You had filed this.

22 MR. VIOLI: They --

23 PRESIDENT NARIMAN: I am just

24 asking, where did you file this
25 affidavit.

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1 Grand River Arbitration

2 MR. VIOLI: It was filed in the
3 federal proceeding.

4 PRESIDENT NARIMAN: So the
5 federal proceeding, it's with regard
6 to that that you are tendering this
7 with a copy of what you had filed
8 there.

9 MR. VIOLI: Yes.

10 PRESIDENT NARIMAN: It's not a
11 new affidavit which we have just now
12 got.

13 MR. VIOLI: No, no, no. And
14 the point was that if you look at the
15 exhibits, the exhibit --

16 PRESIDENT NARIMAN: But then
17 what did the Court hold there?

18 MR. VIOLI: They didn't have to
19 hold anything. It was voluntarily
20 dismissed. They let -- the State of
21 Missouri let Native Tobacco Direct,
22 Native American Wholesaler, the
23 Seneca Nation, Ross John, Iroquois
24 Tobacco Direct, Seneca Smoke, let them
25 go, voluntarily dismissed the cases

1215

1 Grand River Arbitration

2 against them.

3 PRESIDENT NARIMAN: So you are
4 really tendering a copy of an
5 affidavit which you had already filed
6 in another proceeding, which has been
7 ultimately dismissed?

8 MR. VIOLI: Correct.

9 PRESIDENT NARIMAN: That's all
10 I am saying -- and you are only
11 showing this in answer to what they
12 are saying.

13 MR. VIOLI: Exactly. They said
14 service on him should have been
15 sufficient foreknowledge for
16 Claimants --

17 PRESIDENT NARIMAN: All right.

18 All right.
19 MR. VIOLI: And the service on
20 him was even defective.
21 PRESIDENT NARIMAN: All right.
22 MR. VIOLI: But the point on
23 February 26th, it says:
24 "Defendant Seneca Nation has
25 agreed to provide information to the

1216

1 Grand River Arbitration
2 plaintiff to assist with the New York
3 service reservation rules on service."
4 It wasn't a matter that they
5 couldn't find them or that the
6 Seneca Nation was going to help them.
7 There was an issue of how you serve
8 process on tribal land. They had not
9 served Native Tobacco Direct or Native
10 American Wholesaler. They had not
11 served them properly. They had not
12 served them at all. They didn't
13 receive process. They went to the
14 court three weeks before our statute
15 of limitation -- statute of limitation
16 date.

17 They admitted -- they admitted
18 that they couldn't serve. And the
19 Seneca Nation said:

20 "We will help with you
21 reservation rules on service."

22 They ultimately served that
23 complaint on April 19, 2001, after the
24 cut-off date. That's when they say
25 they served process. So there was no

1217

1 Grand River Arbitration
2 service of process on the claim -- on
3 the Claimants before the cut-off date.
4 And this is a court record which
5 attests to what transpired at that
6 time.

7 The other thing I wanted to
8 mention was that they said
9 North Carolina -- we said that, in
10 North Carolina and South Carolina, to
11 this day -- and this goes to the

12 ambiguity -- now, the ambiguity --
13 Bob, would you like to argue the
14 constructive knowledge of what this
15 is.

16 MR. LUDDY: Lynn has put out a
17 significant amount of evidence with
18 respect to ambiguity in the statutes.
19 The government argued this morning
20 that we can't claim an ambiguity in
21 the statute while at the same time
22 saying that we weren't aware of the
23 statute's existence.

24 That's not the point, and that
25 wasn't the reason that the evidence

1218

1 Grand River Arbitration
2 was put in to the record. The
3 ambiguity evidence was put into the
4 record to demonstrate the issue of
5 constructive knowledge, that we can't
6 be charged with constructive knowledge
7 of a fact when the attorney general,
8 the SPMs, the OPMs, none of them at
9 the same time could themselves discern
10 what the facts were with respect to
11 the definition of "tobacco
12 manufacturer." And that's the
13 relevance of the ambiguity evidence,
14 not the good faith issue that they
15 argued this morning. And this goes
16 further to that issue.

17 MR. VIOLI: And they mentioned
18 that, well, there was a default
19 judgment entered against Grand River
20 in North Carolina, and so there was a
21 proceeding against Grand River in
22 North Carolina.

23 But North Carolina and
24 South Carolina -- both --
25 South Carolina never took a judgment

1219

1 Grand River Arbitration
2 against Grand River -- but North
3 Carolina and South Carolina today
4 recognize not Grand River, but
5 Tobacoville, the importer. So we

6 have at least two states saying that
7 it's not the manufacturer; it's the
8 importer.

9 And here is the
10 North Carolina -- which I just pulled
11 off the web site -- here is the North
12 Carolina Department of Justice listing
13 of -- I would like to spend just a
14 minute of your time with this.

15 It says: "Annual approved
16 tobacco lists, NPM, by brand, by
17 manufacturer, and banned." We see
18 that. "Banned" would be the
19 contraband law.

20 So if we go by manufacturer, or
21 by brand -- excuse me -- we -- or by
22 manufacturer, we see the next page.
23 The next page -- and it's sort out of
24 order -- see where it says Seneca at
25 the very bottom on the right-hand

1220

1 Grand River Arbitration
2 side. Next to it is Tobaccoville.

3 So here is North Carolina
4 recognizing by manufacturer. The
5 manufacturer is the importer according
6 to North Carolina. And we see it
7 subsequent, too. When you search by
8 brand, you see Seneca. And then you
9 will see the manufacturer next to it
10 is -- it is Tobaccoville.

11 PRESIDENT NARIMAN: Smoking
12 Joe's.

13 MR. VIOLI: So --

14 PRESIDENT NARIMAN: We have a
15 pizza shop outside our house in Delhi
16 called Smoking Joe's.

17 MR. VIOLI: So the point is
18 that maybe -- it may be that the
19 North Carolina attorney general took a
20 default judgment against Grand River,
21 but he's recognizing the importer as
22 the manufacturer, even more absurd
23 than the Arkansas situation.

24 That goes again to the
25 confusion element.

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1 Grand River Arbitration

2 I would like to -- and I am
3 just going to briefly touch upon some
4 of the points that -- regarding what
5 Ms. Guymon said. Then I can close.

6 She mentioned that the RJ
7 Reynolds comparison is of no value,
8 and to know what RJ Reynolds, the
9 industry standard or what have you --
10 but it is relevant because -- the
11 reason why the RJ Reynolds issue is
12 relevant is, because, as Claimants
13 said, they had no knowledge of
14 enforcement prior to March of 2001.

15 In February of 2001 RJ Reynolds
16 had no knowledge of enforcement
17 either. So we can't be assumed to
18 know something based on some kind of
19 general knowledge in the industry.

20 There is a mention that Kate
21 Barlow, the author, was not mentioned.
22 Mr. Williams said clearly what was
23 discussed when Ms. Barlow called and
24 said that there was a lawsuit similar
25 to the MSA style lawsuit, not an

1222

1 Grand River Arbitration

2 escrow statute lawsuit, but an MSA.
3 He responding specifically, and it's
4 in his affidavit. And you can refer
5 to his affidavit.

6 PRESIDENT NARIMAN: Mr. Violi,
7 the mass of documentation that has
8 been produced in this case, I mean,
9 makes it difficult to believe that you
10 people never had any knowledge of
11 anything. You may argue on law. You
12 may say that, no, it's a matter of
13 that, until it is enforced, it is not
14 reliable, et cetera.

15 All that is correct, about
16 these letters, no, you had no
17 knowledge. You shifted -- actual
18 knowledge.

19 But on constructive knowledge

20 of all of this whole thing which is in
21 the public domain, you have to -- you
22 have to stake them. And,
23 particularly, if you were engaged
24 before July 2002, in -- the year 2000,
25 I would have taken it for granted that

1223

1 Grand River Arbitration
2 you would have made such a thorough
3 search that your clients would have
4 known of each and everything.

5 So it's not possible. I don't
6 know whether you are seriously arguing
7 this, can we:

8 "No constructive knowledge of
9 the escrow statutes, no constructive
10 knowledge of the MSA. We never knew
11 this. We never even looked at these.
12 Nobody told us," although you were so
13 badly affected by it.

14 I mean, please, I have to put
15 it to you, because I want a response
16 from you. I mean, it's very
17 difficult. I can understand, yes, on
18 actual knowledge, yes, that
19 evidence -- was not our address, not
20 properly served -- all that, you may
21 be right -- it's perfectly correct.

22 And there is no cross examination of
23 anybody. We have to accept what
24 everybody says.

25 But on constructive knowledge,

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1 Grand River Arbitration
2 when everything is in the public
3 domain, a whole lot of documentation
4 you have produced, they have produced,
5 you have produced, they have produced,
6 and so on.

7 Is it possible to say, when you
8 are in the trade, that you knew
9 nothing about escrow statutes? Nobody
10 ever told you, whispered to you about
11 escrow taxes? Nobody told you of
12 anything before March 2001.

13 This is very difficult. That's

14 what I am asking you. I am putting it
15 to you. Please, therefore, make a
16 response which is acceptable. And we
17 accept you, but not because your
18 clients are behind you. I am not
19 interested in that.

20 MR. VIOLI: I understand. And,
21 remember, March of 2001 is not that
22 far after -- it's not even a year
23 after many -- at least eight escrow
24 statutes were not even passed within a
25 year.

1225

1 Grand River Arbitration

2 PRESIDENT NARIMAN: You want to
3 persist.

4 MR. VIOLI: No, no, I am just
5 saying --

6 PRESIDENT NARIMAN: You are --
7 all right.

8 MR. VIOLI: You are asking for
9 an answer.

10 PRESIDENT NARIMAN: I have put
11 my difficulty. Yes.

12 PROFESSOR ANAYA: Is it your
13 answer that you -- your client may
14 have had knowledge about the MSA, the
15 escrow statutes, their existence, but
16 they didn't have knowledge about the
17 applicability to them? Isn't that
18 correct?

19 MR. VIOLI: That's correct.
20 That's correct.

21 PROFESSOR ANAYA: Because of
22 the ambiguities.

23 MR. VIOLI: That's correct.
24 They had been doing business for
25 10 years in the US market.

1226

1 Grand River Arbitration

2 PROFESSOR ANAYA: But they did
3 know about the statute. They knew
4 about the MSA.

5 MR. VIOLI: I don't know if
6 they knew about the escrow statute,
7 per se. Maybe there was notice that

8 there was an escrow statute, but
9 surely no notice that it applied to
10 them.

11 PROFESSOR ANAYA: Knowledge.

12 PRESIDENT NARIMAN: What is
13 your submission? In spite of all this
14 record -- we take it down as your
15 submission, that, despite all of this
16 record, you are saying that your
17 clients had no constructive knowledge
18 at all about any of the escrow
19 statutes, the MSA, or anything that
20 preceded the MSA? Is that your case?
21 We must know your case.

22 MR. VIOLI: Yes, prior to
23 March 2001, that is correct. They had
24 no knowledge.

25 PRESIDENT NARIMAN: That is
1227

1 Grand River Arbitration
2 your case?

3 MR. VIOLI: Yes, it's only a
4 year within -- at least --

5 PROFESSOR ANAYA: They had no
6 knowledge that the escrow statutes
7 existed.

8 PRESIDENT NARIMAN: No, they
9 had nothing.

10 MR. VIOLI: Knowledge -- we are
11 talking about knowledge of a breach
12 and knowledge of a --

13 PROFESSOR ANAYA: No, no, no.
14 We are asking you whether or
15 not you knew of the escrow statute's
16 existence, simple point.

17 MR. VIOLI: You could probably
18 make a fair inference that there's a
19 fair --

20 PRESIDENT NARIMAN: No, you
21 make --

22 MR. CROOK: Gentlemen, I think
23 the reporter is having some difficulty
24 here. I think we may need to slow
25 down and only have one person speak at
1228

1 Grand River Arbitration

2 a time here.
3 PROFESSOR ANAYA: They're
4 really separate questions.

5 MR. LUDDY: That's what I was
6 trying to help you with, Professor
7 Anaya. I agree with you. They are
8 separate questions whether there is
9 enough in the record to make a finding
10 of constructive --

11 PRESIDENT NARIMAN: No, not
12 finding, not finding -- please,
13 finding is for us, not for you.

14 We only want to know whether,
15 according to you, your submission,
16 there was no constructive knowledge
17 factually, actually, of either the MSA
18 or any of the escrow statutes.

19 MR. LUDDY: No, I think that we
20 acknowledged yesterday that there was
21 knowledge of the existence of the MSA.
22 As to the detail of the existence OF
23 a, quote, escrow statute, I am frankly
24 not sure of that. I -- certainly, it
25 is our position that we did not have

1229

1 Grand River Arbitration
2 actual knowledge that we had suffered
3 any type of loss as a result of any
4 implementing regulation or how they
5 impacted us. And that is fair and
6 clear.

7 (There was a discussion off
8 the record.)

9 MR. VIOLI: I think what --

10 PRESIDENT NARIMAN: Thank you.
11 That's good, very good. You have
12 cleared your position. At least my
13 mind is clear.

14 MR. VIOLI: No, I am just going
15 to move on by saying that, as we have
16 said, the policy of the statute of
17 limitations, the pleading that is at
18 issue, and what Claimants -- what
19 Respondent are raising, which we think
20 for the first time this morning, still
21 does not defeat the knowledge that we

22 had and the loss that we have incurred
23 under any of the measures.

24 And I think you can sever and
25 deem the allocable share if you wish,

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1 Grand River Arbitration
2 because, if it's enactment -- and that
3 is the way we presented it
4 yesterday -- the statement of claim
5 says the escrow statute, which means
6 it's in our current form.

7 But it can be -- as you said,
8 Mr. President -- severed from the rest
9 of the -- from the claims.

10 With that, I think we have
11 completed our case.

12 PRESIDENT NARIMAN: Very kind
13 of you, very kind of this gentleman
14 here who has given his premises today,
15 very good of you.

16 And, particularly, I am very
17 happy to hear and see the reporter
18 here. He is not bound to be here. He
19 you should have been in the AAA where
20 he regularly performs, and it's very
21 kind of him to consent to be here.

22 So thank you, Ladies and
23 Gentlemen, if I have been a little hot
24 tempered, excuse me. That's the way I
25 operate. I have to get my ideas and

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1 Grand River Arbitration
2 my own thoughts clear. Whatever our
3 discussions are going to be, I want to
4 get my thoughts clear.

5 Thank you all very much for
6 your very detailed and very fine
7 summation. I think I speak for all of
8 us on both sides, excellent
9 submission. You have made it a very
10 difficult job for us.

11 (The arbitration concluded at
12 1:17 p.m.)

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CERTIFICATE

5 I, TAB PREWETT, A Registered
6 Professional Reporter, Notary Public and
7 Certified Shorthand Reporter of the State
8 of New Jersey, License No. XI01828, do
9 hereby certify that the foregoing is a true
10 and accurate transcript of the arbitration
11 proceedings as taken stenographically by
12 and before me at the time, place and on the
13 date hereinbefore set forth.

14 I DO FURTHER CERTIFY that I am
15 neither a relative nor employee nor
16 attorney nor counsel of any of the parties
17 to this action, and that I am neither a
18 relative nor employee of such attorney or
19 counsel, and that I am not financially
20 interested in the action.

21
22

23 Notary Public of the State of New Jersey
24 My Commission expires August 30th, 2007
25 Dated: April 10, 2006