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

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

Claimants/Investors,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

CLAIMANTS' REPLY TO RESPONDENT'S
OBJECTION TO JURSDICTION

In accordance with the UNCITRAL Arbitration Rules and the schedule established by the Tribunal on October 26, 2005, Claimants submit the following response to Respondent's objections to the Tribunal's jurisdiction under Articles 1116(2) and 1117(2) of the NAFTA.

I. PRELIMINARY STATEMENT

Respondent's objections to jurisdiction present an unprecedented and untenable application of the NAFTA's limitations provisions. The grounds Respondent proffers for preliminary dismissal are ultimately based on a distorted version of the relevant and controlling facts and a legal theory that abandons the express language of the NAFTA. Respondent's memorial argues in effect that adoption of a measure; its "breach" of the NAFTA; and the incurrence of "loss or damage" as a result of such breach are coterminous events under the NAFTA.

The NAFTA's language could not be more clear: measures; their breach of the NAFTA; and when "loss or damage" is incurred as a result of such breach are all separate and definable concepts, as is the "knowledge" of their occurrence and existence. Thus, proving knowledge or the existence of any one of these concepts or events does not demonstrate existence or knowledge of the others. Indeed, in a remarkable feat of sophistry, Respondent's Memorial proceeds to argue that Claimants' claim is untimely because of certain events that allegedly occurred prior to March 12, 2001, yet it refuses to acknowledge any measure identified in the Particularized Statement of Claim or even a breach of the NAFTA. In short, Respondent never describes which of the events identified in its Memorial constitute or establish both the fact and knowledge of a measure, breach of the NAFTA, and loss or damage resulting from the breach.

The record before the Tribunal demonstrates and highlights the relationship and differences between and among the aforementioned concepts, and the fact that Claimants did not incur any loss or damage or, more importantly, knowledge of such loss or damage arising from the measures at issue, until the MSA States started imposing the Contraband Laws and obtained judgments under their Escrow Statutes banning the sales of Claimants' products – all of which occurred long after March 12, 2001. Although the Escrow Statutes were enacted in 1999 and 2000, even a cursory review of Respondent's "Factual Materials" reflects that <u>*only half*</u> of the MSA States apparently filed suit against Claimants under the Escrow Statutes, and nothing in the record demonstrates that Claimants received notice in any of those lawsuits before March 12, 2001.

In addition, one of the States that subsequently brought suit against Grand River (Oregon) initially advised Grand River that the Escrow Statute applied only to companies selling products to consumers within Oregon, which (of course) excluded Claimants. Oregon's communication

was the first ever received by Claimants regarding the terms and – albeit – general requirements of the Escrow Statutes, and it was received by Grand River *after* March 12, 2001. Significantly, New York (which is the State where most of Claimants' products were initially shipped and sold) has never pursued enforcement of the New York Escrow Statute against Claimants. In light of the foregoing undisputed and affirmed facts, it is patently disingenuous for Respondent, without acknowledging the measures raised in the claim or the alleged breach, to suggest that Claimants knew, or should have known, that the MSA States breached the NAFTA either when they negotiated the MSA or as soon as the Escrow Statutes were enacted, much less that Claimants should have known that they somehow incurred loss or damage by mere dint of the fact that the MSA was negotiated or that the Escrow Statutes were enacted.

Respondent's further attempt to argue that Claimants' knew that they could have joined the MSA with exemptions equivalent to those provided to other companies is similarly illusory. At best it is a "smoke and mirrors" attempt to detract from the material facts before the Tribunal and the nature of the measures at issue. Claimants acquired no knowledge prior to March 12, 2001 (based on formal notice or otherwise) that exemptions were "available" under the MSA to companies that signed that agreement within ninety (90) days of its execution, and it is unprecedented for Respondent to argue that such knowledge could be imputed through vague references contained in newspaper articles or journals that Claimants never read.

More importantly, as the United States Court of Appeals for the Second Circuit observed, banning the sale of products of companies that do not agree to the imposition of costs derived from the MSA or Escrow Statutes is objectionable, with or without an exemption. In this regard, Respondent's Memorial either through intention or oversight avoids the fact that it is not the MSA *per se* that has caused loss or damage to Claimants. The MSA and the favourable

exemptions provided to only certain companies under the MSA had no force or effect on Claimants, until the MSA States enforced the Contraband Laws and obtained judgments purporting to mandate Claimants' compliance with the Escrow Statutes under pain of having Claimants' products banned from sale in an MSA State. The MSA, in and of itself, does not require a tobacco company to join the MSA and experience the discrimination inherent in the MSA States' allotment of exemptions or its "freezing" of market shares at, or near, 1997 or 1998 production levels. It was only when compliance with the *Escrow Statutes* was mandated by the aforementioned Contraband Laws and judgments were obtained against the Claimants that they suffered loss and damage arising from the discrimination in that allotment process and the Escrow Statute's alternative payment scheme. Mandated compliance with the Escrow Statutes – not the MSA – requires that tobacco companies comply with the MSA's terms or, alternatively, make equivalent payments into escrow for the benefit of MSA States..

For the above-stated reasons and those explained more fully below, Respondent's objections to the Tribunal's jurisdiction must be rejected as misplaced, both factually and as a matter of law.

II. REPLY STATEMENT OF FACTS

As alleged in Claimants' Particularized Statement of Claim ("PSOC"), the measures at issue in this Arbitration are as follows: (1) Enforcement of the Escrow Statutes, both as enacted and subsequently amended, in each MSA State; (2) Enforcement of the Contraband Laws enacted in each MSA State; and (3) the new "equity assessment" laws more recently imposed by states such as Michigan and Minnesota.[1] PSOC, at pages 14-17.

[1] At page 50 of its Memorial, the Respondent attempts to litigate the issue of whether a claim in respect of these particular measures can be addressed by this Tribunal by the time the merits of the overall case are heard. The Claimants remain prepared to demonstrate

A. The Escrow Statutes

The terms and operation of the Escrow Statutes are described at pp. 14 - 16 and 18 –-20 of the PSOC. The Escrow Statutes require a "Tobacco Product Manufacturer selling cigarettes to consumers within [an] MSA State" to join the MSA or make equivalent payments into an escrow fund for the benefit of the MSA States, pursuant to statutorily prescribed schedules and formulas set out in the Escrow Statutes and incorporated from the MSA. MSA, Exhibit "T," Sec. "Requirements." Despite Respondent's characterization, enactment of the Escrow Statutes in each of the MSA States did not, in and of itself, have an adverse effect on Claimants. Indeed, initial communications received by Grand River suggested that the Escrow Statutes only applied to "Tobacco Product Manufacturers" (as defined in each statute) who were selling cigarettes to consumers within an MSA State. Affirmation of Steve Williams, ¶¶ 2-3. The acknowledgement by at least two other States that Claimant Grand River is actually not the "Tobacco Product Manufacturer" of the Seneca® brand cigarettes it produces, under the definition provided in their statutes, has also raised issues as to the application of the Escrow Statutes to Claimants in each State. Williams Affirm., at ¶ 19. In addition, the fact that New York (where most of Claimants' products were shipped and sold during the initial years after the MSA's execution) never sought to enforce its Escrow Statute against Claimants made it uncertain which Escrow Statutes would cause Claimants to incur loss or damage to Claimants and how. Williams Affirm., at ¶ 19.

Significantly, Claimants never received any communication from the Attorneys General regarding the requirements and terms of the Escrow Statutes, until after March 12, 2001.

---

how previous NAFTA tribunals have considered such claims in similar situations, when the appropriate time comes.

Williams Affirm., at ¶ 2. Moreover, Claimants were never served with any complaint seeking enforcement of any Escrow Statute until one was allegedly served on April 10, 2001. Williams Affirm., at ¶ 9. These facts alone demonstrate that Claimants did not know, and could not have known, that any of the measures at issue related to them, and accordingly breached the NAFTA, until after March 12, 2001. Even more clearly, they demonstrate that Claimants could not have incurred any loss or damage arising from the enforcement of the Escrow Statutes, or acquired knowledge of such loss or damage, before that date.

Most compelling is the language of the Escrow Statutes themselves, which by their express terms do not, and cannot, cause loss or damage to Claimants unless and until an Attorney General seeks to obtain and enforce a court order that: (1) mandates compliance with an Escrow Statute; (2) imposes penalties; or (3) bans the sale of Claimant's products for alleged non-compliance with any given Escrow Statute. MSA, Exhibit "T," Sec. "Requirements," §(b)(3). Specifically, the Escrow Statutes do not vest executive officials with the authority to make ultimate determinations of non-compliance or take unilateral adverse action against Claimants. Only a court is permitted to make such determinations or authorize such conduct.[2] It is undisputed that no judgment mandating compliance, imposing penalties, or banning Claimants' products under any Escrow Statute was entered against Claimants prior to March 12, 2001.

The record reflects, for example, that it was not until the Claimants received news that a default judgment had apparently been entered barring Claimants' products from commerce

---

[2] *See, e.g.*, *KT&G Corp. v. Pennsylvania*. In that case, a U.S. District Court struck down an attempt by the Pennsylvania Attorney General to determine non-compliance under the Pennsylvania Escrow Statute and his further, unilateral attempt to impose penalties and ban the sale of a manufacturer's products for such alleged non-compliance. Claimants' Submission of Factual Materials, Tab 8.

in Arizona, on or about October 31, 2002, that they even became aware that adverse action under an Escrow Statute had been taken against them by that State. Williams Affirm., at ¶ 5. Upon receiving information about a similar default judgment and injunction that was entered in Wisconsin, Claimants promptly and successfully moved to have the judgment set aside.[3] While the foregoing events describe the first time Claimants acquired knowledge about how an individual measure caused any of them to sustain loss, the first time Grand River received any communication regarding the terms and requirements of the Escrow Statutes occurred when the Oregon Attorney General forwarded a letter to Grand River, dated March 14, 2001. Williams Affirm., ¶ 2. The letter purports to describe the general terms of the Oregon Escrow Statute and its requirements, stating in pertinent part:

> IF YOU ARE SUBJECT TO THESE STATUTORY REQUIREMENTS AS A RESULT OF HAVING SOLD CIGARETTES TO CONSUMERS IN THE STATE OF OREGON … THEN YOU MUST COMPLY WITH THE LAW.

Grand River never sold cigarettes to consumers, much less sold cigarettes directly to consumers in Oregon. *Id.* In contrast to the penalties that the letter references and which could be imposed only by a court, neither the letter itself nor its receipt has ever caused the Claimants to incur any sort of loss or damage.

Significantly, the first time the Claimants sustained any damages in respect of the Escrow Statutes, or had any knowledge of such loss or damage, occurred when they retained Counsel in May 2002. Williams Affirm., at ¶ 4. It was at that time that Claimants became aware of the nature and extent of these measures. *Id.* Grand River agreed, at that time, to retain Counsel to commence an action along with other plaintiffs in July 2002, seeking a declaration

[3] The Wisconsin court vacated the judgment on the basis that the Attorney General had failed to prove that personal jurisdiction over Grand River existed in Wisconsin. Claimants' Submission of Factual Materials, Tab 9.

that the Escrow Statutes were unconstitutional under United States law. *Id.* The first time Claimants actually sustained loss in the marketplace by reason of the Escrow Statutes, or had knowledge of such loss or damage, occurred on or about October 31, 2002, when the Attorney General of the State of Arizona wrote to Turtle Island Enterprises, advising that the State had obtained a default judgment, enjoining the sale of the Claimants' products in Arizona until such time as Grand River satisfied the conditions of the judgment. A second letter to an importer of Claimants' products followed within days. Williams Affirm., at ¶ 5.

B. The Contraband Laws

The Contraband Laws are explained at pp. 16 - 17 of the PSOC. In admission of the fact that the Contraband Laws were all imposed after March 12, 2001, Respondent attempts to downplay the significance of these measures in the context of the breach complained of by Claimants and the loss and damage resulting from said breach. Resp. Mem. at 49. Despite the description contained in Respondent's Memorial, these laws do not merely "reinforce" payment obligations and penalties under the Escrow Laws.

In point of fact, each state's Contraband Law (also referred to as "Complementary Legislation") drastically changes the operation and effect of the original measures, because it imposes an *in rem* embargo against the sale or distribution of the products of any "Tobacco Product Manufacturer" that the Attorney General deems, unilaterally, to be non-compliant with his or her State's Escrow Statute. *See* Claimants' Submission of Factual Materials, Tab 10 (New Mexico Attorney General explaining Contraband Law's penalties). Whereas under the Escrow Statutes only a court order could ban a tobacco company's products from being sold, the Contraband Laws purport to confer that power to ban upon the Attorney General in his sole discretion. Under these more recent measures, the Attorneys General are required to create a list

of tobacco manufacturers that the Attorneys General, alone, deem to be compliant with the Escrow Statutes. *Id.; see also* Claimants' Submission of Factual Materials, Tab 11 (South Dakota forms and requirements for compliance with Contraband Law). Products of a manufacturer that are not on the "approved list" are deemed contraband and prohibited from sale in the State. Companies distributing products of a manufacturer that is not on the "approved list" also face substantial civil (and in some cases, criminal) penalties, as well as seizure of the allegedly contraband product. *See, e.g.*, 22 M.R.S.A. § 1580-L (Maine Contraband Law), Claimants' Submission of Factual Materials, Tab 7.

Thus, in contrast to the Escrow Statutes, the Contraband Laws had a more immediate adverse impact upon Claimants' business, none of which, however, was experienced before March 12, 2001.

C. The Alleged Enforcement of Missouri's Escrow Statute

Of the dozens of court filings and judgments cited in Respondent's Memorial and appendices, there is only one upon which Respondent purports to rely to demonstrate its claim that the Claimants were aware of the enforcement of an Escrow Statute against them before March 12, 2001. That supposed instance involves the alleged enforcement of the Escrow Statute of the State of Missouri against Grand River. The sum total of Respondent's evidentiary showing in this regard is: (1) a copy of a letter from Claimant Arthur Montour, Jr. to the Missouri Department of Revenue that makes no mention whatsoever of its Escrow Statute;[4] (2) a copy of a letter incorrectly addressed to Grand River from the Missouri Department of Revenue,

[4] At Tab 15 of the Respondent's Appendix II. On its face, it is obvious that the letter concerns a general taxation issue.

with no proof of delivery;[5] (3) the transcript of a newspaper article that attributes certain statements to Mr. Williams regarding a lawsuit filed by the Missouri Attorney General;[6] and (4) the copy of a court petition against a number of companies under Missouri's Escrow Statute, including Grand River.[7]

Respondent does not, and cannot, dispute that the aforementioned Missouri action was not served on Grand River, if at all, until no earlier than April 10, 2001. Williams Affirm., Exhibit D. Respondent, nonetheless, appears to place great reliance on a newspaper article written by a Ms. Kate Barlow, dated 31 July 2000, as proving Grand River's knowledge, at that time, of the Missouri action (and, apparently, its constituting knowledge of the more than one hundred measures at issue in this Arbitration). The article stated that Grand River "is named in [the] lawsuit … as a supplier of cigarettes to Ross L. John …. John, a member of the Seneca nation, is being sued by the State of Missouri." The Article then apparently proceeds with one or two quips of Mr. Williams' alleged comments made over the telephone.

A close review of the Article and the affirmed statements of Mr. Williams demonstrates the folly to Respondent's position and reliance on that Article as defeating the Tribunal's jurisdiction over this Arbitration. At no time did Ms. Barlow say to Mr. Williams that Grand River was being sued by the State of Missouri. Williams Affirm., ¶ 7. She only told him that Grand River had been named in the lawsuit as being John's supplier. *Id.* Indeed, Grand River has no record of ever having received service in respect of that action. *Id.*

---

[5] At Tab 16 of Respondent's Appendix II. On or about January 1, 2000, Grand River ceased doing business at the address listed on the correspondence. Williams Affirm.,¶ 17.

[6] At Tab 112 of the Respondent's Appendix IV, with a condensed version found at Tab 111.

[7] At Tab 48 of the Respondent's Appendix III.

Respondent also misrepresents that the article states, "Grand River had instructed its lawyers as to grounds for its defence." Mr. Williams said no such thing, and there is no evidence in the Missouri court's files or in Claimants' records that could corroborate such an allegation. Mr. Williams made clear that he was commenting on a lawsuit that he had never seen, but, as a former First Nations Chief, he expected that, if such a lawsuit were brought, lawyers would challenge it on the long-established principles of First Nations sovereignty. Williams Affirm., ¶ 12. In short, neither Williams nor Grand River ever retained or instructed any lawyer regarding any grounds for defence in that action. *Id.*

The Missouri court files confirm that the Missouri Attorney General apparently also sued Grand River in that action and, for some unknown reason, voluntarily dismissed his claims against all defendants except Grand River and obtained a default judgment against Grand River on June 10, 2002. Williams Affirm., ¶ 13. In fact, the first time that Grand River had knowledge of incurring any loss or damage in Missouri occurred on or about December 31, 2002, when the Missouri Attorney General sent notices to Missouri distributors that products produced by Grand River were deemed contraband under Missouri's then recently-enacted Contraband Law. Significantly, to this day it is not clear whether the Missouri Attorney General even attempted to enforce the injunction he apparently obtained on June 10, 2002, or a second default judgment he apparently obtained on July 26, 2002, in an action that he filed on December 4, 2001.

In addition to the foregoing, several other facts tend to disprove that the Missouri Attorney General's actions imparted on Claimants knowledge that they incurred loss or damage by reason of the MSA States' measures prior to March 12, 2001. For example, on January 17 January 2003, in federal court in New York, counsel for the Missouri Attorney General and other

States filed a sworn pleading, providing a list of lawsuits that had been filed and were pending against Grand River as of July 1, 2002. . Williams Affirm., Exhibit F.   Absent from the list are the aforementioned Missouri cases, and a recent search of Missouri court files indicate that the second lawsuit was allegedly served on Grand River on March 15, 2002. Williams Affirm., Exhibit E. Accordingly, not only did the Claimants not have knowledge of the aforementioned Missouri actions, which resulted in default judgments against Grand River, these actions were not even brought to Grand River's attention in pleadings filed by the State Attorneys General in January 2003, that purported to identify the actions to which Grand River had been subjected to as of July 1, 2002. Claimants' Submission of Factual Materials, Tab 13.

Although Respondent questions the likelihood that Claimants lacked knowledge of the Missouri Attorney General's enforcement actions, the Attorney General's lack of forthrightness and full candour in the conduct of his dealings with Grand River and in the Missouri actions mentioned above tend to suggest that Respondent's reliance upon that State Official's actions is misplaced. The court files in the two Missouri Actions reflect that the Missouri Attorney General represented to the court, in both actions, that it should find that Grand River knowingly violated the Missouri Escrow Statute, because *inter alia*: "On or about July 8, 1999, John Quinlan, compliance Officer [for] the North Dakota Department of Revenue sent letters to a large number of NPMs, including [ ] Grand River, informing the NPM's of their obligations and attaching a list of states with similar statutes (including Missouri)." Claimants' Submission of Factual Materials, Tab 12, at ¶ 14; Respondent's Appendix III, Tab 48, at ¶ 33.

Grand River did not receive the July 8th letter. Williams Affirm., ¶ 16. More importantly, Respondent's submission corroborates this fact. Volume II of Respondent's Factual Materials, at Tab 14, contains a copy of the July 8th letter sent by Mr. Quinlan and the list of its

addressees. Grand River is not listed as an addressee for that letter. Not unlike Respondent's attempts in the instant Arbitration, the Missouri Attorney General's bootstrapping attempt to impute knowledge of the Escrow Statutes and their enforcement to Grand River was cavalier and in complete disregard of Grand River's rights.

D. The Allocable Share Amendments

On pp. 12 - 13 of its Memorial, Respondent correctly notes that the Claimants were able to mitigate, to some extent, the damage they began to incur as the MSA States started to pass Contraband Laws and obtain injunctions against the sale of their products. Grand River entered into some "standstill" agreements with several MSA States without prejudice to Grand River's rights under the NAFTA, which required Grand River to make payments under the Escrow Statutes and permitted the sale of Claimants' products in those States. In large part, Grand River was able to implement these mitigation efforts by limiting the number of States that Claimants' products would be sold and obtaining "allocable share releases" in those States where the products continued to be sold.

As originally drafted, the Escrow Statutes provided that a Tobacco Product Manufacturer could obtain immediate release of the funds deposited into escrow for a given State, to the extent the deposits exceeded the State's "allocable share" of the payments the manufacturer would have made had it alternatively joined the MSA. MSA, Exhibit "T," Sec. Requirements, §(b)(2). For example, California's allocable share under the MSA is 12.45%, which means California receives 12.45% of each manufacturer's payment under the MSA, and the balance of those payments are distributed to the remaining MSA States. Since Grand River has not joined the MSA, if it sold all of its products in California and made deposits into escrow for California's benefit, it would be entitled, under the Escrow Statute's allocable share release

provisions, to an immediate release of all but 12.45% of the funds deposited. As stated above and explained in the PSOC, by limiting the number of States in which Claimants' products were sold, Grand River was able to lower the effective per-carton escrow payments to a level that allowed it to compete, to a limited extent, with the manufacturers that received multi-million dollar payment exemptions under the MSA. While not optimal, this allowed Claimants to survive in several U.S. States through 2005, provided the aggregate allocable shares of each state in which Claimants' products were sold did not exceed certain limits.

Respondent fails to mention that the States came to view the allocable share release provisions as a "loophole" in their regulatory scheme and accordingly began to amend their Escrow Statutes by repealing those provisions in 2003. Claimants' Submission of Factual Materials, Tabs 4 - 6. Currently, 44 of the 46 MSA States no longer permit allocable share releases. *Id.* Claimants' products are not currently sold in the remaining two States that continue to permit such releases (Washington and Missouri). As the PSOC explains, without the releases, Claimants' ability to compete against manufacturers that have joined the MSA with an exemption is now foreclosed altogether, even in the few States that Claimants managed to become "escrow compliant" prior to 2005. Thus, with the closing of the alleged loopholes, each State has caused new and deeper harm to the Claimants.

E. Factual Errors Contained in Respondent's Memorial

For purposes of a hearing on jurisdiction, Claimants' allegations with respect to the measures at issue must be assumed to be true. Notwithstanding that protocol, Respondent has obfuscated the nature and application of the measures in a veiled attempt to litigate the merits of the case prior to a full evidentiary hearing on the merits. Without waiving objection to

Respondent's course, provided below is a brief response to Respondent's submissions in that regard.

Respondent states: "neither Grand River, nor Jerry Montour, nor Kenneth Hill purports to own or control any enterprise located in the United States." Resp. Mem at 4. On the contrary, the Claimants have alleged, at paragraphs 6 to 10, 12 to 15, 19, 23 and 27 of the PSOC, that they have been engaged in the tobacco business at all relevant times in the United States and the Free Trade Area since the mid-1990's, as Investors and in forms of activity that fall under the definition of "investment enterprise" as defined under the NAFTA. This would be a merits issue, however, that is not relevant for the preliminary hearing.

Respondent also attempts to suggest that Claimants' business ventures prior to the negotiation and implementation of the MSA are not relevant to this dispute. Resp. Mem. at 5. These activities are indeed relevant as a demonstration of the nature of the relationship between the Claimants as co-venturers in businesses in the United States at all relevant times and the substantial, increasing investment they have made in the U.S. market over the years prior to the MSA. This fact is also relevant to the MSA States' arbitrary decision to provide exemptions under the MSA based on U.S. federal excise taxes paid by manufacturers in 1997 and 1998. In any event, this would be a merits issue that is not relevant for the preliminary hearing.

Respondent next attempts to ascribe a different meaning to the text of the PSOC, by suggesting that it was "only after" Claimant Jerry Montour's experience in Omaha that the Claimants established their tobacco business on the Six Nations territory where, today, Grand River's manufacturing facility is located. Resp. Mem. at 5. The erroneous implication is that the Claimants were not already established in the tobacco business in the United States before that time. Similarly, despite Respondent's reference and rephrasing, (Resp. Mem. at n. 23), the

PSOC does not say that Grand River began production in 1999; the PSOC states that Claimants began to produce their products *exclusively* at Grand River's facility in Canada in that year.

Respondent maintains that "it would not have been possible" to conclude the MSA without its terms having addressed "the role of all tobacco manufacturers that sold, or intended to sell, cigarettes in the United States." Resp. Mem. at 8-9. Four States, however, entered into separate, individual settlements with the major tobacco companies, and none of those settlements contemplated or included measures applicable to "all" tobacco manufacturers. In addition, Respondent claims that the MSA presented enterprises such as the Claimants with a compliance choice of joining the MSA or making escrow payments. *Id.* This assertion is patently false. The MSA presented the Claimants with no choices. It was the measures subsequently enacted and enforced by the MSA States that required Claimants to subject themselves to MSA obligations or to make equivalent payments into escrow. Moreover, in contrast to Respondent's characterization, Claimants were never provided with an "open, public and knowable" invitation to "join" the MSA before the 90-day exemption deadline expired. Resp. Mem. at 9-10. Actually, the Claimants have since learned that the offer was originally open for 60 days, and then subsequently extended to 90 days in order to accommodate those companies that lawyers working with the National Association of States Attorneys General ("NAAG") privately solicited to enter the bargain.

Respondent fails to acknowledge the reality of how the enterprises that signed on to the MSA did so and obtained favourable treatment. Immediately after its conclusion, lawyers who had been working with the NAAG in drafting the MSA, such as Joseph Rice, were apparently sent out to personally brief and invite select companies to join the deal on favourable terms. Claimants' Submission of Factual Materials, Tab 1. Neither Mr. Rice nor any of his

associates were apparently interested in paying such a visit to any of the Claimants, or even doing as much as placing a phone call to them. Moreover, many of the foreign enterprises that subsequently joined, such as Japan Tobacco or Imperial Tobacco, were in fact corporate affiliates of the original parties to the MSA.

The Respondent also fails to state exactly when the full text of the MSA actually appeared on the NAAG web site, or when its amendments appeared. Respondent makes note of two subscription-based services upon which the text was apparently available, neither of which were subscribed to by any of the Claimants. Violi Affirm., ¶ 3. Other subsequent press articles are mentioned by the Respondent, none of which the Claimants did, or would have necessarily, read. More importantly, however, it strains credulity to suggest that a Claimants' NAFTA rights could somehow be dictated by whether it has read a passing reference in a media report as to the complicated terms of the MSA and its planned implementation, particularly given that other competing enterprises were treated to special visits and invitations by lawyers working for the MSA States themselves.

Respondent also resorts to the myth sold by the NAAG and its lawyers for years that the purpose of each State's Escrow Statute was to ensure funds would be available to satisfy a judgment for medical costs associated with tobacco-related illness. The problem with this myth is that there has never been a court judgment against any tobacco producer in the United States based upon such theory. The theory upon which the States were moving against the major tobacco companies involved allegations of fraudulent practices involving tobacco and addiction; not merely the recovery of health care costs. Again, this is an issue for a merits hearing, rather than this preliminary hearing on jurisdiction.

Respondent suggests that letters supposedly sent to Star Tobacco or to the Omaha Nation would have been sufficient to notify the Claimants that there existed measures which related to them; breached the NAFTA; and caused them loss or damage. Resp. Mem., at 19-20, 44-46. These facts are irrelevant because Claimants did not have any business relationship with either of those parties by the dates upon which those letters were purportedly sent. PSOC at ¶ 22.

In sum, the foregoing demonstrates a pattern of Respondent attempting to impute to Claimants knowledge of *something* before March 12, 2001. Respondent's attempts, however, do not demonstrate Claimants' knowledge of any of the measures at issue having breached the NAFTA in respect to them or their investments, or knowledge that any of them had incurred loss or damage by reason of such breach prior to that date. At the end of the day, unsubstantiated allegations do not become more believable merely because they are earnestly repeated.

ARGUMENT

POINT I

APPLICABLE STANDARDS

The Respondent maintains that it did not consent to this arbitration, under NAFTA Article 1122(1), because the claimants have failed to comply with the conditions set out in Articles 1116(2) and 1117(2).

NAFTA Article 1122(1) provides that the NAFTA Parties consent to claims submitted to arbitration "in accordance with the procedures set out in [the NAFTA]." This provision applies to the satisfaction of fundamental jurisdictional issues. It does not entitle a Party to avoid the

arbitration of an otherwise meritorious claim because of mere technical defects in the submission of a claim to arbitration.[8]

A. The Interpretation and Adjudication of Jurisdictional Provisions

At pp. 25 - 28 of the PSOC, Claimants set out the appropriate standards for interpreting the NAFTA's terms. Respondent does not dispute these points in its Memorial. NAFTA provisions are supposed to be interpreted in good faith in accordance with the ordinary meaning to be given to their terms, in context and in light of the object and purpose of the treaty.[9]

It is also established in NAFTA arbitral practice that preliminary questions heard under Article 22 of the UNCITRAL Rules are generally to be decided on the basis that the facts alleged by the claimant are assumed to be have been proved.[10] The Respondent makes numerous allegations that go beyond the facts to be assumed from the PSOC. As the moving party on this preliminary question, the Respondent accordingly bears the burden of proof to establish any alleged facts that are not contained within the PSOC. As a majority of the *Feldman* Tribunal noted, in citing the following passage from a report of the WTO Appellate Body:

---

[8] *Mondev International Ltd.* v. *United States of America*, ICSID Case No. ARB/AF/99/2, Final Award, 11 October 2002, Authorities Tab 7, at 86: "International law does not place emphasis on merely formal considerations, nor does it require new proceedings to be commenced where a merely procedural defect is involved."

[9] *Loewen Group Inc. & R. Loewen* v. *United States of America*, ICSID Case No. ARB/AF/98/3, Award on Jurisdiction, 9 January 2001, Authorities Tab 10, at para. 50.

[10] *Methanex Corporation* v. *United States of America*, UNCITRAL Tribunal, Preliminary Award, Authorities Tab 5, at para. 120; *United Parcel Service of America, Inc.* v. Canada, UNCITRAL Tribunal, Preliminary Award, 22 November 2002, Memorial Tab 2, at para. 32; *Emilio Agustin Maffezini* v. *Kingdom of Spain*, ICSID Case No. ARB/97/7, Award on Jurisdiction, 25 January 2000, Authorities Tab 4, at para. 69.

> ... various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or respondent, is responsible for providing proof thereof. Also, it is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.[11]

The Respondent makes allegations concerning the state of knowledge held by the Claimants at various times that were certainly not contained within the PSOC, and it bears the burden of proving them.

B. The Provisions at Issue in this Dispute

NAFTA Chapter 11 contains only a limited number of true jurisdictional provisions – whose requirements must be met in order for authority to vest in the Tribunal to hear the claim submitted to it.[12] These provisions include Article 1101, which sets out the scope and coverage for the Chapter, and Articles 1116 and 1117, which provide for the submission of claims to arbitration. The relevant text of these three provisions read:

> **Article 1101: Scope and Coverage**
>
> 1. This Chapter applies to measures adopted or maintained by a Party relating to:
> (a) investors of another Party;
> (b) investments of investors of another Party in the territory of the Party; and

[11] *Marvin Feldman* v. *Mexico*, ARB(AF)/99/1, Final Award, 16 December 2002, Authorities Tab 12, at para. 177, citing: *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, adopted 23 May 1997, WT/DS33/AB/R and Corr. 1, Authorities Tab 3 at Section IV (page 8); and: *Asian Agricultural Products Limited* v. *Republic of Sri Lanka*, ICSID Reports, pp. 246, 272, 1990, Authorities Tab 11: ("In case a party adduces some evidence which prima facie supports his allegation, the burden of proof shifts to his opponent.").

[12] *Methanex* Preliminary Award, Authorities Tab 5, at para. 120.

(c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.

…

Article 1116: Claim by an Investor of a Party on Its Own Behalf

1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:
(a) Section A or Article 1503(2) (State Enterprises), or
...

2. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise

1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:
(a) Section A or Article 1503(2) (State Enterprises), or
...

2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.

….

The NAFTA thus provides that there must be: (1) a measure that directly effects either the investor or its investment in the territory of another NAFTA Party;[13] that (2) **breaches**

[13] A measure that "relates to" an investor is one that directly affects the investor or its investment. *Pope & Talbot, Inc.* v. *Canada*, UNCITRAL Arbitration, Decision on Application of NAFTA Article 1101, 26 January 2000, Authorities Tab 8, at para. 33; *Methanex* Preliminary Award, Authorities Tab 5, at para's 137-139; *Methanex Corporation* v. *United States of*

an obligation under Section A; and (3) causes the Investor to **have incurred** loss or damage by reason of, or arising out of, that breach. Significantly the time limitations contained in Articles 1116 and 1117 do not necessarily apply to the adoption of a measure or to its mere relation to an investor *per se*. Rather, they apply to knowledge of the extent to which a measure breaches the NAFTA and the extent to which such breach causes loss or damage to the Investor.[14]

It is beyond doubt, however, that a claim is to be brought only after loss or damage has been incurred as a result of the application of a measure that breaches the NAFTA. This is the fundamental difference between claims brought by an individual under Section B of Chapter 11, versus ones brought by a NAFTA Party itself under NAFTA Chapter 20.[15]

C. "Measure"

America, UNCITRAL Tribunal, Final Award, 3 August 2005, Authorities Tab 6, Part II – Chapter E – Page 2, at para. 3. For example, a tobacco grower would not be entitled to bring a claim for loss or damage it suffered as a result of the imposition of the measures identified in the PSOC. Someone engaged in the production or distribution of such products is so entitled because the various measures listed in the PSOC are designed to regulate his or her business. Respondent's erroneous interpretation of this issue has been reserved for a hearing on the merits of this case.

[14] Article 1116 concerns claims brought by investors on their own behalf and Article 1117 concerns claims brought by investors on behalf of an investment enterprise established in the territory of the Respondent NAFTA Party. In most cases, where the investment in the Free Trade Area takes the form of an investment enterprise in the territory of another NAFTA Party, claims are commonly brought under both provisions.

[15] The investor's situation under Section B of Chapter 11 is contrasted to that found under Chapter 20 of the NAFTA (see: Articles 2004, 2006(1) and 2008(1)). Under the Chapter 20 process, or under the WTO option provided in Article 2005, a State can succeed in a claim against another State without having to prove that any loss or damage has been incurred. This is because the remedy attainable from those tribunals is a declaration of non-compliance (with a corresponding obligation falling upon the unsuccessful Respondent to bring its measures into compliance) whereas the only remedies available from this Tribunal, under NAFTA Article 1135, is an award of damages or an order for the restitution of property **already taken** (which can be converted to a damages award at the discretion of the NAFTA Party).

NAFTA Article 201 includes a definition of "measure" that governs its meaning for the entire treaty text, including Chapter 11. It provides that:

> measure includes any law, regulation, procedure, requirement or practice;

Not all types of government conduct qualify as a "measure," even under the broad definition found in the NAFTA. This is because the focus of NAFTA Chapter 11 is on conditioning the regulatory conduct of NAFTA Parties, and their constituent governmental units, rather than on an announced intention to regulate. Hence, the definition found in Article 201 specifically refers only to an inclusive list of regulatory instruments: laws; regulations; procedures; requirements; practices.

This is why other chapters of the NAFTA include a distinction between actual measures and proposed measures. For example, in Article 1803, both sections (1) & (2) contain reference to "proposed or actual measure[s]." This provision concerns the obligations owed as between NAFTA Parties, requiring that notice be given to the other Parties even when just a "proposed" measure threatens to materially affect rights it holds under the Treaty.[18] The term

[18] It is obvious that such obligation was certainly not met in this case by the MSA States, either in respect of the MSA itself or the measures listed in the PSOC. Nevertheless, as the Respondent would be only quick to argue, Article 1803(1) does not oblige the United States or its sub-national governments to provide notice of "proposed" measures to investors of another Party. "Proposed" measures can only be the subject of a claim made by another NAFTA Party under NAFTA Chapter 20; not by an investor acting under Section B of Chapter 11.

"proposed measure" is also found in NAFTA Article 2004, which provides for the arbitration of disputes between the three NAFTA Parties. Under the NAFTA, an investor is not entitled to bring a claim in respect of a "proposed measure."[19]

The text of NAFTA Article 1101 specifically refers to measures "adopted or maintained" by a NAFTA Party.[20] The use of these terms is indicative of intent to limit the application of Chapter 11 to those actions that involve positive steps taken by a government to ratify and enforce an announced agenda.[21] Neither the intention to enact a measure, nor the imposition of a measure that is not self-executing, constitutes a breach of the NAFTA with respect to a particular investor.

---

[19] See, also: *Ethyl Corp.* v. *Canada*, UNCITRAL Arbitration, Award on Jurisdiction, 24 June 1998, Authorities Tab 9. In *Ethyl*, the Claimant served a notice of intention to submit a claim to arbitration in respect of a bill that was under consideration in the Parliament of Canada and launched the arbitration before the bill became law. Canada argued that none of the NAFTA's timing requirements were met because there did not exist a "measure" which could form the subject of these notices, or the arbitration, until a date after the arbitration was actually launched. Canada argued that the bill, a self-executing instrument designed to ban a fuel additive made by *Ethyl*, became a "measure" only after it became law. The investor countered that the draft legislation constituted a governmental "program" of sorts and that therefore that it constituted a "measure." The Tribunal concluded that the legislation became a measure when the legislation came into force, at ¶ 69, but it determined that the NAFTA's timing requirements were not conditions precedent to bringing a valid claim. It rejected the arguments of both Canada and the investor, however, awarding costs against the claimant – for the preliminary hearing – because it "jumped the gun" by launching the arbitration before the "measure" actually came into existence, at ¶¶ 87-88.

[20] *Loewen* Jurisdictional Award, Authorities Tab 10, at para. 57. See, also: *Loewen* v. *USA*, Respondent's Memorial, Appendix 1, Tab 3, at p. 31, where Respondent cites Art. 8 of the MIGA Contract of Guarantee, (3rd Revision, 1 August 1995) the standard form contract of the Multilateral Investment Guarantee Agency ("MIGA"), a World Bank body that offers insurance to investors against political risk, to explain how a measure must be put into action by a government in order for an expropriation to occur.

[21] In the *Loewen* case, the United States attempted to take the argument too far, arguing that a civil litigation process before its courts was a private matter between two parties that did not require the sanction or ratification of the State. The Tribunal found that because the hearing of such case takes place within an organ of the State, the conduct of officials involved in that case (such as the judge) could constitute a "measure" under the NAFTA.

D. "Breach" and "Loss or Damage"

NAFTA Articles 1116 and 1117 specify that a measure that directly affects an investor must be found to breach the relevant provisions of the NAFTA. A measure "breaches" a NAFTA provision when, through its application to an investor or investment, it violates the obligation represented in that provision. Such obligations include: the requirement to pay compensation for expropriation; the requirement to provide "treatment no less favourable" to comparable investors; and the requirement to accord "fair and equitable treatment" to investments. Just as a measure may cause loss or damage to an investor but not breach the NAFTA, similarly a measure can breach the NAFTA without causing an investor to incur loss or damage. Both elements are required for a valid claim to exist.[24]

[24] At note 176 of its Memorial, Respondent confuses the difference between the existence of a "breach" and the existence of loss or damage. It further conflates the difference between one's having knowledge of either and their very existence. It does so by quoting Article 14(1) of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts in its discussion of damages, noting that "breach occurs 'at the moment when the act is performed, even if its effects continue." Id. The breach of an obligation does occur as described in the draft article, but that has nothing to do with when an investor has actually incurred loss. It also has nothing to do with the question of when someone should be said to have known that either a breach took place or that harm had been suffered.

"Loss" and "damage" are generic terms whose use together demonstrates that an investor can make a claim on the basis of any sort of loss, from deprivation of access to market to simple out-of-pocket costs. Loss or damage can arise either "by reason of" the breach or merely "arising out of" the breach. Contrary to Respondent's claims, however, an investor does not necessarily suffer loss or damage merely because of the existence of a breach. Otherwise, there would have been no need for the drafters of Articles 1116(2) and 1117(2) to include the additional requirement of knowledge that the investor "has incurred loss or damage by reason of or arising out of the breach."

E. The NAFTA Three Year Rule – a Two-Step Test

NAFTA Article 1116(2) requires an investor to submit the claim to arbitration no more than three years from the date upon which it first acquired, or should have first acquired: (1) knowledge or constructive knowledge of the alleged breach; and (2) knowledge or constructive knowledge that it "**has incurred**" loss or damage resulting from the breach.[27]

In other words, in determining whether a claim has been brought within the acceptable period of time under these provisions, a tribunal must focus not only on when Claimants knew or ought to have known that the measures at issue constituted a breach of Respondent's NAFTA obligations; it must also determine the date upon which Claimants knew or ought to have known that they suffered either loss or damage as a result of the application of each offending measure.

Obviously it is impossible for any investor to have knowledge that it "has incurred loss or damage" unless such loss or damage has actually been incurred. In both sections (1) and (2), of both Articles 1116 and 1117, the operative term is: "has incurred." Respondent's arguments completely ignore this text, with arguments that effectively amend the treaty text to read: "will incur" rather than "has incurred."

Of necessity, the three-year rule must be applied on a measure-by-measure basis. Application of the two-step test is accordingly simple. First, the Tribunal must determine the earlier of the dates upon which the Claimants knew, or should have known, that each and every one of the "measures" at issue "breached" the Respondent's obligations under NAFTA Chapter

---

[27] Article 1117(2) provides an identical two-part test for claims brought by investors on behalf of investment enterprises established in the territory of another NAFTA Party.

11. For each measure, if the earlier of the dates of actual versus constructive knowledge falls after March 12, 2001, the claim has been submitted in a timely fashion. Should the Tribunal find that the earlier of these dates falls prior to March 12, 2001 for any given measure, the inquiry must continue to the second step of the test in respect of that measure.

The second step of the test requires the Tribunal to determine exactly when the Claimants first suffered loss or damage as a result of that particular breach. It must undertake this inquiry because Articles 1116(2) and 1117(2) require a Claimant to know that it "has incurred" such loss or damage, not more than three years from the date upon which a claim is submitted to arbitration. An investor cannot be found to have known that a thing "has" happened unless it has actually happened.

F. Respondent's Arguments

Respondent's Memorial contains very little in the way of argument. The sum total of its argumentation on the operation of NAFTA Articles 1101, 1116 and 1117 can be found between pages 27 and 29 of its Memorial. The test articulated therein does obvious violence to the language of Articles 1116 and 1117.

Respondent first argues that to succeed in its objection, all it must do is prove that Claimants had actual or constructive knowledge that the MSA before March 12, 2001. Respondent fails, however, to offer any explanation as to how the MSA itself could constitute a "measure" as defined under NAFTA Article 201; that breached the NAFTA; and caused loss or damage to Claimants. The MSA – a litigation settlement between forty-six state governments and a group of companies unrelated to the Claimants – could not constitute a measure related to Claimants under the NAFTA.

Respondent's corollary argument is that its objection may be sustained merely based upon the fact that the Escrow Statutes were adopted prior to March 12, 2001. Respondent again fails to describe how the mere adoption of the Escrow Statutes constituted a breach of the NAFTA and caused loss or damage to Claimants in and of itself, or that Claimants had knowledge or should have had knowledge of the breach or loss prior to March 12, 2001.

POINT II

CLAIMANTS' SUBMISSION WAS TIMELY UNDER APPLICABLE NAFTA RULES

A. Respondent has Confused the Actual Measures at Issue

Without any explanation or analysis of the relevant NAFTA provisions, Respondent attempts to treat the MSA as if it was a "measure" relating to Claimants – but a simple reading of the treaty text and applicable law negates its argument.

The broadest term found in the NAFTA Article 201 definition of "measure" is "requirement," but as it related to strangers to the agreement, the MSA could not possibly have constituted a "requirement." The only requirements found in the MSA were the contractual obligations imposed upon its signatories. The Claimants, however, were never party to the MSA; they were not included in its secret negotiations; and they were certainly not provided with any sort of notice or comment period in respect of its contents.

Similarly, the MSA was not a "law" or a "regulation." As it related to non-signatories, the MSA was not a regulatory instrument of any kind. It was an agreement among State Attorneys General and various tobacco companies to settle lawsuits alleging fraudulent conduct on their part that has never been attributed to Claimants.

B. The Relevant Measures and the Relevant Date

The Investors submitted their claim, in respect of all of the offending measures, on March 12, 2004. The Parties are agreed, therefore, that the operative date for application of the NAFTA's three-year rule is: March 12, 2001.

The first measures to be applied against Claimants, and about which Claimants complain, were the Escrow Statutes. Claimants also independently and separately complain about the Contraband Laws; the Equity Assessment Laws; and the amendments made to the Escrow Statutes eliminating the "allocable share" mechanism. Significantly, only the Escrow Statutes were implemented prior to March 12, 2001, although knowledge of their enforcement by any given MSA State against Claimants existed only after that date.

C. Claimants Could Not Have Knowledge of Breach before March 12, 2001

As described above, the first time the Claimants were even informed that a MSA State's Escrow Statute might apply to them was after March 14, 2001, when Grand River received a letter from the Attorney General from the State of Oregon. Williams Affrim., ¶ 2. The letter stated that the Oregon Escrow Statute would apply to a "Tobacco Product Manufacturer" that sold tobacco to consumers in its territory, something that Grand River did not do.

There is no evidence that Claimants received a letter from any MSA State, in respect of compliance with its Escrow Statute, before this date. The Missouri correspondence relied upon by Respondent was either addressed incorrectly, or not addressed to Claimants at all. Williams Affirm., ¶¶ 15 to 17. Moreover, it only applied to enforcement of the Missouri measure.

The only MSA State that Respondent says commenced action against Claimants before March 12, 2001 was Missouri, but the Missouri court records themselves say that service was not effectuated against Claimants until April 10, 2001, if at all.[28]

The forgoing confirms that Claimants could not have been aware that any measure relating to them breached the NAFTA before March 12, 2001. While the text of each Escrow Statute may be very similar, their enforcement has varied widely. There are states in which Escrow Statutes are in today force but where no enforcement has been sought as against Claimants. It accordingly bears repeating that mere passage of the Escrow Statutes could thus not constitute a breach of the NAFTA in respect of Claimants' business until judgments enforcing those statutes were sought against them.

D. Knowledge of Loss or Damage for Each Measure

Claimants did not know that the measures at issue caused them loss or damage prior to March 12, 2001. The Escrow Statutes were adopted in 1999 and 2000, but Claimants did not suffer loss or damage as a result of their enforcement, or that of any other measure mentioned in the PSOC, until long after March 12, 2001. Respondent contends, at page 36 of its Memorial, that the *Mondev* Tribunal found that a claimant "may know it has suffered loss or damage even if the extent of quantification of the loss or damage is unclear."[29] It does so in an attempt to vitiate the requirement that an investor knows it has incurred loss or damage under the two-step test. The *Mondev* Award is of no assistance to the Respondent, however. That Tribunal's finding,

---

[28] This evidence is itself questionable as to proof of service. On its face, the affidavit of service found in the court record is fatally flawed. Williams Affrim., Exhibit D. Service was apparently made to a non-existent company: "Grand River Enterprises, Inc." and to a "native male" who identified himself as its "owner." Grand River Enterprises Six Nations, Ltd. is the relevant party and it does not have "an owner."

[29] Authorities at Tab 7, at para. 87.

taken completely out of context by Respondent, was made with respect to a very different factual pattern than the case at bar.[30]

With its Memorial, Respondent has simply failed to meet its burden of proving that Claimants knew or should have known that they "had incurred loss or damage" arising out of a breach of the NAFTA, by any of the measures identified in the PSOC, before March 12, 2001. There is no evidence that the Claimants hired attorneys, paid into escrow, or saw their products banned from any market until well after March 12, 2001. Instead of attempting to meet its evidentiary burden, Respondent attempts to confuse the difference between when a breach occurs and when "loss or damage" has been incurred. It also attempts to confuse the difference between the existence of such events and knowledge thereof. It does so because the **only** evidence Respondent offers to demonstrate how Claimants allegedly incurred loss or damage before March 12, 2001 is a misconstrued newspaper article.

Respondent argues that this single newspaper article proves how Claimant Steve Williams allegedly hired attorneys to defend Grand River against a Missouri action prior to March 12, 2001. It does so even though court records show that Grand River was not served notice of such action until at least April 10, 2001, if at all. Williams Affirm., Exhibit D. In fact, Claimants would not be apprised of the full nature and extent of the measures until May 2002,

[30] In the Mondev case the claimant commenced a civil suit against two local bodies before the NAFTA had even existed. It won at trial but lost on appeal, because of the application of a public immunity statute. The appeal hearing took place after the NAFTA entered into force. The claim was accordingly brought only in respect of the appeal process and the public immunity statute that was applied therein. Within this context, the claimants argued in the alternative that they could not have been found to have "incurred loss or damage" until after the appeal court had ruled. The Tribunal disagreed, concluding that the claimants were aware of loss or damage incurred before the NAFTA came into existence, because they were suing for relief from such harm in local court. In stark contrast, the case before this Tribunal involves court processes that were launched against Claimants unbeknownst to them, rather than by them. Accordingly, whereas Mondev knew it had suffered a loss and was suing because of it, Claimants only suffered losses once they discovered that they were being sued.

when an attorney from New York flew in to explain these measures to them. Williams Affirm., ¶ 4; Violi Affirm., ¶ 1. Only at that time did Claimants retain counsel and join with other small tobacco producers to ask a Federal Court to strike down all of the offending measures. Violi Affirm., ¶ 6.

Accordingly, only as of May 2002 did Claimants incur their first out-of-pocket loss, by retaining counsel to pursue injunctive relief before a Federal Court. The "instructions to retain counsel" allegedly mentioned in Respondent's newspaper article referred only to Mr. Williams' expectation with respect to any form of State or Provincial regulation that might be imposed against First Nations peoples generally. Williams Affirm., Exhibit E.

SUMMARY AND CONCLUSION

Without analysis or explanation, Respondent has argued that the MSA should be construed as the one and only measure applicable in this case. It does so only because the MSA was negotiated before March 12, 2001. The problem is that the MSA simply does not fit the definition of a "measure" as contemplated in NAFTA Article 201.

Moreover, the measures that were initially designed to implement the MSA – the Escrow Statutes – did not take effect until they were enforced against Claimants. Without enforcement, which required MSA States to obtain judgments against Claimants, the measures could not, and did not, cause Claimants any loss or damage. This is why the Claimants have remained in business in New York State, where enforcement has not yet been attempted. In cases where an Escrow Statute has been enforced against Claimants, there is no evidence that Claimants could know about such enforcement, or incurred loss or damage, before March 12, 2001.

Respondent also fails to provide justification to strike any of the measures from the claim that were imposed by MSA States after the Escrow Statutes came into force. This is because all of these measures were implemented after March 12, 2001.

In summary, Claimant has successfully plead – and Respondent has failed to disprove – that each of the over one hundred measures at issue in this claim have been submitted on a timely basis.

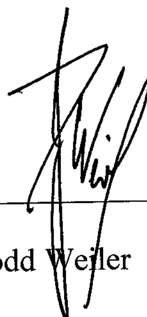
For the forgoing reasons, the Claimants respectfully request the following:

a) that this Tribunal dismiss Respondent's objection to jurisdiction;

b) that this Tribunal move immediately to set a date for a single and final hearing on the merits of the Investors' claim; and

c) that costs be ordered against Respondent pursuant to Article 40 of the UNCITRAL Rules, including costs for legal representation and assistance.

Dated: January 16, 2005

By: 

Todd Weiler

2317 Erlton Street SW
Calgary, Alberta, T2S 2V7
(313) 686-6969

Counsel to Grand River Enterprises Six Nations, Ltd., Jerry Montour, Kenneth Hill And Arthur Montour, Jr.

Chantell MacInnes Montour

Inch Hammond Professional Corporation
1 King Street, West Suite 1500
Hamilton, Ontario L8P 4X8

Counsel to Grand River Enterprises Six
Nations, Ltd., Jerry Montour, Kenneth Hill
And Arthur Montour, Jr.

Leonard Violi

Law Offices of Leonard Violi, LLC
910 East Boston Post Road
Mamaroneck, New York 10543
(914) 698-6200

Counsel to Grand River Enterprises Six
Nations, Ltd., Jerry Montour, Kenneth Hill
And Arthur Montour, Jr.

Served to:

United States of America
C/o Mr. Mark A. Clodfelter
Assistant Legal Advisor

And to:

Ms. Andrea Menaker
Chief, NAFTA Arbitration Division
Office of Internatioal Claims and
Investment Disputes
2430 E Street, NW
Suite 203, South Building
Washington, D.C. 20037-2800

And to:

Mr. Ucheora Onwuamaegbu
International Centre for Settlement of Investment Disputes
World Bank
1818 H Street, N.W.
Washington D.C.
20433