IN THE ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES AND CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT

Between:

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

Applicants

-Against-

GOVERNMENT OF THE UNITED STATES OF AMERICA

Party

SUBMISSION ON WHETHER TO BIFURCATE THE PROCEEDINGS

Pursuant to the Tribunal's direction, issued during the First Session on 31 March 2005, we are pleased to provide our response to the Respondent's request for bifurcation of these proceedings, dated 29 August 2005.

In summary, the Claimants categorically disagree with the manner in which the Respondent has characterized their NAFTA claim. The claimants further submit that none of the Respondent's grounds for seeking a preliminary hearing on jurisdiction are actually jurisdictional in nature; and, finally, that the Respondent has failed to demonstrate that this arbitration would be more effectively run if a preliminary hearing was to be held. Accordingly, the Claimants submit that the Tribunal should deny the Respondent's request and move immediately to schedule a single hearing on the merits.

Authority to Conduct a Bifurcation of the Proceedings

As indicated by the interim award in *Methanex* v. *USA*, a NAFTA Tribunal does not have authority (under the NAFTA or the UNCITRAL Rules) to entertain motions to dismiss claims on the grounds of their alleged admissibility.[1] Rather, as also demonstrated cases such as *Ethyl* v. *Canada*[2] and *Mondev* v. *USA*,[3] NAFTA tribunals only possess the authority to entertain, on a

[1] *Methanex Corporation* v. *United States of America*, Award on Jurisdiction, 7 August 2002 at para's. 109-120.
[2] *Ethyl Corporation* v. Canada, Award on Jurisdiction, 24 June 1998, at para. 61.

preliminary basis, challenges to their competence to hear a claim. For tribunals operating under the UNCITRAL Rules, this authority specifically delineated in Article 21(4) of the UNCITRAL Rules, which only confers tribunals with authority to resolve jurisdictional objections on a preliminary basis.[4]

It is not enough for a respondent to merely cast questions of admissibility as "jurisdictional" to have them heard on a preliminary basis. The objection must go to the root of the tribunal's competence to hear the claim. For example, a NAFTA tribunal may dismiss a claim on a preliminary basis where the facts, as pleaded, indicate that the alleged measure does not "relate to" (i.e. directly affect) an investor or its investment.[5] It should not dismiss the claim on a preliminary basis merely because the respondent alleges that the facts, as alleged, cannot – in the respondent's opinion – sustain that a breach of the treaty.

In this case, none of the Respondent's objections go to the root of the Tribunal's competence to hear the Investors' claims. Rather, they arise either out of the Respondent's erroneous construction of the facts, as pleaded, or out of the Respondent's contention that – even if the facts were true – other provisions of the Agreement operate to vitiate the claim. As such, all of the Respondent's "jurisdictional" objections are actually not jurisdictional at all, but are instead objections as to the admissibility of the claims at issue or simple defences on the merits. Such objections need to be resolved in the light of all available evidence, elicited through the process of discovery and tested through cross examination at a full merits hearing.

The Six Objections Raised by the Respondent

In its Request, the United States raises six objections for which it demands a preliminary hearing (although it strategically casts its objections as numbering only five):

1. That the claims are time-barred under NAFTA Articles 1116(2) and 1117(2);
2. That the measures at issue in this claim do not 'relate to" the investments of Claimant Arthur Montour as required under Article 1101;
3. That Claimants Grand River Enterprises Six Nations Ltd., Jerry Montour and Kenneth Hill, have not made any "investments" as allegedly required under NAFTA Article 1101;
4. That, given the evidence thus far submitted, Arthur Montour may not be a national of Canada, and therefore not be an "investor of another Party";

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[3] The Jurisdictional Award in *Mondev* v. *United States of America* has never been made public by the Respondent, but at para. 26 of its Final Award, dated 11 October 2002, the Tribunal indicated, at para. 26, that a one was issued and that in it the Tribunal determined that jurisdictional objections not unlike those raised before this Tribunal "could conveniently be, and should be, joined to the merits of the case."

[4] The Tribunal in *UPS v. Canada*, with its Award on Jurisdiction issued 22 November 2002, has thus far been the only one that chose to resolve a clearly substantive issue (i.e. the meaning and application of Article 1105(1) to the facts of the case) on a preliminary basis, without conducting an evidentiary hearing – effectively striking portions of the statement of claim as might a domestic court of competent jurisdiction. It is submitted that, under the NAFTA or under Article 24(1) of the UNICTCRAL Rules, the *UPS* Tribunal had no authority to strike portions of the Statement of Claim on the grounds of admissibility, and thus erred in doing so.

[5] *Methanex*, Award on Jurisdiction, at para. 137.

5. That NAFTA Article 2103 precludes the Investors' claims made in respect of the equity assessment statutes of Michigan and Minnesota; and
6. That the claims made in respect of these equity assessment statutes cannot be adjudged by this Tribunal because of alleged non-compliance with NAFTA Articles 1119 and 1120.

The Respondent's first objection rests on a complete misconstruction of the Investors' claims. The Investors have claimed that measures taken by forty six state governments – purportedly to implement a private agreement between themselves and a number of unrelated companies to settle tort claims against those companies brought by those same state governments – violated Articles 1102, 1103, 1105 and 1110 of the NAFTA. The Respondent has elected to cast that private agreement between state governments and entities unrelated to the claimants – i.e. the Master Settlement Agreement ("MSA") – as a "measure" in order to ask the Tribunal to conclude that the Investors have brought their claims too late.

To be clear, a private settlement agreement between unassociated parties cannot be construed as a "measure" as defined under Article 201 of the NAFTA.[6] What is at issue in this case is the decision of each state government to enforce certain measures upon the claimants, which each claims is necessary to implement the MSA. Whether such measures were indeed necessary to implement the MSA is not relevant: the fact of the implementation and enforcement of these measures, and the losses suffered by the Claimants as a result of their imposition upon their business, is what matters. As such, while the circumstances surrounding the negotiation of the MSA will certainly be germane to the Tribunal, the MSA itself cannot be construed as the measure operative in this case.

Moreover, the first objection, and the Respondent's mischaracterization of the facts used to underpin it, is founded upon a misconstruction of the test to be applied under Articles 1116(2) and 1117(2). The objection is founded on the premise the measures at issue came into effect earlier than three years prior to the launch of the claim. The relevant question, however, is not simply to ask whether a measure came into effect three years prior to the launch of the claim – but rather: (1) whether the Claimants knew or ought to have known that the measures forming the subject of the claim breached the treaty three years prior to their having launched it; and (2) whether they suffered loss or damage by reason thereof more than three years prior to the date the arbitration was commenced. In other words, it does not matter if a claimant has known, or ought to have known, that a measure breached Section A of NAFTA Chapter 11 for ten years – so long as it only started suffering loss or damage three years prior to its launch of the claim.

Given the circumstances of this case – with the enforcement measures of 46 separate states at issue – it is obvious that a full merits hearing must be held in order to properly evaluate the factual and evidentiary bases for this particular objection, even if it was credible (which it is not).

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[6] Article 201 provides: "… measure includes any law, regulation, procedure, requirement or practice… " which has thus far only been construed by tribunals to include actions by governmental officials acting in their official capacities. See, e.g.: *Ethyl*, Award on Jurisdiction, at para's. 66-69; and *Loewen Corp. & Loewen* v. *United States of America*, Award on Jurisdiction, 9 January 2001, at 39-60.

It is equally obvious that, given the facts as pleaded, the Investors' claims are timely. The Claimants have alleged that the enforcement measures at issue were, and continue to be, imposed upon them and their investments, and that – in respect of each of these measures – they consequentially began suffering losses less than three years prior to the commencement of this arbitration. Thus, there is no basis, under Article 24(1) of the UNCTIRAL Rules, to entertain Respondent's objection on a preliminary basis. The facts as claimed establish the Tribunal's jurisdiction to proceed.

The Respondents' second and third objections are styled as a single objection rooted in NAFTA Article 1101, and the reason for doing so is not merely one of semantics. As the *Methanex* Tribunal has previously confirmed, an objection based upon non-compliance with Article 1101 may be heard on a preliminary basis.[7] Accordingly, the Respondent is apparently attempting use reference to Article 1101 in order to cloak both of these objections with a jurisdictional veneer.

In *Methanex*, however, the claim concerned a measure the investor claimed as banning the use of a gasoline fuel additive, MTBE, in California. The investor claimed not to produce MTBE, but rather to supply its chief ingredient, methanol, to MTBE manufacturers. After conducting a preliminary hearing, the Tribunal concluded that the investor's claims under Articles 1110, 1105 and 1102 should be dismissed because the measures did not "relate to" (i.e. directly affect) the business of the investor (which was the production of a substance that was not banned by the measure and for which other applications existed).[8] The claim was only allowed to proceed on the basis that both parties had apparently agreed that, had the measure been imposed with the intent to directly harm the interests of the investor or its investments, it would have directly affected (i.e. "related to") the investor and/or investment, in compliance with the requirements of Article 1101.[9]

In this case, the Investors have claimed that the measures at issue directly affect them and their investments in the U.S. They have also specified that the measures in question relate to the manufacture, sale and distribution of tobacco products in the United States, by virtue of both their express terms and through their operation and enforcement. Unlike the *Methanex* case – where the investors admitted the facts upon which the Respondent's jurisdictional objections were founded – in this case the Claimants strenuously object to the facts as cast by the Respondent. The Respondent cannot manufacture a jurisdictional issue by simply recasting the facts as pleaded. A jurisdictional issue only arises where the facts, as pleaded, give rise to an argument that the tribunal lacks jurisdiction to entertain the claim (as seen in the *Methanex* case).

The question of whether the measures at issue in this claim actually do "relate to" the investors and their investments (both individually and collectively) is thus inextricably bound up with determinations of facts that must be found by the Tribunal about the exact nature of the measures at issue. Such determinations cannot be addressed in an evidentiary vacuum.

The third objection, which the Respondent includes as the second portion of its Article 1101 objection, goes to the heart of the merits of the case. It concerns nothing less than the issue of

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[7] *Methanex*, Award on Jurisdiction, at para. 137.
[8] *Methanex*, Award on Jurisdiction, at para. 150.
[9] *Methanex*, Award on Jurisdiction, at para. 151-162.

whether some of the investors made and/or maintain the kind of investments in the United States that are deserving of protection under the NAFTA. Again, such an issue cannot be resolved in the absence of a full examination of the evidence upon which the investors' claims are based.

Moreover, whether Claimants Grand River Enterprises Six Nations Ltd., Jerry Montour and Kenneth Hill have made investments in the United States (as defined in NAFTA Article 1139) is a merits issue that has nothing more to do with Article 1101 than it does with any other NAFTA provision that includes the terms "investor" or "investment." There is nothing inherent in this determination that could possibly go to the competence of the Tribunal to hear this case. Rather, the objection goes to the merits/admissibility of the claims, based upon the facts as pleaded.

With its fourth objection, the Respondent actually demurs – by characterizing this issue as only a concern about the suitability of the evidence thus far provided to establish the nationality of Claimant Arthur Montour. The Respondent does not appear to be raising an objection based upon a challenge to his nationality *per se*. Indeed, Respondent has not advanced any basis for its contention that Arthur Montour is not a Canadian national.

Normally it would be too trite to require restatement – but the Tribunal clearly possesses the competence to determine whether Mr. Montour is a national of Canada. Accordingly the Tribunal does not have authority, under Article 24(1) of the UNCITRAL Rules, to entertain the Respondent's "concern" on a preliminary basis. Rather, the Tribunal should determine whether Mr. Montour is a national of Canada upon review all of the available evidence – as tested in the fire of a merits hearing. There is simply no basis to raise such an evidentiary issue within the context of a jurisdictional objection.

Similarly, there is simply no need for the Tribunal to entertain the Respondent's fifth "jurisdictional" objection on a preliminary basis – again because it is not jurisdictional in nature. Whether the more recent measures promulgated by states such as Michigan and Minnesota constitute taxation measures falling outside of the scope of protection under NAFTA Chapter 11 cannot be answered in the absence of a full review of the available evidence. Such evidence would potentially be provided from both experts in the field of taxation and from state government officials who have already admitted publicly that these measures are indeed **not** taxes. According to their express terms, these measures are "equity assessments." Nonetheless, invocation of the tax provisions of the NAFTA is obviously a merits-based defence, rather than the proper assertion of a jurisdictional objection.

Moreover, given that resolution of this final issue would not be dispositive of a significant portion of the claim, there is thus neither a need, nor any advantage, in having the Tribunal address this issue on a preliminary basis. To do so would only unduly lengthen the time required to resolve the merits of this arbitration.

Finally, the Respondent's sixth objection does not constitute a proper jurisdictional challenge because the timing requirements of Articles 1119 and 1120 have already been found by past

tribunals to be merely prescriptive (rather than mandatory preconditions to the establishment of a Tribunal to hear any claim).[10]

By the time a merits hearing is held, it will have been six months since the Michigan and Minnesota measures were imposed upon the Claimants' business, and during this same period of time, the Claimants will have suffered losses as a result. Accordingly, by the time of the actual hearing of the claims, the requirements of NAFTA Article 1120 will have been satisfied. These requirements were included in NAFTA Chapter 11 to provide claimants and Parties with a "cooling off" period, during which resolution of potential claims could be resolved without resort to arbitration. It is clear, however, that in this case no such resolution would be possible. In fact, upon its first meeting with the Claimants, ostensibly conducted in compliance with Article 1118, counsel for the Respondent stated unequivocally that the United States was not prepared to discuss settlement of any aspects of the measures being imposed upon the Claimants or their investments.

Moreover, no prejudice will have been suffered by the Respondent in the result, as by the time a merits hearing is held, the Respondent will have enjoyed a far longer notice period, during which to have contemplated how to respond to the Investors' claims, than that which is required under Article 1119: i.e. 90 days.

In contrast, the Claimants would suffer considerable prejudice and hardship should the letter of Articles 1119 and 1120 be applied as a jurisdictional bar in the instant case. The absurd result would require the Claimants to submit a new notice of intent; wait 90 days; file a new claim in respect of the equity assessment statutes (which in all other respects would be of the same character and quality as the existing claim); and then take steps to have the claims heard together. Such steps might well include having a new tribunal established under Article 1126, which could then take jurisdiction over the existing claims being heard by this Tribunal, even though it would have been working on the remainder of the case for well over a year by that time. Such an incredibly ineffective and cumbersome process could not possible have been what the Parties had in mind when they drafted Articles 1119 and 1120.

As stated by the Tribunal in *Mondev* v. *USA*:, in dismissing similar jurisdictional objections based upon the procedural timing requirements found in NAFTA Articles 1116(2) and 1117(2):

> ***Chapter 11 should not be construed in an excessively technical way, so as to require the commencement of multiple proceedings in order to reach a dispute which is in substance within its scope.***[11]

Similarly, in dismissing procedural objections characterized by Respondent as jurisdictional in that case, the Tribunal in *ADF* v. *USA* stated:

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[10] See, e.g., *Ethyl* Award, at para's. 74-85, rejecting the same kind of objections raised by the Respondent in this case. See, also: *Feldman* v. *Mexico*, Interim Award, 6 December 2000, at para's. 39-59.
[11] *Mondev* Award, at para. 44.

> ***We see no logical necessity for interpreting the "procedures set out in the [NAFTA]" as delimiting the detailed boundaries of the consent given by either the disputing Party or the disputing investor.***[12]

As provided in Article 102(1)(e), one of the objectives of the NAFTA is to create effective procedures for the resolution of disputes under the Agreement. In such context, it makes no sense to require the Claimants to file a new notice of intent in respect of the equity assessment statutes promulgated by Michigan and Minnesota, given that effective notice has already been provided to the Respondent, in respect of these measures, through both the notice of arbitration and the particularized statement of claim.

Similarly, it makes no sense to have the Claimants wait six months to notify the Respondent that these measures will form part of their case, if they remain in place. Much like the 90 day notice period required under Article 1119 the six-month "cooling off" period contained within Article 1120 will be of no effect in this case. Given the context of the dispute between the parties in this case, it is beyond credible to suggest that strict observance of either period by the Claimants would make any practical difference, aside from frustrating their claims, delaying their hearing, and unnecessarily increasing legal costs for both parties.

Finally, this final objection is also not suitable for preliminary adjudication simply because its resolution could not result in bringing about an end to the claim.

In conclusion, because none of the objections raised by the Respondent are truly jurisdictional in character, in addition to being based upon gross misconstructions of the facts as claimed, none of them may be heard on a preliminary basis under Article 24(1) of the UNCITRAL Rules.

Moreover, and in the alternative, for various reasons none of the objections lend themselves well to adjudication on a preliminary basis. Either their resolution on a preliminary basis would not end the claim or their adjudication cannot be divorced from the full hearing of the evidence that can only be accomplished within the context of a merits hearing, or both. Accordingly, this Tribunal should decline the Respondent's request for bifurcation in its entirety and immediately proceed to establish a schedule that would lead to an oral hearing of the entire claim within six months of the date hereof.

Urgency in Completion of the Proceedings

Since they began working together, the United States of America has served as – by far – the largest market for the Claimants' business. It is quickly dying today, because of the application of the measures identified in the particularized statement of claim. Prior to the state governments' measures being applied to them and their investments, the Claimants' products were freely distributed throughout the United States – both on- and off-reserve. Within the past two years, the Claimants' products have been banned from sale in all but eight states, and even in those states the Claimants have been forced to pay millions of dollars just for the right to have their products sold there. Even in these eight states, officials are currently threatening to ban the

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[12] *ADF* v. *United States of America*, ICSID Case No. ARB(AF)/00/1, Final Award, 9 January 2003, at para. 133.

Claimants' products from sale if millions of dollars more are not paid – millions that Claimants do not have

It is not just the Investors who stand to suffer grievously if their business is allowed to die, or if they fail to obtain compensation for its loss. The livelihoods of a large number of native peoples are also resting on an efficacious resolution of this dispute.

For the Claimants, time is accordingly of the essence. As such, it is submitted that if the Tribunal declines to schedule a preliminary hearing, it should immediately schedule a telephone conference call with the parties, in order to set the schedule for the remainder of the proceedings.

In this regard, the Claimants envisage a simultaneous exchange of requests for documents by the parties, followed by a suitable time for documentary production and the exchange of interrogatory questions between the parties, if necessary. Next should follow a simultaneous exchange of memorials, including all of the evidence upon which the parties intend to rely in the oral hearing. There is nothing to be gained for the Tribunal or the parties in staggering the delivery of these documentary requests or memorials consequentially. With the statements of claim and defence in hand, both parties know the case they have to meet.

Next, the other NAFTA Parties should be allowed to make submission under NAFTA Article 1128 and any interested amicus applicants should be permitted to make submissions as per the NAFTA Free Trade Commission Recommendations for Non-Party Participation, dated 7 October 2004. Finally, after the parties identify the witnesses that they will be cross-examining, an oral hearing should be scheduled, lasting likely no more than four to five days, depending upon the number of witnesses to be cross-examined. The parties will be able to address any novel arguments raised by the non-parties in oral argument before the Tribunal.

The following table illustrates the kind of schedule that could be adopted by the Tribunal for the remained of these proceedings:

Time Period	**Action**
15 days from decision not to bifurcate	The parties submit their requests for documents
45 days from delivery of requests	The parties respond to each other's request for documents
15 days from date for document production	Exchange of interrogatory questions by the parties (if necessary)
30 days from delivery of interrogatories	Submission of replies to interrogatory questions (if necessary)
60 days from response date for interrogatories	The parties submit their Particularised Memorials of Fact and Law
15 days from submission of the memorials	Submission of Amicus briefs (if any)
15 days from submission of the memorials	Submission of Article 1128 briefs by Canada and Mexico (if any)

15 days after date for non-party submissions	Parties to identify witnesses for cross-examination
30 days from date for witness identification	Oral hearings, 3 days for witness cross-examinations Oral hearings, 1 to 2 days for legal arguments

In the alternative, should the Tribunal actually decide to entertain any of the six objections raised by the Respondent in its request for bifurcation on a preliminary basis, the Claimants submit that the process of briefing, as well as the schedule put forward by the Respondent, would be overly burdensome and completely unnecessary, given the circumstances of this case.

With the delivery of the particularized statement of claim and the statement of defence, the parties' respective positions have already been well-established before the Tribunal. Accordingly, there is simply no need for two successive rounds of consequential pleadings, with months of time wasted between them.

Should the Tribunal decide to hold a preliminary hearing, although the Claimants maintain that no authority exists to do so, the Claimants would submit that a much more efficient process should be established, involving one simultaneous exchange of memorials within 45 days of the Tribunal's decision and a short hearing to be held before the end of the year.

All of which is respectfully submitted, this 12th day of September, 2005.

By: _____

Todd Weiler
NAFTAClaims.com
3007 Turner Road
Windsor, Ontario, N8W 3L6
(313) 686-6969

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

Chantell Macinnes Montour
Inch Hammond Professional Corporation
1 King Street, West Suite 1500
Hamilton, Ontario L8P 4X8
(905) 525-4481

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