L/CID
DEPARTMENT OF STATE
2004 MAR 11 P 2:46

NOTICE OF ARBITRATION
UNDER THE ARBITRATION RULES
OF THE
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
AND
THE NORTH AMERICAN FREE TRADE AGREEMENT

BETWEEN:

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

Claimants/Investors

- AND -

GOVERNMENT OF THE UNITED STATES OF AMERICA

Respondent / Party

March 10, 2004

Pursuant to Article 3 of the United Nations Commission on International Trade Law ("UNCITRAL") and Articles 1116 and 1120 of the North American Free Trade Agreement ("NAFTA"), the Claimants initiate recourse to arbitration under the UNCITRAL Rules of Arbitration (Resolution 31/98 Adopted by the General Assembly on December 15, 1976).

A. DEMAND THAT THE DISPUTE BE REFERRED TO ARBITRATION

Pursuant to Article 1120(1)(c) of the NAFTA, the Claimants hereby demand that the dispute between them and the Respondent be referred to arbitration under the UNCITRAL Rules of Arbitration.

B. NAMES AND ADDRESSES OF THE PARTIES

Claimants/ Investors	**Grand River Enterprises Six Nations, Ltd.** **2176 Chiefswood Road** **Ohsweken, Ontario, Canada**
	Jerry Montour & Kenneth Hill **c/o Grand River Enterprises Six Nations, Ltd.** **2176 Chiefswood Road** **Ohsweken, Canada**
	Arthur Montour **c/o Native Wholesale Supply** **11037 Old Logan Drive** **Seneca Nation Territory** **Perrysburg, New York 14129**
Respondent/ Party	**Government of the of the United States of America** **Executive Director** **Office of the Legal Advisor** **United States Department of State** **Room 5519** **2201 C. Street NW.** **Washington, D.C.** **20520**

C. REFERENCE TO THE ARBITRATION CLAUSE OR THE SEPARATE ARBITRATION AGREEMENT THAT IS INVOKED

The Claimants invoke Section B of Chapter 11 of the NAFTA, and specifically Articles 1116, 1117, 1120 and 1122 of the NAFTA, as authority for the arbitration. Section B of Chapter 11 of the NAFTA sets out the provisions agreed concerning the settlement of disputes between a Party and an investor of another Party.

D. REFERENCE TO THE CONTRACT OUT OF OR IN RELATION TO WHICH THE DISPUTE ARISES

The dispute arises from measures adopted by 46 States relating to Claimants and their investments in the United States and the damages caused by Respondent's breaches of its obligations under Section A of Chapter 11 of the NAFTA.

E. THE GENERAL NATURE OF THE CLAIM AND AN INDICATION OF THE AMOUNT INVOLVED

(I) Facts

Background of the Investors and their Investments

1. Grand River Enterprises Six Nations, Ltd. ("Grand River") is a Canadian corporation organized under the laws of Canada on April 29, 1996. Grand River has at all relevant times since its incorporation maintained a principal office and tobacco products production facility located in Ohsweken, Ontario, Canada. Ohsweken comprises part of the territory of the Six Nations of North America (also known as the Iroquois Confederacy), whose land spans both sides of the U.S. - Canadian border. Grand River currently provides for the employment and income of over two hundred native Canadians and their families in addition to numerous other non-native Canadian individuals in its employ.

2. Jerry Montour and Kenneth Hill are aboriginal Canadian nationals, born in Canada and currently residing in Ontario, Canada. Arthur Montour is an aboriginal Canadian national, born in Canada, who currently resides in New York State. Messrs. Montour, Hill and Montour are also members of the Six Nations of North America.

3. Jerry Montour and Kenneth Hill are shareholders of Grand River. They are also former partners in several enterprises, including, among others, Traditional Trading, Grand River Enterprises (a partnership previously owned and operated by Grand River shareholders), and a third partnership that operated on Native American land in the State of Nebraska.

4. Arthur Montour is the sole named shareholder of Native Tobacco Direct and Native Wholesale Supply -- companies operating under charters granted by the Sac and Fox Nation of Oklahoma on January 13, 1999, and February 25, 2000, respectively. Native Tobacco Direct and Native Wholesale Supply have at all times maintained their principal operations on Six Nations land in Northern New York in association with Grand River and Messrs. Jerry Montour and Kenneth Hill. Prior to owning Native Tobacco Direct and Native Wholesale Supply, Arthur Montour did business individually and under the proprietorship name Native American Wholesale, both separately and in association with Jerry Montour, Kenneth Hill and the entities described in the immediately preceding paragraph.

5. Messrs. Montour, Hill and Montour (and, later, Grand River) have been engaged at all times since 1992, individually or as co-venturers in and through the foregoing entities, in the licensing, manufacture, packaging, production, importation and sale of tobacco products sold in the Free Trade Area, including the United States and Canada.

6. Specifically, beginning in 1992 and thereafter, Jerry Montour, Kenneth Hill, Arthur Montour, Grand River, and the entities they chartered and associations they established, did, individually and as co-venturers operating exclusively on Native American land in the Free Trade Area, invest, contribute and dedicate -- and have continued to invest, contribute and dedicate -- significant capital and resources into establishing and maintaining the foregoing businesses, operations, good will and intellectual property rights in the Free Trade Area, including the United States. To date, the total amount invested has been approximately $70,000,000 - $80,000,000 (USD).

7. By reason of the foregoing, Jerry Montour, Kenneth Hill, Arthur Montour and Grand River are, individually and as co-venturers, investors of a Party, Canada, whose investments and investment enterprises include, without limitation, the assets of Grand River and Native Wholesale Supply (including operations facilities, real property, machinery, inventory, contractual, intellectual property and distribution rights, and good will) and their business associations in the Free Trade Area, including in the United States.

8. Thus, since 1992, the foregoing Investors have possessed and maintained investments in the United States, Canada and Mexico which include or included, without limitation, investment enterprises, operations facilities, real property, machinery, inventory, contractual, intellectual property and distribution rights, and good will.

9. The foregoing investments and relationships exist and existed, without limitation, in respect of the manufacture and sale of tobacco products commonly known or described by the brand names Seneca, Omaha, Sago, DKs and Putters, in addition to other tobacco products manufactured or licensed to be manufactured or sold by or for Investors since 1992 in the United States.

Acts of Expropriation and Discriminatory Treatment

10. In November 1998, attorneys general and state officials representing forty-six States and six U.S. territories (the "MSA States") entered into a master settlement agreement ("MSA") with the four largest U.S.-based manufacturers of cigarettes, namely: Philip Morris Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corp., and Lorillard Tobacco Company (collectively, the "Majors"). A copy of the MSA is annexed as Exhibit "1."

11. The MSA settled and resolved over forty lawsuits and claims that these officials had filed and asserted against the Majors, beginning in or about May 1994.[1]

12. In consideration of the States' dismissal of the lawsuits, the Majors agreed under the MSA to make annual "settlement" payments to the MSA States totaling $206 billion over the first 25 years following the MSA's execution, and $9 billion thereafter, annually, subject to certain contingencies, adjustments and offsets.

13. During the MSA's negotiation in the summer and fall 1998, however, and unbeknownst to the Investors or their investment enterprises, the MSA States and Majors had occasion to discuss and did discuss and enter into agreements affecting the future of competition and trade in the cigarette industry within the Free Trade Area, particularly in the United States.

14. Specifically, during the negotiations and discussions leading up to the execution of the MSA, the Majors and the MSA States discussed the fact that the Majors would be raising the price of their tobacco products after the MSA's execution to fund the MSA's settlement payments.

15. In the context of those discussions, the Majors expressed a concern that they would lose market share to existing and potential competitors in the U.S. market, including the Investors and their investment enterprises, who would not need to

---

[1] The lawsuits sought primarily to recoup Medicaid expenses the States had incurred for the treatment of smoking-related illnesses of indigent smokers, including cancer and emphysema, and were premised principally on theories of conspiracy, fraud and deception. The States' claims focused on allegations that the Majors targeted youth in their advertising; knew of, controlled, and failed to disclose research into the harmful effects of smoking; and knew nicotine in cigarettes was addictive and marketed their cigarettes with those addictive properties in mind. *Report to Senate U.S. Comm. on Commerce, Science & Trans.*, States' Use of MSA Payments, GAO-01-851, at 8 (June 2001), Exhibit "2."

raise prices or maintain higher price levels for their tobacco products subsequent to the MSA's execution.

16. The reason that the Majors' competitors would not need to raise their prices subsequent to the MSA is that these smaller competitors were never sued nor accused of the wrongdoing that gave rise to the States' claims against the Majors. Accordingly, they could not rightfully be made the subject of the burdens and costs associated with the MSA's annual settlement payments.

17. Thus, the Majors refused to agree to the MSA unless the MSA's payment obligations were also imposed on *all other* competitors whose cigarettes would be sold in the U.S. after the MSA's execution.

18. Consistent with these demands, the MSA's payment obligations were drafted to apply, and currently do apply, not only to the Majors but to all other competitors whose cigarettes are sold in the United States, despite the fact that these smaller competitors have never been, and may never be, sued or threatened with suit, nor accused of the wrongdoing that gave rise to the claims asserted against the Majors and settled under the MSA.

19. The device, artifice and contrivance employed by the Majors and the MSA States to make the MSA's "payment scheme" applicable to the Majors' competitors constitutes the principal gravamen of the Investors' claims. This scheme was designed, and currently operates in each individual MSA state, to restrict the sale of smaller competitors' products to the point that these competitors will effectively be put out of business.

20. The MSA's payment scheme is expressly made applicable to the Majors' competitors through two interrelated provisions of the MSA.

21. First, the Majors and the MSA States included provisions in the MSA "permitting" other competitors (who were never sued nor accused of any wrongdoing) to nonetheless join the MSA as Subsequent Participating Manufacturers or "SPMs." MSA §IX(i).[2] Thus, under what are called the "Renegade Clause" provisions of the MSA, competitors of the Majors may join the MSA as SPMs and make *pro rata* settlement payments to the MSA States based on their annual sales volume *vis-à-vis* the Majors in the United States.

22. The second provision applicable to the Majors' competitors is model legislation annexed as Exhibit "T" to the MSA, which the drafting parties intended to be enacted (and which has been enacted) as an "Escrow Statute" in each of the MSA States. MSA, Ex. "T."

---

[2] The Majors are defined as Original Participating Manufacturers or "OPMs" under the MSA.

23. The Escrow Statutes require each tobacco product manufacturer that does not join the MSA as an SPM to establish a "Qualified Escrow Fund" for the benefit of the MSA States, into which the manufacturer must deposit annually an amount equivalent to that which the manufacturer would have paid the States had it joined the MSA as an SPM.

24. In simplest terms, the Escrow Statutes incorporate the Renegade Clause's payment requirements (with one exception)[3] and makes them applicable to all competitors that do not join the MSA, *i.e.*, non-participating manufacturers or "NPMs."

25. For the reasons explained below, none of the Investors or their investment enterprises has joined the MSA as an SPM. Consequently, Grand River, Native Tobacco Direct and Native Wholesale Supply have been classified by the MSA States as "NPMs" under the Escrow Statutes and subjected to that legislation's payment requirements. The result has been devastating and has damaged and continues to cause significant damage to the Investors and their investments.

The Renegade Clause

26. Notwithstanding that the MSA was drafted by the Majors and the MSA States, and presented to the public as a settlement of lawsuits that were asserted only against the Majors, the MSA expressly provides that other manufacturers and competitors of the Majors may join the MSA as SPMs. MSA § IX(i).

27. Inducing manufacturers and competitors that had never been accused of, nor sued for, any wrongdoing to enter into a settlement agreement, however, required an incentive. That incentive came in the form of a payment exemption set forth in the MSA's Renegade Clause and, further, from the threat that electing not to join the MSA would subject an NPM to substantial, non-exempt payment obligations under the Escrow Statutes.[4]

---

[3] The one exception, explained immediately *infra*, is that certain SPMs benefit from a payment exemption that is not similarly afforded to other SPMs nor NPMs.

[4] As North Dakota Attorney General Heidi Heitkamp and Washington Attorney General Christine Gregoire explained at the press conference announcing the MSA: "We are deeply concerned about so-called renegades or rogue manufacturers who are not subject to the [MSA] .... And so consequently, there are incentives built into this deal all around for us to bring as many [manufacturers] in as we can .... [W]e believe there is an incentive for [these manufacturers] to come in, to live consistently [with] the advertising and marketing restrictions that are placed here. We've tried to give them economic incentives." Press Conference of Attorneys General announcing MSA, *Federal News Service,* November 16, 1998 (hereafter "MSA Press Conference"), Exhibit "3."

28. Under the MSA's Renegade Clause, a tobacco product manufacturer (which includes a manufacturer or importer of record) that elects to join the MSA as an SPM must make *pro rata* annual "settlement" payments to the MSA States based on the SPM's comparative U.S. market share *vis-à-vis* the Majors' market share. MSA §IX(i)(1). The Renegade Clause contains an exemption, however, pursuant to which an SPM that agreed to sign on to the MSA within 90 days of its Execution Date (November 23, 1998) would not be required to make any MSA payments, provided its sales in any given year do not exceed the greater of 100% of its 1998 U.S. market share or 125% of its 1997 U.S. market share. MSA § IX(i)(1),(4).

29. In contrast to the early signing SPMs, any manufacturer that signed the MSA more than 90 days after the Execution Date is deemed to have 0% U.S. market share for both 1997 and 1998; hence, any manufacturer that became an SPM subsequent to the 90-day deadline, or which now becomes an SPM, must make MSA payments based on every cigarette it sells -- no exemption applies.

30. None of the Investors nor their investment enterprises were privy to the MSA negotiations, nor were they ever notified of the 90-day deadline. Indeed, none of the Investors or their investment enterprises was ever notified that the MSA -- a settlement agreement between States and private third parties -- could be signed by any manufacturer other than those accused of wrongdoing or sued, *i.e.*, the Majors.

31. Yet, as the statements of the attorneys general that negotiated the MSA make clear, the MSA States and Majors had been secretly negotiating before the MSA's execution with a select few of the Majors' competitors to join the MSA as SPMs within the 90-day deadline, so that they would receive the benefit of the foregoing exemption and favorable treatment under the MSA:

> *MSA Press Conference at 8* ("I'm delighted to say that just before I came in here today, we received a call and a fax from Commonwealth [Tobacco] ... who was not sued by any of the states, but has decided they, too, will be a signatory to the agreement ... *We're in negotiations with a number of other manufacturers*.") (emphasis added).

32. In 1998, the Majors accounted for approximately 96% – 98% of the U.S. cigarette market. The intent and purpose of the Renegade Clause's exemption was to induce a select group of smaller competitors (hereinafter "Exempt SPMs") to join the MSA under a grant that effectively safeguarded their existing market share, while simultaneously and effectively taking the share held by other competitors, including the Investors and their investment enterprises, for the benefit of these Exempt SPMs. The Exempt SPM's would thus be provided with the exclusive entitlement to the remaining 2% – 4% of the U.S. market and subsequent increases in market share beyond those levels. This result was engineered through a secret arrangement only offered to Exempt SPMs.

33. The statements of the MSA States' officials reveal the deception and discrimination inherent in their treatment of other competitors, particularly the Investors and their investments, *vis-à-vis* Exempt SPMs. Even prior to the MSA's Execution Date in November 1998, the MSA States had already negotiated and reached agreement with Exempt SPMs to sign on to the MSA within 90 days of the Execution Date, and thus receive the benefit of the foregoing exemption from the MSA's payment requirements.

34. Notice of the foregoing negotiations or an invitation to join as an Exempt SPM was never given to the Investors nor to their investment enterprises, and no explanation exists for the MSA States' failure to do so. In short, the Majors and the MSA States selected an exclusive group of smaller competitors with whom they would negotiate privately, and secretly, to obtain this favorable treatment. The MSA States did so to the exclusion and considerable detriment of all other smaller competitors, including the Investors and their investments.

35. Moreover, the States were well aware that the tobacco products of other competitors, including the Investors and their investment enterprises, were sold in the United States. Yet, the MSA States did not invite or give notice to these entities to participate in the MSA under the same favorable terms as those secretly offered to and negotiated with Exempt SPMs, including Ligget Corp. and Commonwealth Tobacco Company, which are U.S.-based manufacturers.[5]

36. Without an exemption, if the Investors or their investments join the MSA, their payment obligation to the MSA States would amount to tens of millions of dollars annually. To illustrate, if Grand River and Native Wholesale Supply, individually or as co-venturers, sold cigarettes in 1999 equivalent in amount to the market share devised and allocated to Exempt SPMs (3.8%), and they chose now to join the MSA, they would be required to make retroactive MSA payments for that year in the approximate amount of $158 million, despite the fact that Exempt SPMs were required to make *no* MSA payments for selling the same number of cigarettes in 1999.

37. Similarly, assuming current sales trends, if Grand River and Native Wholesale Supply, individually or as co-venturers, now or hereafter join the MSA, they will incur tens of millions of dollars in MSA payments for their 2002 and 2003 sales, *alone*, despite the fact that Exempt SPMs incurred $0 for selling the same number

---

[5] In 1999, Exempt SPMs sold approximately 3.8% of all the cigarettes sold in the U.S. -- <u>16.6 billion cigarettes</u> -- without incurring any MSA payment obligations with respect to those sales. These SPMs also were, and continue to be, exempt from Escrow Statute payment obligations (discussed *infra*) with respect to those and equivalent future sales. In short, the Renegade Clause's annual exemption for these Exempt SPMs continues *pro rata* in perpetuity under the MSA

of cigarettes. In addition, if Grand River and Native Wholesale Supply "join" the MSA today, they must pay on average approximately 12.5% more per carton annually than the Majors must pay under the MSA.

38. Thus, the Investors and their investment enterprises have been effectively precluded from "joining" the MSA on the same terms that have been made available to their competitors. Moreover, as demonstrated below, even if the Investors and their investment enterprises do not join the MSA, they are still required to make the equivalent, multi-million dollar payments annually under what are called Escrow Statutes -- while Exempt SPMs are required to make *no* payments under the MSA or under the Escrow Statutes for selling the same number of cigarettes.

The Escrow Statutes

39. The MSA contains, in Exhibit "T," model legislation that was drafted by the MSA's parties to be enacted in every MSA State and applicable to every tobacco product manufacturer whose cigarettes are sold in the MSA States. Each of the 46 MSA States has enacted this model legislation, which is commonly known as the "Escrow Statue." These measures effectively gave force to the discriminatory and anticompetitive provisions of the MSA in each State.

40. The Escrow Statutes require a tobacco product manufacturer whose cigarettes are sold in an MSA State to do one of two things. First, it may join the MSA as an SPM (without an exemption.) Alternatively, it may remain a "Non-Participating Manufacturer" or "NPM." As an NPM, the manufacturer must establish and maintain a "Qualified Escrow Fund," *i.e.*, an escrow arrangement with a qualified financial institution, into which the manufacturer must make annual payments that are held for twenty-five years for the benefit of the MSA State.

41. To illustrate, for each carton of cigarettes manufactured and distributed by Investors and their investment enterprises that are sold in MSA States, the Escrow Statutes require them to place into a Qualified Escrow Fund by April 15th of the year following the year in which such sales are made: $1.88482 for cigarettes sold in 1999; $2.09424 for cigarettes sold in 2000; $2.7225 for cigarettes sold in 2001 and 2002; $3.35078 for cigarettes sold in 2003 through 2006; and $3.76964 for cigarettes sold in 2007 and thereafter. Each of the foregoing per carton amounts are further subject to cumulative inflation adjustments of no less than 3% per year, as calculated per the terms of the MSA.

42. The total amount an NPM must deposit and maintain in the Qualified Escrow Fund is capped by, and ultimately calculated based on, what it would have paid as an SPM under the MSA, *with no exemption.*

43. The purported purpose of each Escrow Statute is to create a fund that may be accessed by an MSA State to satisfy any judgment that it might receive in the

event it successfully sues the NPM in the future. Such lawsuits must be for claims similar to those asserted against the Majors, and the NPM must be found by a court to have acted "culpably." The funds deposited may not be accessed by the NPM for twenty-five years after their deposit, except to the extent needed to satisfy such judgments.

44. Thus, despite having never been accused of any wrongdoing nor sued or alleged to have engaged in the kind of misconduct allegedly engaged in by the Majors, anywhere in the Free Trade Area, the Escrow Statutes require the Claimants and their investment enterprises to deposit millions of dollars annually into a Qualified Escrow Fund to secure claims that presently do not exist, may never arise, and which currently have no legal basis. The Claimants do not receive the benefit of a fair and equitable hearing (assessing their likely culpability – for which such payments are ostensibly to be made). They do not even hear any claim against them. They are simply ordered to make tens of millions of dollars in annual payments for the benefit of these MSA States, which are to be held for twenty-five years in the event at some point in the future a State recovers a judgment against them for acting culpably (a term nowhere defined).

45. As indicated in the MSA, however, the Escrow Statutes' true purpose is to "effectively and fully neutralize the cost disadvantages that the [Majors and SPMs] experience *vis-à-vis* [NPMs] within each [MSA State] as a result of the provisions of [the MSA]." MSA IX(d)(2)(E).

46. The Escrow Statutes have this "neutralizing" effect because the escrow payments they require are prohibitive, *i.e.*, the per carton payments required under the Escrow Statutes are greater than the per carton profits of Investors or their investment enterprises.

47. Thus, the Investors and their investment enterprises are forced to raise prices if they wish to comply with the Escrow Statutes; they cannot maintain pre-MSA price levels for their cigarettes and stay in business. If they increase prices, however, their ability to offer significant price competition to the Majors and SPMs -- particularly Exempt SPMs -- is materially and adversely compromised. The effect of compliance, accordingly, is the complete destruction of the Investors' business and their investments.

48. On the other hand, if an NPM does not make the payments required under a State's Escrow Statute, the NPM is subject to civil penalties and its products will be prohibited from being sold in the State. The effect of non-compliance, accordingly, is a complete prohibition against the operation of the Investors' business and their investments within the territory claimed by the USA, again resulting in its complete destruction.

The Contraband Laws

49. In or about the beginning of 2002, the MSA States started to enact and adopt what the MSA States call "complementary legislation" and regulations -- defined herein collectively as "Contraband Laws." They are defined herein as Contraband Laws because cigarettes that are manufactured by an NPM that has not complied with the Escrow Statutes are considered contraband. These laws were and are designed to provide a further, immediate means of neutralizing competition from NPMs, and they were drafted and proposed for legislation by the National Association of Attorneys General ("NAAG") and the Majors.[6]

50. Penalties under the Contraband Laws are severe and, unlike the Escrow Statutes, explicitly apply to distributors as well as NPMs. Violation of a Contraband Law subjects a distributor to civil monetary penalties and suspension or cancellation of its license to stamp cigarettes. Cigarettes that are stamped in violation of a Contraband Law are also subject in some States to immediate seizure by state officials and a forfeiture action similar to those involving pre-conviction forfeiture crimes.

51. The Contraband Laws also provide that an NPM's products may not be sold in an MSA State unless the NPM appoints a representative statutory agent for service of process in the State. In addition, these laws provide for the public posting and publication of lists of NPMs who have not complied with the Escrow Statutes – a black list – that lists those manufacturers whose products can and cannot be sold in the State. If an NPM has not complied with an escrow statute, its products are "black listed," meaning they are posted on an attorney general's website and cannot be sold in the State.

MSA States' Actions Against the Investors and their Investments

52. Within the past twenty-four months, the MSA States have undertaken enforcement and coordinated enforcement of the Escrow Statutes and Contraband Laws against and relating to the Investors and their investment enterprises.[7] Thus

---

[6] Under the Escrow Statutes, an NPM and others selling its cigarettes may be enjoined from selling cigarettes in an MSA State only after the NPM is found to have knowingly withheld escrow payments for two separate years. Under the Contraband Laws, however, there is an immediate prohibition against the stamping and sale of an NPM's cigarettes if the NPM is not in compliance with the State's Escrow Statute.

[7] Each Escrow Statute provides that the State's Attorney General is authorized to bring a civil action on behalf of the State against an NPM if it fails to make required escrow payments, and seek a civil penalty of up to 300% of the amount required to paid into escrow in the case of a knowing violation. The Escrow Statutes also provide that each failure to make an annual escrow payment constitutes a separate violation, and, in the case of a second knowing violation, the NPM is to be prohibited from selling cigarettes to consumers within the applicable MSA State for a period not to exceed two years.

far, a number of MSA States have commenced litigation against these entities under the Escrow Statutes, and many more have demanded escrow payments from these entities and threatened suit.

53. To date, approximately $1,100,000 in escrow and penalties (for alleged untimely compliance with the Escrow Statutes) has been paid by or for the Claimants under the Escrow Statutes, without prejudice and under a full reservation of their rights under U.S. law.

54. More importantly, the Investors and their investment enterprises face numerous additional lawsuits and demands for tens of millions of dollars in escrow payments and penalties from other MSA States, all under similar threats that, if the escrow and penalties are not paid, the Claimants will be prosecuted and their products deemed contraband in the MSA States.

55. The foregoing enforcement efforts are coordinated and implemented through various committees and task forces of NAAG that are comprised of officials from the attorneys general offices of the MSA States and the personnel and attorneys employed by NAAG, who are paid from an enforcement fund that is funded separately under the MSA by the Majors.

56. The MSA States' enforcement actions and demands are based on the claim that the Investors and their investment enterprises manufacture and sell cigarettes that they "intend to be sold in the United States," irrespective of whether they "intend" their cigarettes to be sold in any particular MSA State.[8]

57. The Investors and their prior and current investment enterprises have produced, sold and distributed tobacco products that have been sold on Native American land in the United Statessince long before the MSA's execution or the States' enactment of the Escrow Statutes. None of the Investors or their investment enterprises has ever been sued for, nor accused of, any of the claims asserted against the Majors and settled under the MSA.

58. There is no basis whatsoever for the MSA States, for the first time in the history of the U.S. tobacco industry, to require competitors such as the Investors and their investment enterprises to make multi-million dollar escrow payments for the States' benefit as herein described. Moreover, there is no legally permissible or

---

[8] Indeed, *even if Investors' products are sold only in one of the four non-MSA States*, they would be subject to an MSA State's Escrow Statute if the cigarettes are subsequently sold in that MSA State "whether directly or through a distributor, retailer or similar intermediary or intermediaries" -- irrespective of how such products find their way into the State, by whom they are sold, and even if Investors or their investment entities did not direct or take part in any sale in the State.

internationally acceptable basis for the MSA States to select those competitors that are to receive favorable treatment in the form of payment exemptions under the MSA and Escrow Statutes -- significantly to the disadvantage and detriment of other competitors, particularly the Investors and their investment enterprises herein.

Additional State Measures Designed to Secure the MSA Cartel Price

59. On January 8, 2004, Michigan promulgated Act Nos. 285 and 286, which renew the escrow obligations of all NPMs whose cigarettes are sold in Michigan and impose a new "equity assessment" on such sellers. This "equity assessment" must be "pre-paid" by March 1st of each year, at a rate of 175 mills per cigarette (i.e. ¢35 per 20-cigarette pack) for all cigarettes likely to be sold in the State (based upon the past year's performance) or $10,000.00 (whichever is higher).

60. Measures such as those imposed by Michigan should be considered as part of the ongoing application of the MSA by the 46 MSA States to preserve the market share of their settlement partners (i.e. the Majors), to the detriment of NPMs such as the Claimants and their investment enterprises. The Claimants reserve their rights to include the impact of these, and any other related measures imposed by any of the MSA States before this claim is heard, in their analysis of damages suffered as a result of their imposition.

(II) Issues

61. The Government of the United States, through each of its MSA States, has breached its obligations under NAFTA Articles 1102 (National Treatment), 1103 (Most Favored Nation Treatment), Article 1104 (Standard of Treatment), Article 1105 (Treatment in Accordance with International Law), and Article 1110 (requiring Compensation for Expropriation). The claimants have incurred damage by reason of that breach, including in relation to their investments as hereinbefore and hereafter described.

Article 1102 - National Treatment

62. NAFTA Article 1102 requires the States of the United States to accord to Canadian investors and their investments treatment no less favorable than that accorded, in like circumstances, to U.S. investors and their investments with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

63. The Investors and their investments have been accorded less favorable treatment than that accorded to investors of the United States and their investments with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of their investments. The best treatment

available to investors operating in like circumstances with the Claimants and their investments is offered to virtually every other person conducting business in the U.S.A. – i.e. the freedom to transact business without being forced to make prohibitive payments into an escrow fund to secure payments of judgments arising from vaguely unspecified "culpable conduct" which has never been committed, nor even accused of having been committed.

64. In addition, the Investors and their investments have not been provided with the best treatment available to their U.S. competitors. The best treatment provided under these measures is accorded to those who are exempted from the payment requirements of the MSA and Escrow Statutes as described above.

65. The operation and effect of the MSA, Escrow Statutes and Contraband Laws has been to unreasonably discriminate against the Investors and their investments, thereby compromising their ability to compete and operate their businesses and investment enterprises, including in territory claimed by the U.S.A., and causing them financial loss, to the corresponding benefit of U.S. competitors who have received and continue to receive more favorable treatment under the MSA and these laws.

Article 1103 – Most-Favored Nation Treatment

66. NAFTA Article 1103 requires the States of the United States to accord to the Investors and their investments treatment no less favorable than that they accord, in like circumstances, to investors or investments of any other Party or non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

67. Neither the Federal Government nor any of the MSA States requires foreign investors to maintain qualified escrow funds to secure judgments that may be rendered against them for unspecified wrongs. Under Article 1103, the MSA States must provide this level of treatment to the claimants, who are operating their business in like circumstances; i.e. never having had a claim made out, much less proved, against them in a U.S. court.

68. Moreover, foreign competitors of the Investors and their investments have been provided with an exemption under the aforementioned measures in breach of Article 1103. As a result, the Investors and their investments have not been accorded the best treatment available with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. The Investors and their investments have suffered loss and harm as a result of the imposition of these measures in breach of Article 1103.

Article 1104 - Standard of Treatment

69. Article 1104 of the NAFTA requires each NAFTA Party, and the states or

provinces of such Party, to accord to investors and the investments of another Party the better of the treatment required by Articles 1102 and 1103.

70. None of the MSA States has thus far accorded to the Investors and their investments the better of the treatment required by Articles 1102 and 1103.

Article 1105 - Minimum Standard of Treatment

71. Article 1105 requires each NAFTA Party to accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

72. The investments of the Investors have been accorded treatment which falls far below the minimum standard of treatment which is required under customary international law.

73. The MSA States have imposed measures relating to the investments of the Investors that require the establishment of an escrow fund to secure claims that do not exist or that have never been asserted against them. These measures have been imposed in a manner that is so arbitrary as to be completely unjust. Arbitrariness is an anathema to the international rule of law.

74. In addition, international law requires that for treatment to be fair and equitable, a certain minimum degree of transparency will be required. As the degree of interference with the investment increases, so too does the obligation to provide notice and an opportunity to be heard. No such notice, much less an opportunity to be heard, was provided to the Investors before these measures were imposed upon their investments and in favor of their competitors. The Investors and their investments have suffered loss and harm as a result of the imposition of these measures in breach of Article 1105.

75. Similarly, the good faith requirement to provide fair and equitable treatment prohibits States from acting in a way specifically intended to favor one participant in the business community better than another similarly situated participant. It does not matter why such conduct is engaged in, or whether it is performed *ultra vires* any official grant of authority. It certainly does matter, however, if such conduct is engaged in by stealth – as it was in this case – because it evidences an utter lack of good faith in the administration of public office.

Article 1110 – Expropriation

76. Under Article 1110 of the NAFTA, no Party may directly or indirectly expropriate an investment of an investor without the prompt payment of effective compensation. This obligation is extended to the states and provinces of a Party through the application of NAFTA Article 105.

77. By essentially banning the purchase and sale of the Investors' products in the MSA States and the operation of their investment enterprises unless they make prohibitive MSA or escrow payments, the MSA States have effectively expropriated their business as hereinabove described.

78. Currently, cigarettes produced and sold by the Investors and their investment enterprises are banned from sale in numerous MSA States. Additional MSA States continue to demand and sue the Investors or their investment enterprises, seeking damages in the amount of escrow and penalties claimed to be due and injunctive relief preventing the sale of their cigarettes in these States.

79. In short, if the Investors fail to comply with the arbitrary and unjustifiable demands imposed by these measures, they will lose their business. If they comply with these unconscionable demands, they will still lose their business.

80. The claimants only remain in business today, and their products are only sold in a few States, because they have fought the application of these measures, and mitigated their effect by making certain "without prejudice" escrow payments, but their products have been banned in numerous States and their business will fail if the measures continue in force against them. Accordingly, the result of the conduct of these MSA states has been effectively to expropriate the business of the Investors, without any of the MSA States' having paid effective compensation to the claimants.

(III) Relief Sought and Damages Claimed

81. The Investors claim damages for the following:

    i. Damages of not less than US$340 million, as compensation for the damages caused by, or arising out of, the United States' measures that are inconsistent with its obligations contained within Part A of NAFTA Chapter 11;

    ii. Costs associated with these proceedings, including all professional fees and disbursements;

    iii. Fees and expenses incurred to oppose the promulgation of the infringing measures;

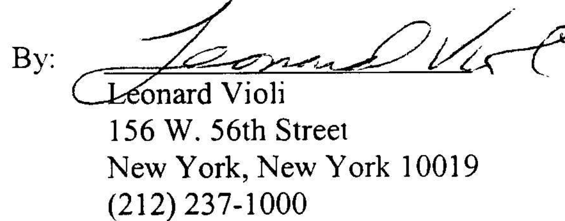
    iv. Pre-award and post-award interest at a rate to be fixed by the Tribunal;

    v. Payment of a sum of compensation equal to any tax consequences of the award, in order to maintain the award's integrity; and

vi. Such further relief as counsel may advise and that this Tribunal may deem appropriate.

Dated: New York, New York
March 10, 2004

WINDELS MARX LANE & MITTENDORF, LLP

By: 
Leonard Violi
156 W. 56th Street
New York, New York 10019
(212) 237-1000

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

-----
Todd Weiler
NAFTALaw.org
Of Counsel

Served To:

United States Department of State