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,

V.

UNITED STATES OF AMERICA,

RESPONDENT/PARTY.

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VOLUME I

ARBITRATION HEARING

TRANSCRIPT of the stenographic
notes of the proceedings in the
above-entitled matter, as taken by and
before TAB PREWETT, a Registered
Professional Reporter, a Certified
Shorthand Reporter of the State of New
Jersey, and Notary Public of the State of
New Jersey, held at the Offices of the
INTERNATIONAL CENTRE FOR DISPUTE
RESOLUTION, 1633 Broadway, New York, New
York, on Thursday, March 23, 2006,
commencing at 9:30 a.m.
APPEARANCES:

MEMBERS OF THE Tribunal:

MR. FALI S. NARIMAN, PRESIDENT
PROFESSOR JAMES ANAYA
MR. JOHN R. CROOK

SECRETARY OF THE Tribunal:
UCHEORA ONWUAMAEGBU, ICSID

ATTENDING ON BEHALF OF Claimants:
LEONARD VIOLI, ESQ.
ROBERT J. LUDDY, ESQ.
CHANTELL MACINNES MONTOUR, ESQ.

STEVE WILLIAMS
ARTHUR MONTOUR
TODD WEILER, ESQ.

ATTENDING ON BEHALF OF THE UNITED STATES:
MARK A. CLODFELTER, ESQ.
ANDREA T. MENAKER, ESQ.
CARRIELYN D. GUYMON, ESQ.
MARK E. FELDMAN, ESQ.
WILLIAM LIEBLICH, ESQ.
LEWIS POLISHOOK, ESQ.
RENEE GARDNER
Grand River Arbitration

PRESIDENT NARIMAN: Welcome to this jurisdictional hearing. And we all of us read your papers; and you have submitted them, and they have been quite numerous. And I think we can proceed with your objections to jurisdiction, if you just tell us what your case is.

MR. CLODFELTER: Mr. President, we would ask whether the tribunal would be interested in considering the issue that was raised recently, about the proposed introduction of new evidence.

PRESIDENT NARIMAN: I know; we saw that. But let's see whether it's relevant, not relevant. So I think let's get along, and you address us, of course, when you attempt to introduce that. You go first.
MR. CLODFELTER: Mr. President, let me introduce myself again first. I am Mark Clodfelter. I am assistant legal advisor for international claims 0006 Grand River Arbitration in investment disputes for the US State Department. It's a pleasure to appear before you again, and it's an honor to open the United States presentation. PRESIDENT NARIMAN: Would you introduce your team so that -- and go on record, on both sides. MR. CLODFELTER: I hope to do that now. To my left is Ms. Andrea Menaker, who is chief of the NAFTA Arbitration division of my office. To her left is CarrieLyn D. Guymon who will be presenting this morning, and Mark Feldman, both of whom are attorney advisors, who are members of that division. We also have Renee Gardner from our office, who will be the legal assistant assisting us in presenting our argument. We also have to assist us Mr. Bill Lieblich from the National Association of Attorneys General, who you may remember from last year's 0007 Grand River Arbitration organizational meeting, and as well Lewis Polishook from the New York Attorney General's Office. PRESIDENT NARIMAN: Good. And on this side would you like to -- MR. VIOLI: Yes. Good morning, Members of the Tribunal. My name is Leonard Violi. I will be presenting the presentation today. To my left is Robert Luddy with the law firm of Windels Marx Lane & Mittendorf. To my right is Todd Weiler. To his right is Chantell MaclInnes Montour. To her right is Arthur Montour, one of the
claimants in this proceeding. And
immediately to Mr. Montour's right is
Steve Williams, who is the president
of Grand River Enterprises Six Nations
Limited, also one of the claimants in
this proceeding.

PRESIDENT NARIMAN: Thanks.
Welcome. All right.

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OPENING PRESENTATION BY MR. CLODFELTER

MR. CLODFELTER: Mr. President,
this morning I'll begin our
presentation with a statement of the
issues before you at this preliminary
stage of the proceedings, and I will
be followed by Ms. Menaker and
Ms. Guymon. We anticipate our
presentation will last about two hours
this morning. I would suggest that,
for the morning break, it might be
appropriate to take it after
Ms. Menaker's presentation.

Mr. President, under your
decision of bifurcation, the task
before you today is to determine
whether the Claimants have established
that this tribunal has jurisdiction
over their claim, in the light of one
of the five jurisdictional objections
that the United States has raised
that.

And that objection is, of
course, that the claim as presented by

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the Claimants in their notice of
arbitration and statement of claim,
was submitted outside of Chapter 11's
limitations period.

As Claimants stated in both of
those pleadings, the gravamen of the
claim is the Tobacco Master Settlement
Agreement concluded in November of
The Master Settlement Agreement, or MSA for short, was the largest civil settlement in the United States and represented a monumental effort by the constituent states and territories of the United States to address the public health crisis presented by smoking-related deaths and illnesses.

Cigarettes, including the Claimants' cigarettes, are, like all tobacco products, inherently dangerous and cause serious illness and death. The health problems caused by cigarettes impose enormous costs on state and local governments.

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The MSA was an effort to apportion responsibility for those costs among tobacco product manufacturers. All of the losses that Claimants complain about stem from changes in the tobacco market in the United States that resulted from the MSA, and the actions that it required to be taken, and which Claimants allege were in breach of NAFTA.

All of the breaches and the losses they allege -- and the Tribunal must take the allegations and a breach of loss as they were pled -- all of them derive from the MSA.

And the relief that they seek is aimed at undermining the MSA's carefully crafted scheme for apportioning responsibility among tobacco product manufacturers. In short, this case and the present jurisdictional issue before you today necessarily concerns the MSA.

But the Claimants have a serious problem. And that problem is that the MSA was concluded over
five years before they submitted their claim to arbitration, and the opportunity afforded to them to be grandfathered into the MSA without having to make payments under the agreement expired over five years before they submitted their claim to arbitration.

And the escrow statutes enacted by all 46 of the MSA states, as the MSA required them to do, were all enacted at least three years and nine months before they submitted their claim to arbitration.

In short, the claim is time barred. As you can see on the screen, Articles 1116(2) and 1117(2) of NAFTA bar claims by an investor on its own behalf or on behalf of its enterprise, quote:

"If more than three years have elapsed from the date on which the Grand River Arbitration investor or enterprise first acquired or should have first acquired knowledge of the alleged breach, and knowledge that the investor or enterprise has incurred loss or damage." End of quote.

The United States' consent to arbitrate, and thereby this Tribunal's jurisdiction. Is confined to claims that are submitted within this time limitations period.

PRESIDENT NARIMAN: How do you -- what do you think is commencement of the claim according to you? Is it the arbitration notice, or is it the statement of claim?

MR. CLODFELTER: The arbitration notice.

PRESIDENT NARIMAN: Please go on.

MR. CLODFELTER: This time bar is jurisdictional in nature.
Claimants themselves have acknowledged this in their response to our Grand River Arbitration objection, as they had to do in the light of the overwhelming weight of authority supporting the principle that international tribunals lack jurisdiction over time-barred claims. We cite a bunch of that authority to support that at note five in our request for bifurcation. This time bar is absolute.

As the NAFTA Chapter 11 Tribunal in the Feldman case explained in its award, excerpted on the screen:

"NAFTA articles 1117(2) and 1116(2) introduce a clear and rigid limitation defense, which, as such, is not subject to any suspension, prolongation, or other qualification."

Thus, the NAFTA legal system limits the ability of arbitration within the clear-cut period of three years.

PRESIDENT NARIMAN: I was just wondering -- pardon my interruption -- is there any wording with regard -- with regard to this limitation provision inside NAFTA? Are you aware, because none of you have cited it? I just wanted to know. Is there anything in the wording which may assist us in some sort of a conclusion, because I would like you at some stage -- even though I don't want to interrupt your -- flow of your argument -- at some stage to address us in particularity about some general statements about limitation, on the wording of the article, if you don't mind at some stage, so that you claim breach, et cetera, so that we get very clear about this concept, what breach
is, alleged breach, such as and so on.
I mean, if you could, just so
our mind gets focused -- you see -- on
this three-year period, which you say
commences from the notice of
arbitration.

Take your own time.

MR. CLODFELTER: The period

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ends upon the filing of the notice of
arbitration, three-year period prior
to the filing of the notice of
arbitration.

But if I might, with respect to
the travaux, just to give you a
general answer at this point, that is,
the travaux relating to Chapter 11, is
very sparse, essentially constitutes
exchange -- agreed text during the
negotiations that the parties
exchange. And those have all been
made available publicly.

We will consult during the
break to make sure that we give a full
and complete answer to your question
as it regards specifically the time
limitation language, but I don't think
anything in the travaux helps.

With respect to the specific
terms of the provisions, we will be
addressing those during our
presentation. Of course, please
interrupt anytime if we are not.

PRESIDENT NARIMAN: Please
proceed, yes.

MR. CLODFELTER: The times
limitation provisions are important.
It is paramount that the Tribunal
enforce this times limitation
provision and enforce it strictly in
order to uphold the sound rationales
underlying its conclusion under the
provisions of NAFTA.
Limitations period, such as this three-year limitation period, provide certainty and legal peace for respondents. The United States is entitled to know that, five years after the MSA was concluded, it does not have to defend against claims of international responsibility arising thereunder. Now, without this kind of legal certainty, governments could not continue to function effectively.

Limitations periods also prevent the airing of stale claims for which evidence may no longer be available and the witness recollection may be infirm. I refer you to the authority cited at note 126 of our objection.

The United States has already encountered difficulty in obtaining evidence relevant to its defense of this case as a result of the passage of time. For example, the lead outside attorney for the MSA states responsible for liaison with small tobacco companies, Larry Loveland and the author of some of the documents that Claimants wish to introduce late, is now deceased.

In addition, the reporter for The Hamilton Spectator, Kate Barlow, who quoted Grand River's president in the article that we have submitted, has retired and left no contact information.

Now, the testimony of these witnesses is not necessary to sustain our defense. Indeed, the documents submitted speak for themselves.

Nevertheless, the fact that Claimants attempt to so doubt where none exist by citing the absence of testimony by
individuals like Ms. Barlow underscores the importance of the times limitation provision. It is imperative that it be strictly honored.

Now, because times limitations provisions are jurisdictional, Claimants have the burden of proving that they have complied with the time limitation here just as they have the burden of proving that they meet all of the jurisdictional requirement for arbitration under NAFTA Chapter 11.

It is well established in international law that the burden of proving jurisdiction is on the claimant. Claimants, however, deny that they bear that burden on this issue. This is at page 23 of the rejoinder.

Grand River Arbitration Not only is this denial against all authority; it is also a strong indicator that they cannot meet that burden. For example, Claimants disavow any responsibility for Mr. Arthur Montour's failure to state this statement, when he first learned of the Missouri enforcement action, a key fact.

They also disavow responsibility for the absence of any testimony on behalf of Native Wholesale Supply or its predecessor, Native Tobacco Direct. The company files have been searched for notices to the Claimants, like the testimony provided today, in fact, by Mr. Williams on behalf of Grand River.

As another example, Claimants express outrage that the states did not extend to them a personalized direct invitation to join the MSA before the 90-day window for grandfathered treatment ended. But
when asked if Grand River even manufactured cigarettes for sale in the United States before the MSA, a simple question, they merely repeat, again, that Claimants, quote: "Have been involved in the manufacture and distribution of tobacco products for sale in the United States since 1992," unquote. This is at page eight of the rejoinder.

But they are evading rather than answering such a simple question. And their failure to correct such gaping holes in their presentation can not be excused on the ground that they don't have the burden of doing so. This would turn the burden of proof on its head.

MR. CROOK: Mr. Clodfelter, excuse me. Maybe you are going to address this, but the Claimants, as I recall, quote Feldman for the proposition, essentially, that the movant has the burden of going forward. And they say, here you are the movant. Therefore, you have the burden of proof.

Do you have a view on that?

MR. CLODFELTER: Yes, we do. We have a very strong view on it. The international authority is really not in question on the point of who bears the burden, as all burdens of proof. The burden of going forward shifts depending upon what is produced. Our position here is that the initial burden the Claimants bear has not been met.

PRESIDENT NARIMAN: Yes, but isn't their case, as far as I can see, is that they are not -- they say:
"We are not so much concerned with the MSA. We are not even so much concerned with the escrow statutes."

That is their case.

"We are concerned with the third stage," what they call the

Grand River Arbitration enforcement of those escrow statutes.

And that is where, according to them, their liability, if at all, arises. I mean, that is the sort of case that they make out.

MR. CLODFELTER: That's their latest case.

PRESIDENT NARIMAN: It doesn't matter.

MR. CLODFELTER: We will talk about that, but, obviously, these are important points.

PRESIDENT NARIMAN: Because they said that the MSA -- they talk all very well:

"But we had nothing to do with the MSA. It doesn't effect us."

That is how they put it.

MR. CLODFELTER: Mr. President, they say that now because they lose if they didn't, the gravamen of their case in the notice of arbitration. But in their notice of arbitration they made it clear the MSA was a breach.

Last year in this meeting, they said the MSA was a breaching measure.

And then in their statement of claim, they couldn't run fast enough away from the MSA because they knew its implication, once they knew we were challenging the time limitations of their claim.

PRESIDENT NARIMAN: You say the MSA is an integral part of their claim with regard to breach?
MR. CLODFELTER: Absolutely.

And Ms. Menaker and Ms. Guymon will walk you through very carefully why we view that to be the case.

PRESIDENT NARIMAN: Please proceed.

PROFESSOR ANAYA: Sorry. You said they knew about the MSA's effect on them, the breach that the MSA represented -- they knew about it.

MR. CLODFELTER: We think the evidence shows that they knew about it, and they knew its effect as well.

MR. ANAYA: But they have the burden of showing that they didn't know about that.

MR. CLODFELTER: They have the burden of showing it. They do. They do have the burden of showing that, and we will point out the incompleteness of that showing and why it does not constitute a -- we have gone beyond that burden, and we have discussed evidence and produced evidence to show that, in fact, they do.

MR. ANAYA: But -- all right. But you have shown that they did know about it, but you say you don't have the burden of showing that they did know about it. Is that right?

MR. CLODFELTER: That's right. We have gone beyond our responsibility to disprove the case.

PRESIDENT NARIMAN: What has been pointed out is that this burden question fades into some sort of insignificant -- after everyone has said whatever they want to say on the subject, and then you have to assess whether this is proven or not proven.

MR. CLODFELTER: That's exactly
right. We agree with that, and, of course, in the exchange of views today, it does get lost, and it doesn't necessarily jump out as a key issue. But in your deliberation, of course, you have to weigh the evidence according to the respective burdens.

I was making the point that, when asked a simple question about whether Grand River had ever even produced cigarettes for sale in the United States before the MSA, they come back with an evasive answer that they have stated a number of times, that:
"We have been involved in manufacture and distribution since 1992."

But that type of evasion cannot avoid their burden of proof. Under the particular --

PRESIDENT NARIMAN: I didn't follow that. I'm sorry. I didn't follow that precise last part.

MR. CLODFELTER: They can't rest on blurring their activities for a period of time.

PRESIDENT NARIMAN: But how is it blurring?

MR. CLODFELTER: Because they say "manufacture and distribution."

And we don't doubt that they were involved in the distribution of cigarettes before 1999. The question is: Did Grand River produce, manufacture cigarettes for sale in the United States before the MSA?

And the fact is that, as we will talk about -- I will mention it again -- that they did not.

PRESIDENT NARIMAN: And, therefore, and if they did not.
MR. CLODFELTER: If they did not, it's two points to be drawn from that. One is, it goes to the very heart of their case -- their argument that they were entitled to individualized personal notice of the grandfather period and they were excluded from that period, and the point being, of course:

How could the MSA parties have known to notify them if they weren't even in the business at that time?

The second point, the point relevant here, is that they are not stepping up to the burden of proof. And if they didn't even enter the market, the business of manufacturing cigarettes until after the MSA, suggests strongly that they did so fully knowing the implications of the MSA regime.

In fact, the MSA regime may have been a key factor of their business plan. We don't know that.

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Yet, the very fact that they didn't manufacture before the MSA is crucial on the merits, later on, if the jurisdictional objection is rejected; but, certainly, it's crucial on the issue of the time limitation because it suggests knowledge well in advance.

But there are lots of other indicators as well which we will be getting to.

So on this issue -- the issue of the time limitation, the Claimants have the burden of proving their assertion that they neither knew nor should have known until years after their occurrence of the breaches and losses that they allege. Of course, as I mentioned, we feel that they have failed to meet that burden.

This is not surprising because
the Claimants have built their case on a series of preposterous assertions, so much that they would have you believe that, despite the fact that

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their primary business activities for many years has been in multi-million dollar cigarette enterprises:

One, they were completely unaware of the single-most important development in the history of their industry, the negotiation of the MSA.

Two, that they were so lacking in curiosity about the resulting agreement that they did not even bother to familiarize themselves with the publicly discussed opportunity to be grandfathered in.

Three, that they thought that the MSA-mandated escrow statutes, despite their clear terms, didn't apply to them because they were manufacturers -- you heard of that -- instead of direct sellers to consumers.

And, four, that for the entire period from 1999 to 2001, they didn't realize that the incurred escrow payment obligation for every Grand River cigarette that was sold in an MSA state on which excise taxes were paid -- in other words, that they were completely oblivious to the revolution taking place all around them in their very own industry.

These assertions are simply not credible. Perhaps sensing how empty these propositions sound when stated out loud, Claimants have had constantly to shift the focus of the claim. For example, they have continually changed the identification of the measures they are challenging,
as I mentioned and as you have mentioned, Mr. President.

In the notice of arbitration, they identify the MSA, the escrow statutes, and the complementary legislation as breaching measures. In their statement of claim, they impermissibly added a tax measure of the State of Minnesota, which is not even an MSA state, plus added a Michigan tax measure, which they had previously cited only as related to their calculation of their damages.

And then, this past February for the first time, they alleged that they are challenging amendments to escrow statutes, the allocable share limits, as another example. Claimants have continually changed the time at which they allege they first acquired knowledge of loss, shifting from pleading to pleading. The language of the notice of arbitration contemplates losses upon the breaching measures that they have challenged.

And in their statement of claim, they allege that they first incurred loss or damage as a result of the MSA regime in May of 2002 when they retained an attorney. And then in their rejoinder, they moved forward that time to October of 2002, when a default judgment was entered into Grand River Arbitration against them in Arizona.

But continually changing their case does not meet Claimants' burden of proving their case. And, in fact, the evidence in the record actually disproves their assertions, we will show. For example, while Claimants -- and I explained this -- they were
evasive on the question of when Grand River began manufacturing. The evidence in the record shows that they didn't begin manufacturing until afterward. Their distributors -- the relation with -- the relationship with the two exclusive distributors that they had didn't begin until well after the MSA.

PRESIDENT NARIMAN: But is it your case that the MSA did not require any specific notice in order to grandfather -- to make them take advantage of the grandfather clause, if they were not manufacturers prior to the MSA?

MR. CLODFELTER: You are assuming absolutely no requirement of the individual tobacco manufacturers --

PRESIDENT NARIMAN: That's what I thought.

MR. CLODFELTER: -- which were notified.

PRESIDENT NARIMAN: Yes.

MR. CLODFELTER: But the second point we are making is they weren't even an existing tobacco or a cigarette manufacturer.

PRESIDENT NARIMAN: I see.

MR. ANAYA: Are you saying that there is no argument that the MSA and the escrow statutes may not have applied to them in a way that ultimately they were applied, because it seems like their argument is that there was some ambiguity about how the MSA was affecting them, how the escrow statutes would affect them, and hence the damage didn't come until that was clear or there were --

MR. CLODFELTER: That is their
argument, because. You see -- the
difficulty is they have to step away
from these obvious requirements and
the obvious impact of these
requirements.

So one way is to say:
"No, we didn't know they
applied to us. We are a cigarette
manufacturer, the target of this
entire regime, but we didn't know they
did apply to us."

We will address why that
doesn't hold later this morning, if I
can refer to Ms. Menaker's
presentation on that.

MR. ANAYA: Your position,
basically, is that on the face is
these measures are clear in their
application.

MR. CLODFELTER: That is
correct. And they had all the
information they needed. Now, they

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didn't present all of that information
to you when they talked about what
information they had. But we will
walk you through why it's clear that
they knew the information contained in
these instruments.

So we don't have the burden.

They have the burden. They have not
met it, but we have summoned and
marshaled and cited evidence which
would disprove the assertions that
they have made, and demonstrates they
knew or should have known they had
first incurred the loss or damage they
allege as a result of the breaches
they allege well before March 12,
2001, the date three years before they
filed their notice of arbitration, and
thereby submitted their claim to
arbitration.

PRESIDENT NARIMAN: I just want
to know, how much knowledge is
requisite for this limitations clause.

What use is knowledge -- I just want

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to know from you. I mean, what is

your case? Forget -- I mean, we will
deal with this burden of proof and so

on. But what sort of knowledge should

be acquired in order that the

limitation begins to run?

MR. CLODFELTER: Ms. Guymon

will explain -- two things, one is

that every participant in the market,
including foreign participants, have a
duty to know the law, and that the
content of this law is clear,
unambiguous, and they can't walk away
from the duty borne by every other
trade operator.

PRESIDENT NARIMAN: No, but

this is on that argument of ignorance

of law. But does it apply to a

foreign trader or a foreign

manufacturer? Does a foreign

manufacturer have to necessarily know

the law of the country where he's

trading?

I just want to know what your

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standing is.

MR. CLODFELTER: Our position

is they have a duty to know the law.

PRESIDENT NARIMAN: The foreign

trader?

MR. CLODFELTER: Especially the

foreign trader entering the market of

another country has a particular

responsibility before doing so to

understand its obligations under the

law of that country, whether it be the

United States, whether it be India,

wherever in the world -- they have an

obligation to understand their legal

obligations.

PRESIDENT NARIMAN: It is some
sort moral obligation, yes. But a legal obligation, that is what we are on. We are only on the legal part here. Morally, you are quite right. I think there is no doubt about it that they are bound to -- that's an assumed thing. But here we are not just now on Grand River Arbitration assumptions. We are now on focusing strictly on this March deadline. 

MR. CLODFELTER: Well, it's certainly more than a moral obligation, and Ms. Guymon will address why.

PRESIDENT NARIMAN: Yeah, because I would like to have something to suggest that it's a legal obligation arising out of such and such a statement of the law, because ignorance of law is no excuse. That is a very general sort of statement. You know, it applies -- but does it apply also to a foreigner, because ignorance of foreign law is certainly not a matter on which you can say that you must know what the foreign law is because for him it's foreign law -- for them it's foreign law.

MR. CLODFELTER: I agree. I agree. No foreigner bears the responsibility for knowing the law of another country until they enter that country and conduct business. And then they have a legal, not just a moral, but a legal obligation to understand the laws.

PRESIDENT NARIMAN: I would like to have some principle on which you base this assumption.

MR. CLODFELTER: We will address that. Let me cite the authorities that we have cited before.
Let me just read you an excerpt from the MTD Equities case against Chile. This is from last year, where the Tribunal found that, quote:

"It is the responsibility of the investor to assure itself that it is properly advised regarding legal and regulatory requirements, particularly when investing abroad in an unfamiliar environment," unquote, and that the respondent Chile had, quote, "no obligation to inform Claimants, and that the Claimants should have found out by themselves.

And there are other authorities as well.

PRESIDENT NARIMAN: This is the Chile award.

MR. CLODFELTER: Yes.


MR. CLODFELTER: I will just refer you to our notes in our objections at 173 and 174.

PRESIDENT NARIMAN: Notes.

MR. CLODFELTER: Yes, footnotes.

MR. CROOK: 173 and 174.

MR. CLODFELTER: Yes.

PRESIDENT NARIMAN: Thanks.

Please. Proceed.

MR. CLODFELTER: Let me just close my opening, if I might, Mr. President. Our written submissions show this in many other ways that the evidence demonstrates that Claimants knew or should have known that they had first incurred the loss of damage well before March 12, 2000.

The rest of our presentation
will be divided into two. Ms. Menaker will walk you through the evidence that Claimants first actually incurred loss or damage as they allege before the beginning of the three-year limitations period.

Then Ms. Guymon will demonstrate how the evidence shows that the Claimants should also have known about these alleged breaches and losses before March 12, 2001, both because they had a duty to know, as we have just argued, and because of the publicity surrounding the regime itself. And she will show how that evidence demonstrates that, in addition to the fact that they should have known, they actually knew before that date. And then she will conclude our opening argument. And, Grand River Arbitration Mr. President, if it pleases you, I will you now then turn the floor over to Ms. Menaker.

OPENING PRESENTATION BY MS. MENAKER

Ms. Menaker: Thank you and good morning, Mr. President, and Members of the Tribunal. As Mr. Clodfelter noted, I would now demonstrate that Claimants first incurred losses arising out of the breaches they allege well before the three-year time limitations period had expired. Throughout my presentation I will be referring to a time line and some other slides; and our legal assistant is going to be distributing hard copies of those slides to both members of the Tribunal and to Claimants' counsel, so you can look at the hard copies if you prefer. (There was a discussion off the record.)
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MS. MENAKER: So now on the screen, you will now see a time line, and the first point that I have highlighted is March 12, 2004, which is the date that Claimants submitted their claims to arbitration. I have also highlighted March 12, 2001; and this is the date that is three years prior to the day that Claimants submitted their claims to arbitration. All of the losses for which Claimants seek recovery first occurred prior to March 12, 2001, because they all arise out of the Master Settlement Agreement and the escrow statutes. I will first discuss the Master Settlement Agreement and the escrow statutes.

PRESIDENT NARIMAN: Before you come to that, would one of you deal with the question of breach. According to you, what is the Claimants' claim with regard to breach, according to you, according to the United States?

MS. MENAKER: Yes, I will be doing that.

PRESIDENT NARIMAN: Later, whenever you -- don't take yourself out of this, but a little later.

MS. MENAKER: I certainly will. And if I don't deal with that comprehensively, feel free to ask.

PRESIDENT NARIMAN: Thank you.

MS. MENAKER: Thank you.

I will begin by discussing the Master Settlement Agreement and the escrow statutes, and show that all of the losses for which Claimants seek to recover arise out of those instruments and were first incurred in 1999. I will then explain that Claimants'
complaints about the penalties that
they have incurred for non-compliance
with the escrow statutes and their
challenges to the complementary
legislation do not alter the fact that
they first incurred loss or damage

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arising out of the alleged breaches
more than three years before the
claims were submitted to arbitration.

And, finally, I will address
Claimants' belated and improper
challenges to the allocable share
amendments and the Michigan and the
Minnesota tax assessment laws and show
why those challenges do not meet
Claimants' claims timely, leaving
aside their late introduction into the
case.

So as you can see on the slide,
the Master Settlement Agreement was
concluded in November of 1998; and
that agreement forms the centerpiece
of Claimants' claims. The Claimants
now contend that they are not
challenging the MSA, since, as is
apparent, doing so would be clearly
time barred.

But the Tribunal has to look at
the claims themselves. And it's clear
from both the notice of arbitration

Grand River Arbitration
and the statement of claim that
Claimants allege that the MSA itself
breaches the NAFTA. So even if they
now want to retract those allegations,
it doesn't save their claims because
many of the losses that they allege
arise out of the MSA, and only out of
the MSA. And those losses were first
incurred shortly after the MSA was
concluded.

So the MSA imposes payment
obligations on Original Participating
Manufacturers, or OPMs. And those manufacturers must make significant payments to the state based on their national market share. As Claimants acknowledge in their notice of arbitration -- and I have put this quote on the screen, quote:

"The MSA's payment obligations" --

PRESIDENT NARIMAN: What is NOA?

MS. MENAKER: That is notice of

Grand River Arbitration

arbitration.

PRESIDENT NARIMAN: Sorry.

Thank you.

MS. MENAKER: "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." End quote.

Payment obligations similar to those made by the OPMs are imposed on other cigarette manufacturers that join the MSA, and those manufacturers are known as Subsequent Participating Manufacturers, or SPMs.

By virtue of section nine of the MSA, however -- and I have also posted section nine on the screen -- manufacturers that joined the MSA within 90 days received a payment exemption for sales that were not in excess of a certain amount, which was calculated by reference to their market share at or before the time the MSA was concluded.

Now, these SPMs that receive that exemption are known as grandfathered SPMs. Manufacturers that joined the MSA after the 90-day period are known as SPMs, but are not
grandfathered SPMs and do not receive
a payment exemption.

Manufacturers that do not join
the MSA at all are called
Nonparticipating Manufacturers or
NPMs, and they too are not entitled to
the payment exemption.

PRESIDENT NARIMAN: What was
the object of this? I mean, with
regard to the MSA -- and I am a little
blurred about this -- why was it
drafted in this fashion, because
shouldn't it have extended to each and
every person who was a cigarette
manufacturer selling cigarettes, I
mean?

MS. MENAKER: It did, indeed.
PRESIDENT NARIMAN: I just want
to understand. I mean, why was this
drafted in this way, that it's within
90-days? They do make a mention of
it. Then they fall within the
exemption, but, if they miss the
90-day period, then they drop out of
the exemption. What was that
structured on? I mean, why was that?

MS. MENAKER: Because the MSA
was structured in order to enable the
states to get payments to reimburse
them for the medical costs that they
were -- that they had to pay out for
health-related expenses due to
cigarette smoking.

Now, the attorneys general all
realized that, if the only
manufacturers that were affected by
the Master Settlement Agreement were
the four major tobacco companies,
their prices for their cigarettes with
would necessarily have to rise, and
their payments that they had to make
to the state was based on the amounts

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of cigarettes they held -- they sold.
So the entire object of the MSA
would have been defeated because,
ultimately, what would have happened
was they would have been undercut by
all of these new manufacturers who
would have sold cigarettes into the
states who would not be paying to
reimburse the states for the medical
expenses.
So they devised this means in
order to enable as many cigarette
manufacturers to sign onto the
agreement as possible, and in order to
incentivise them to do that, they
granted them this payment exemption,
so long as their market share stayed
within certain bounds.
Now, that payment exemption --
that 90-day period had to be limited
in time because, otherwise, an NPM
would simply not incur any expenses
for reimbursing the states for the
harm that its cigarettes were causing,
Grand River Arbitration
and then, you know, three years down
the road, all of a sudden sign onto
the agreement and limit its market
share.
PRESIDENT NARIMAN: But this
brings me to the second question,
that:
Wasn't it in their interest --
I mean, as they are traders making
profits, they are not out to crook the
United States government. That's not
the object. They want to do business.
Now, wouldn't it be within
their business interests, if they had
knowledge, as you say, if they had
knowledge, to have opted in, that is
to say, to take the benefit of the
exemption within the 90-day period?
And what would be their object in
staying out and then contesting and
making a big hoo-ha about this and incurring all of these costs?

MS. MENAKER: Well, certainly, it made a number of cigarette

Grand River Arbitration manufacturers determine that it was in their business interests to opt in and to get the exemption.

Now, we don't know why a certain cigarette manufacturer would decide not to opt in. Perhaps, it decided that it would -- it did not want to be subject to the marketing and advertising restrictions that also you were obligated to abide by if you sign the agreement.

PRESIDENT NARIMAN: There is another restriction.

MS. MENAKER: That is another restriction that you had to abide by if you were an SPM.

PRESIDENT NARIMAN: It's another question. That's why I am first asking you.

MS. MENAKER: And also, perhaps, a manufacturer wanted to come in and did not want to make any payments, thought they could evade this as done by not keeping their

Grand River Arbitration market share at a certain amount.

They wanted to come in and undercut the Majors who were all going to be raising their prices.

MR. ANAYA: I thought they were exempt from payment.

MS. MENAKER: They were exempt up to a certain -- as long as their market share does not go up a certain amount.

PRESIDENT NARIMAN: The 1997 --

MS. MENAKER: Exactly, and after that then they became subject proportionally.
President Nariman: Yes.

Ms. Menaker: So there are a whole host of reasons why any -- why any individual manufacturer did not do that. One doesn't know. And like --

President Nariman: Generally speaking, it would be in the business interests of a subsequent participant in the venture to take advantage of the exemption clause unless they

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wanted to challenge the whole thing as unconstitutional or something.

Ms. Menaker: Which, in fact, they did do.

President Nariman: Unless they did for their own business purposes, it sounds to me -- I mean, good business.

Ms. Menaker: Certainly, the state governments thought that it would be in a manufacturer's interests; and, in fact, over 99 percent of the industry did sign on in one way or another. So when you look at --

Mr. Anaya: To the grandfather provision?

Ms. Menaker: To the grandfather provision, yes, if you count the --

President Nariman: Because the Majors had about 93 percent, you were saying.

Ms. Menaker: I think a little more, around 97, and then you got another around 2 percent with the 99, it was --

President Nariman: The Majors are 97.

Mr. Lieblich: The Majors had 99 percent at that time.

President Nariman: At that
time. So this was that 1 percent where the Subsequent Participating Manufacturers had.

MS. MENAKER: I think the OPMs plus the grandfathered SPMs had 99 percent of the market share at that time.

PRESIDENT NARIMAN: Not the Majors.

MR. CROOK: 2.6 percent at that time. So if you believe Claimants Exhibit 1, which I am perfectly prepared to do, let's see -- Nonparticipating Manufacturers' share -- market share at that time was 0.03 percent.

PRESIDENT NARIMAN: Okay. Please carry on.

MS. MENAKER: So we certainly -- the states certainly thought it would be in the manufacturers' interest to sign on, but there could have been reasons why they did not. But even if it were -- even if as we suspect, that it was in their interest, and the only reason for their not signing on was because they did not know, as Ms. Guymon will later show, they should have known.

And so that does not exempt them from the requirement that they sign on within the 90 days in order to get the exemption.

Now, it's this payment exemption that is granted by virtue of the Master Settlement Agreement that is at the heart of Claimants' claims. Grand River, as you know, is a manufacturer of cigarettes that did not join the MSA within 90 days. And because it has not joined the MSA, it
is relegated to NPM status, and it has
forever lost the chance to become a
grandfathered SPM.

PRESIDENT NARIMAN: Isn't it
the case that it is because they did
not know about this, for any reason,
whatever the reason, despite all the
documents that you have shown,
et cetera, that it would have been to
their interests to join if they had
known?

MS. MENAKER: We do not think
that the evidence shows that. In
fact, we think that the evidence
demonstrates quite the contrary, that
they did, in fact, know, that they did
have actual knowledge.

And what was their motivation
for not signing on? We don't know.
We can't speak for them. We don't
know if it was because they saw some
advantage in not signing on. They did

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not want to be subject to the
marketing, advertising.

PRESIDENT NARIMAN: You say --
it was difficult, perhaps.
MS. MENAKER: That is what the
evidence shows, is that they did have
actual knowledge. And in any event.
It doesn't matter, because, if they
should have known, that is sufficient.

PRESIDENT NARIMAN: No, no,
that's okay. The limitations
provision -- I just want to know, as a
matter of business interests, if they
had known, they would have joined.

Unless you are able to say
that, "No, they studiously kept out,
knowingly kept out in order to gain
some advantage over their other
competitors" -- I mean, if that is --
you can address that.

MS. MENAKER: That just would
be pure speculation on our part
because we don't know. We have no way of knowing what their motivation was.

However, there were some perceived advantages to some manufacturers for not joining on. And whether it was because they did not want to --

PRESIDENT NARIMAN: Can you enumerate these perceived advantages of not joining on, if you could give us the clauses of the MSA of not joining on -- later on -- later on.

MS. MENAKER: Okay. Some of them, like I said.

PRESIDENT NARIMAN: No, but give it to us in detail, please.

MS. MENAKER: Okay. I will do that.

PRESIDENT NARIMAN: Thank you.

Later.

MR. CROOK: Mr. Chairman, I need to correct myself. I gave the figure wrong. It's the Roger Parloff article, which was Exhibit 1 to the Claimants' later submission, which I found very interesting. And the figure was not 0.037. It was 0.37,

not 0.037. It was essentially a third of a percent according to Mr. Parloff.

MS. MENAKER: I could just point the Tribunal to -- as well as to tab 31 of our factual materials, which contains the declaration of Patricia Tilton; and then in table one it shows market share as of 1998. It shows that the Original Participating Manufacturers had just under 96 and a half percent of the national market share, that the Subsequent Participating Manufacturers had another 3 percent, and that the Nonparticipating Manufacturers had just slightly over half of a percent.
PRESIDENT NARIMAN: All right.

MS. MENAKER: The Claimants allege a breach of NAFTA on account of the fact they were purportedly denied the opportunity to become a grandfathered SPM. And they allege -- and I put these quotes on the screen -- that they were not, quote:

"Privy to the MSA negotiations, nor were they ever notified of the 90-day deadline." End quote.

And that, quote: "The MSA states and Majors have been secretly negotiating 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." End quote.

And Claimants thus contend that they were, quote:

"Effectively precluded from joining the MSA on the same terms that have been made available to their competitors." End quote.

Now, this conduct, which Claimants contend breached the NAFTA, all occurred in 1998 when the MSA was being negotiated or in early 1999 when the opportunity to become a grandfathered SPM expired.

PRESIDENT NARIMAN: Pardon me for interrupting, again, but this 90-day deadline -- was that according to you widely advertised throughout the United States, Canada, et cetera?

MS. MENAKER: Yes, it was.

PRESIDENT NARIMAN: Was it advertised by the proponents of this agreement?

MS. MENAKER: Yes, it was, and Ms. Guymon will go into detail as
to --

PRESIDENT NARIMAN: Please give me those tab numbers.

MS. MENAKER: We will certainly do that.

Now, according to their statement of claim -- and I quote:
"The MSA regime constitutes a prima facie breach of both articles 1102 and 1103, because it provides an exemption from payment obligations to both domestic- and foreign-owned tobacco businesses, while providing no exemption whatsoever to the investors Grand River Arbitration or their investment." End quote.

PRESIDENT NARIMAN: Your argument is that this is basic to their claim.

MS. MENAKER: That's right. They are saying that it's the denial of this payment exemption -- they were foreclosed from gaining that payment exemption in early 1999, 90 days after the MSA was concluded.

And they are alleging that their inability to gain that payment exemption breached articles 1102 and 1103.

Now, they similarly claim that it also breached article 1105(1) because -- and the next slide shows -- it says:
"The surreptitious manner in which smaller discount manufacturers were invited to join the MSA in return for multi-million dollar exemptions in perpetuity fell below minimum standards of transparency and thus Grand River Arbitration breached article 1105(1)."

So, Again, that is activity or conduct that occurred in 1998 when the MSA was being negotiated, and during
the early months of 1999, that they are saying breached the MSA because they were not invited to join. They did not know about this opportunity. They also claim that the exemption violated article 1110, the expropriation provision, because their market share was allegedly taken away from them by virtue of the payment exemption which they were denied. Now, these purported breaches are the cause of many of the losses for which Claimants are trying to recover in this arbitration. As Claimants acknowledge -- and I am quoting from paragraph 29 of their notice of arbitration -- quote: "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." End quote. PRESIDENT NARIMAN: I don't understand this -- the statement of claim on this. Their case is that the very intent and purpose of the exemption was to induce a group of smaller competitors to join under a grandfathered grant that safeguarded their existing -- and keeping them out. I don't understand. How would that -- MS. MENAKER: Well, it's their statement of claim. PRESIDENT NARIMAN: -- because I thought we come down to about -- I mean, as just explained, we come down to about less than 1 percent. MS. MENAKER: Right. PRESIDENT NARIMAN: Why would there be this intent and purpose of the exemption, I mean? MS. MENAKER: We believe there
was absolutely no intent and purpose of the exemption. The intent and purpose of the MSA negotiators --

PRESIDENT NARIMAN: They said to induce a group of smaller competitors to join and keeping them out.

MS. MENAKER: And that certainly --

PRESIDENT NARIMAN: They are the larger competitors, according to them.

MS. MENAKER: And the evidence shows that was certainly not the intent or the purpose of the MSA negotiators.

In fact, when you look at the press conference that the negotiators held when they announced the MSA, they publicly invited -- that's right -- they publicly invited all of the manufacturers to join. The intent -- their intent and purpose certainly was not to exclude anyone from that public invitation. They wanted as many --

"It is in our interests to get as many cigarette manufacturers as possible into the deal."

PRESIDENT NARIMAN: Was Mr. Montour also part of that -- so that Mr. Montour was also part of -- in that -- in this transcript?

MS. MENAKER: No, this is a transcript of the press conference that the attorneys general held on the day when the MSA was announced back in November of 1998.

PRESIDENT NARIMAN: There is no association applied by Mr. Montour.

MS. MENAKER: We believe that they could have been listening to it.
It was also broadcast.

PRESIDENT NARIMAN: There is no evidence apart from --

MS. MENAKER: No.

PRESIDENT NARIMAN: -- the presumed knowledge?

MS. MENAKER: We have --

PRESIDENT NARIMAN: Is a presumed knowledge enough? If a whole set of circumstances goes to show that these people must have known, is that enough? I just want to know from the United States.

MS. MENAKER: Yes, absolutely yes, because if you look at articles 1116(2) and 1117(2), it says, "knew or should have known," and "should have known" is a constructive knowledge standard.

And so if a reasonable person in that situation would have known, then they are deemed to have known, and that is sufficient. One need not prove actual knowledge.

PRESIDENT NARIMAN: Okay.

MS. MENAKER: Now, as soon as Grand River Arbitration Grand River lost the ability to join the MSA as a grandfathered SPM --

PRESIDENT NARIMAN: When should they have joined, 90 days --

MS. MENAKER: 90 days after the conclusion of the MSA, so they had until February 23, 1999, to join as a grandfathered SPM.

PRESIDENT NARIMAN: Yes. Yes. I see. Yes.

MS. MENAKER: So as soon as that date was passed, Claimants
suffered a loss to the extent that their cigarettes were sold in any MSA state because they did not have that payment exemption.

PRESIDENT NARIMAN: Right.

MS. MENAKER: So Claimants' own damages expert, which is LECG -- you will recall that LECG put in a preliminary report on damages that was attached to the statement of claim.

LECG acknowledges the fact that Claimants first incurred a loss as soon as they were denied the opportunity to become a grandfathered SPM -- I shouldn't say "denied" -- as soon as they -- that opportunity existed no longer.

So in its expert report --

PRESIDENT NARIMAN: Please read that, if you don't mind.

MS. MENAKER: I certainly will.

In the expert report, LECG calculated damages using two alternative methods. One of the methods it used, which is on the screen, was to quantify the value of Grand River's lost exemption quota under the MSA based on estimated cigarette sales.

Okay. And that is what that paragraph says, is that:

"We will look at future losses by," quote, "quantification of the value of GRP's lost exemption quota under the MSA based on its current volume of sales into the 46 US states.

Okay. And that is what that paragraph says, is that:

"We will look at future losses by," quote, "quantification of the value of GRP's lost exemption quota under the MSA based on its current volume of sales into the 46 US states."
value that was assigned to that
payment exemption in the transaction.
And using this methodology, it
concluded that the value to
Grand River of its lost payment
exemption is between 100 and
$452 million.
So Claimants' own expert report
thus confirms that Grand River
incurred a loss as a result of not
having the payment exemption obtained
by grandfathered SPM.
PRESIDENT NARIMAN: That is a
distinct claim.
MS. MENAKER: That's right.
It's a distinct loss.
PRESIDENT NARIMAN: It's a
case they are now making.
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MS. MENAKER: So the loss of
the opportunity to obtain
grandfathered SPM status was valued by
Claimants at millions of dollars, and
that loss was incurred as soon as the
opportunity to obtain the payment
exemption was foreclosed.
MR. CROOK: Just to be clear,
again, this is Claimants' study -- but
this number that you just quoted to us
was derived from the assumption that
their current volume of sales was
their volume of sales in 1997. Is
that how it worked?
MS. MENAKER: I don't believe
that is how it worked.
MR. CROOK: It says, "based on
current volume of sales."
MS. MENAKER: I think they also
looked forward to anticipate what
their future sales would be. I mean,
taking into account --
MR. CROOK: I am just going to
ask the question of whether they
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actually had sales in '97.

  MS. MENAKER: They did not have
sales -- the manufacturing facility in
Canada was not manufacturing
cigarettes for sale into the
United States until 1999, and we know
that from a number of different
sources.

  But if you look at Claimants'
own allegations, they say that -- that
the only way that they have imported
cigarettes into the states were
through two distributors, Native
Tobacco Direct or Native Wholesale
Supply, which is their exclusive
distributor for sales made on a
reservation.

  Now, that company was first
established in 1999, and then they say
that their exclusive importer for
off-reservation sales is Tobaccoville
USA. And their distributorship
agreement with Tobaccoville USA wasn't
concluded until 2002.

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  And, in addition, if the
Tribunal -- when we get to this
point -- we do have additional
information that we would be prepared
to introduce into evidence to
establish definitively that Claimants
did not import cigarettes for sale
into the United States that were
manufactured in their Canadian
facility before 1999.

  PRESIDENT NARIMAN: But your
point in drawing attention to this is
that they themselves, having
quantified their -- the amount of the
lost exemption, that 90-day period,
then they were deliberately kept out,
that that goes to show that they --
that their loss, if at all, was
incurred after -- as a direct result
of the MSA.
MS. MENAKER: Exactly.

PRESIDENT NARIMAN: That's your point?

MS. MENAKER: That is my point.

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And for this reason, this case is in stark contrast to the Feldman case that Claimants rely on. In the Feldman case, you will recall the Claimants challenged the fact they were denied rebates for that tax -- back taxes that were paid in certain years.
And they were audited and sued for the return of rebates that had been granted to them in other years. And they complained and the Tribunal found that this constituted a national treatment violation because Mexican-owned companies that were in like circumstances with it, were granted rebates in years in which Claimants were denied the rebates. And those Mexican-owned companies were not audited for the return of the rebates.
Now, this difference in treatment, which formed the basis for the claim, did not arise until the Mexican-owned company was granted the treatment that Claimants sought; and this was within the three-year limitations period. But by contrast here, the treatment of which Claimants complain was accorded -- was accorded long before March 12, 2001.

PRESIDENT NARIMAN: What is the date of this report? Do we have any --

MS. MENAKER: The LECG report, yes, it is --

PRESIDENT NARIMAN: And who was the author of this report?
MS. MENAKER: The author is -- it says LECG, which is the name of the company.

PRESIDENT NARIMAN: What is LECG?

MS. MENAKER: It is -- I don't know exactly what the acronym stands for. It says LECG Canada, Limited.

PRESIDENT NARIMAN: LECG Canada, Limited.

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MS. MENAKER: Yes. And the person who signed the report Errol, E-r-r-o-l, middle initial D. Soriano.

PRESIDENT NARIMAN: Soriano.

MS. MENAKER: And I do not -- PRESIDENT NARIMAN: He signed as director. He's a director of something.

MS. MENAKER: He's a director. That's right. And it is dated June 28, 2005.

PRESIDENT NARIMAN: June 28, 2005.

MS. MENAKER: Yes.

PRESIDENT NARIMAN: Thank you.

MS. MENAKER: Sure. Now, as I mentioned, the treatment that Claimants complain about in this case was accorded long before March 12, 2001, because, as of February 23, 1999, the door was closed to cigarette manufacturers to join the MSA and to get the payment exemption.


MS. MENAKER: 1999. Yes. And we can -- PRESIDENT NARIMAN: Exemption is closed.

MS. MENAKER: Yes. And you can see this on the time line as well.

PRESIDENT NARIMAN: Yes, yes.
MS. MENAKER: So there was no opportunity --

PRESIDENT NARIMAN: Yes, that's right.

MS. MENAKER: -- to become a grandfathered SPM after that time. So any loss that Grand River incurred as a result of not being granted the same treatment as a grandfathered SPM was incurred as of February 23, 1999, which was 90 days after the MSA was concluded.

PRESIDENT NARIMAN: Yes.

MS. MENAKER: So all of the losses for which Claimants seek to recover arise out of their obligation Grand River Arbitration to make payments into escrow in each MSA state in which their cigarettes are sold because they do not have this payment exemption as do the grandfathered SPMs.

So Claimants acknowledge in their notice of arbitration the MSA payment scheme is expressly made applicable to them through two interrelated provisions.

And the first of the provisions is section nine of the MSA, which I already talked about, which grants the grandfathered SPM treatment to those manufacturers that joined within the 90 days.

And the second of the two provisions referred to by Claimants is the model legislation or the model statutes which formed the part of the MSA.

Now, in accordance with the MSA terms --

PRESIDENT NARIMAN: That is like one of the exhibits.

MS. MENAKER: That's right,
Exhibit T.

PRESIDENT NARIMAN: T.

MS. MENAKER: That's right.

Now, in accordance with the MSA terms, once the state signed the MSA, it was required to enact legislation in the form of the model statute without modification or addition or risk a reduction in its share of payments that it would otherwise receive under the MSA.

And as you can see on the slide, by June 2000, each of the 46 MSA states had enacted an escrow statute as was required by the Master Settlement Agreement.

PRESIDENT NARIMAN: This is by June?

MS. MENAKER: By June. They started earlier. Some even had adopted their escrow statutes even before February -- or, no, I'm sorry, 1999 to 2000 --

PRESIDENT NARIMAN: Escrow statutes.

MS. MENAKER: That's right.

So each and every one of those escrow statutes was a qualifying statute within the terms of the MSA, and that means that they faithfully adhered to the model statute in all material respects as was required by the MSA.

And as you can see, again, the last of the statutes was enacted nine months prior to the time of the three-year period that precedes the submission of Claimants' claims to arbitration.

MR. CROOK: Ms. Menaker, as I understand Claimants' position, it is
that there is some ambiguity as to the application of the escrow statutes to them. Now, my question to you is a rather precise one.

Do you know -- is there any material variation among these statutes as to their application to manufacturers? Or do they all apply by their terms to manufacturers, or is there some material variance among them?

MS. MENAKER: There is absolutely no material variance among them. Each and every one of the escrow statutes applies to manufactures of cigarettes that sells -- whose cigarettes are sold in an MSA state, whether directly or indirectly.

So whether it's sold by the manufacturer directly or whether it's sold through an importer or distributor, each and every one is identical in that regard. And, in fact, in a few minutes, I have a slide showing, you know, just an example of

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not sued for nonenforcement as of this
time. Some states have.

But that does not mean that the
statutes are effectively different in
any regard just because one state is
slower to prosecute offenders than
another state. There is no material
difference in the way in which those

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That's right. And even if a
state, you know, for any reason -- one
reason or another, has not brought a
claim or prosecuted it, doesn't
affect --

MR. ANAYA: How about
Wisconsin?

MS. MENAKER: The Wisconsin
decision, which I will talk about in
more depth later, there what happened
was the claim against Grand River was
dismissed for lack of personal
jurisdiction because the attorney --
because the Court found that the
evidence that the attorney general
submitted to establish personal
jurisdiction was hearsay.

And it was dismissed on that
ground and that ground alone. The
attorney general's office thinks that
it was an erroneous decision. The
amount at issue was so small that they
determined not to appeal, even though

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they think it's clearly wrong.

But in any event, that says
nothing about the applicability of the
escrow statutes to Grand River or to
manufacturers generally.

The fact that the Court found
that hearsay testimony could not be
submitted and there was no other
evidence to establish personal
jurisdiction is really irrelevant to
the issue of the effect of that escrow statute.

PRESIDENT NARIMAN: Is there anything in Exhibit T to the MSA or in any of the escrow statutes which specifically make them applicable to manufacturers, foreign manufacturers, manufacturers of cigarettes abroad, outside of the United States? Is there anything specific either in Exhibit T or in any of the escrow statutes?

MS. MENAKER: Yes, the definition of a "tobacco product manufacturer" that is in the MSA --

PRESIDENT NARIMAN: In the MSA?

MS. MENAKER: Yes.

PRESIDENT NARIMAN: Definition of "tobacco" --

MS. MENAKER: -- "product manufacturer," is an entity that, quote:

"Manufactures cigarettes anywhere that such manufacturer intends to be sold in the United States."

PRESIDENT NARIMAN: Okay.

MS. MENAKER: So, clearly, that applies to manufacturers -- like it says "anywhere," whether they are in the United States or outside of the United States, so long as they intend their cigarettes to be sold in the United States.

And then it goes on to say, "including cigarettes intended to be sold in the United States through an importer."

So there it is clearly recognizing that, if you're a foreign manufacturer, this -- you are a "tobacco product manufacturer" within
the definition because they envision
that you might be intending your
cigarettes to be sold in the
United States through an importer.

PRESIDENT NARIMAN: Yes. Yes.

But there is no -- in the escrow
statutes, there is nothing about this
definition.

MS. MENAKER: There is.

PRESIDENT NARIMAN: -- or the
document.

MS. MENAKER: It is adopted
verbatim in each of the escrow
statutes, yes.

PRESIDENT NARIMAN: Thank you.

MS. MENAKER: Now, the escrow
statutes, like the model -- as the
model statute envisions, they obligate
NPMs to make payments into escrow.
And the payments are calculated using

a per cigarette formula that is set
out in the model statute and is
adopted by each of the states in its
escrow statute. And each cigarette
that is subject to a state's excise
taxes is calculated in making this
payment.

PRESIDENT NARIMAN: But if they
are not subject to excise, then they
are exempt.

MS. MENAKER: That is correct.

PRESIDENT NARIMAN: That means
the -- applies to -- as the
reservation states are concerned.

MS. MENAKER: So far as
New York is concerned --

PRESIDENT NARIMAN: Only
New York.

MS. MENAKER: Well, not only
New York. States vary in that regard.

New York, for instance, does
not tax cigarettes that are sold on
reservations. They are not subject to
the state excise taxes. So therefore,
those cigarettes are not counted for purposes of determining escrow payments.

PRESIDENT NARIMAN: Only that share.

MS. MENAKER: That's right. The Claimants -- they argue that the requirement that Grand River make payments into escrow violates the NAFTA or breaches the NAFTA.

PRESIDENT NARIMAN: What, according to them.

MS. MENAKER: For three reasons, one for each of the provisions.

Insofar as their national treatment claim and most favored nation claim is concerned, articles 1102 and 1103, they argue it violates national treatment, most favored nation treatment, but because they, but not grandfathered SPMs, have to make payment into escrow. So they say that that is an impermissible discrimination in violation of those articles. They also contend that the escrow statutes --

PRESIDENT NARIMAN: How is that discrimination?

MS. MENAKER: In our view it is not at all discrimination --

PRESIDENT NARIMAN: Say that again.

MS. MENAKER: -- because they are not treated the same. They don't have the treatment that the grandfathered SPM have, so there is a difference in treatment there. In our view, that is not at all a national treatment violation because it is not a difference in treatment based on nationality. But this is their claim.
They said this they are entitled to
the best treatment accorded to anyone
in like circumstances.

PRESIDENT NARIMAN: If they had opted in, they would have been given the same treatment.

MS. MENAKER: That's right. So they say that this difference in treatment constitutes a national treatment and a most favored nation treatment violation. They also say it constitutes a violation of article 1105(1) because they have to make payments into escrow, even though they have not been found liable by a Court for any of the wrongdoing for which the Original Participating Manufacturers were originally sued.

So they say: "Therefore, this requirement that we pay into escrow is a violation of article 1105."

They also say that the requirement --

PRESIDENT NARIMAN: That means they are questioning the MSA indirectly.

MS. MENAKER: Yes, that's right.

PRESIDENT NARIMAN: Because the MSA makes no distinction.

MS. MENAKER: Well, the MSA has the model statute as a part of it. It is all a whole, and that is the requirement that they have to pay into escrow; and, of course, as soon as the escrow statutes were enacted, that became, you know, a legal obligation for them by virtue of their NPM status.

They also argue that the escrow statutes violate article 1110, the
expropriation article, because they
say the statutes have resulted in a
complete destruction of their business
and their investments, and therefore
is an expropriation.

But it's clear that Claimants
first suffered a loss or damage as a
result of these alleged breaches as
soon as their cigarettes were sold in
any MSA state that had enacted an
escrow statute. That is when they
first incurred a legal obligation to

PRESIDENT NARIMAN: Let's be
clear, that, until the escrow statute
was enacted in the state, there was no
obligation.

MS. MENAKER: That's correct.

PRESIDENT NARIMAN: Am I right?

MS. MENAKER: That's correct.

PRESIDENT NARIMAN: Despite the
model Exhibit T and so forth.

MS. MENAKER: That's right.

But their status, it's connected
insofar as a course their obligation
is only on NPMs, and, you know, not
grandfathered SPMs. And that was
sealed as of 90 days after the MSA was
concluded, but they had no legal
obligation to make payments until the
escrow statutes were enacted.

PRESIDENT NARIMAN: No, but
does the escrow -- each of the escrow
statutes say that the obligation
commences from the date of the
commencement of the statute, or does

MS. MENAKER: The escrow
statutes were -- their effective date
the escrow statutes were the date of
enactment, so by June --

PRESIDENT NARIMAN: Therefore,
the obligation to pay is within what
period of that?

MS. MENAKER: Well, they incur
a legal obligation -- it accrues to --
it's calculated by reference to each
cigarette that it sells in the state.
So every time it sells the cigarette,
it incurs the legal obligation to make
the statement.

It doesn't actually have to put
that payment into escrow until
April 15th of the year following that
year's sales. But it incurs the legal
obligation as soon as it makes the
sale into the state.

It's much the same as if you
purchase something on your credit
card. As soon as you make the

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purchase given on your credit card, at
that time you have incurred a
liability. You have incurred a loss,
so to speak. You are legally
obligated to pay. You may not be in
default of that payment obligation
until you get your credit card bill
and you don't pay by the time it's
due.

But as soon as you make that
purchase, you have incurred that legal
liability or that loss. And that's
the same thing here. That's right,
but the date that they became
effective was the date of the
enactment.

PRESIDENT NARIMAN: No, that's
correct, the date of enactment.

MS. MENAKER: Yes.
PRESIDENT NARIMAN: But they
had to pay into the escrow account by
April 15th following the date of that
enactment.

MS. MENAKER: Yes.

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MR. CROOK: Of the year following.

PRESIDENT NARIMAN: Of the year following.

MS. MENAKER: Yes.

PRESIDENT NARIMAN: Now, you have said here that, by June 30, 2000, all the escrow statutes were already enacted.

MS. MENAKER: Yes.

PRESIDENT NARIMAN: So how does that -- so if it was on the 30th of June, 2000, then the obligation to put into the -- is it April 2001?

MS. MENAKER: That is only for the last of the states that enacted the escrow statutes.

PRESIDENT NARIMAN: Can you give us, at least, that break-up -- namely, which of the states --

MS. MENAKER: Yes.

PRESIDENT NARIMAN: A little later, which are the states?

MS. MENAKER: I can tell you Grand River Arbitration that it's Exhibit 6.

MR. CROOK: We have that. By my count it was approximately 38 enacted in 1998.

PRESIDENT NARIMAN: 1999.

MR. VIOLI: Eight enacted --

PRESIDENT NARIMAN: 38 in 1999.

MR. VIOLI: And eight in 2000.

MS. MENAKER: Again, Mr. President, members of the Tribunal, I remind you that articles 1116 and 1117 talk about the date on which they first incurred loss or damage as a result of the breach.

MR. ANAYA: When was that?

MS. MENAKER: The time that they first incurred loss of damage as a result of the escrow statutes --

PRESIDENT NARIMAN: No, is it possible to say that their first date
on which they incurred that loss or
damage was the April -- that April
date after the enactment of the
statute. I mean, that would be

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argued, so that is just -- I am asking
you.

MS. MENAKER: No, we do not
believe that that is correct.

PRESIDENT NARIMAN: But suppose
that is correct. How many states
would be excluded? How many states
would be included?

MS. MENAKER: Claimants have
never made the claim that each escrow
statute gives rise to a separate
breach, so to speak. They have not
even delineated what sales they have
made in certain states or whether --
they have never even identified each
of the states' escrow statutes.

They are challenging the
escrow -- the MSA regime; and that MSA
regime is the obligation that
cigarette manufacturers that did not
join within 90 days have lost the
payment exemption and thus are subject
to the requirement to place moneys
into escrow.

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PRESIDENT NARIMAN: And that's
the quantification of damages in the
exhibit you pointed out.

MS. MENAKER: That's right.
And those losses are twofold in our
mind. The first type of loss is just
the loss that they lost the
opportunity to become a grandfathered
SPM.

MR. ANAYA: That was the first
thing.

MS. MENAKER: That was the
first claim.

PROFESSOR ANAYA: So that the
earliest date that you would point to, the 90 days after the --

MS. MENAKER: Right, yes, right, which is the first loss that arises out of some of their allegations of breach.

As far as the first loss that arises out of their remaining allegations of breach, that occurred as soon as they became legally obligated in any state to -- as they incurred a legal obligation under the escrow statute in any state. So as soon as they sold a cigarette in a state that had adopted an escrow statutes, which was back in 1999, they incurred a legal obligation or a loss; and that would be the first loss or damage that they incurred as a result.

PRESIDENT NARIMAN: Is that also computed by that --

MS. MENAKER: It is, indeed.

PRESIDENT NARIMAN: In that report?

MS. MENAKER: It is, indeed.

PRESIDENT NARIMAN: Which is what?

MS. MENAKER: That is in the LECG report, again, and I can show you -- if you go to, Renee, the slide. I believe it's 14.

If you see there, they, as I mentioned -- great, that is it.

LECG calculated losses based on two alternative methods. One was the value of the lost payment exemption. The other method was this method up here, where they quantify the present value of the estimated money that Grand River would have to pay in the future, to be in compliance with the escrow statutes.
So they basically looked, and, as LECG recognized as their damage -- recognized that this could be easily calculated because the amounts that they could --

PRESIDENT NARIMAN: What is the amount -- what is the figure that they put for this?

MS. MENAKER: They put a figure of --

PRESIDENT NARIMAN: -- in this LECG report, the second part, present value of estimated moneys that they would have to pay is how much according to them?

MS. MENAKER: This is anywhere Grand River Arbitration between --

PRESIDENT NARIMAN: You are reading from the report?

MS. MENAKER: I am reading from the report. I have it here someplace. It is between 212 and 443 million.

PRESIDENT NARIMAN: Just a minute, between 212 --

MS. MENAKER: And 443 million.

PRESIDENT NARIMAN: And then the first part, which you read earlier, the quantification of the lost exemption quota, how much do they value it at?

MR. CLODFELTER: If we can get a few minutes to find that out and get that to you in a minute, would that be all right? It's in the report somewhere; but, obviously, we need -- we didn't anticipate the question.

MS. MENAKER: Let me make the additional point:

Even with respect to the date that they became -- that Claimants first incurred a loss, under the last escrow statute that was enacted, which
was back in June of 2000 --

PRESIDENT NARIMAN: No, I just wanted -- sorry -- we will come back to it. According to the report, how have they quantified it? How has the report quantified it?

MR. CROOK: Mr. Chairman, quite frankly, this is Claimants' report, and I didn't review it in anticipation of the hearing. If it's going to become material, maybe all of us ought to take the opportunity to look at it. I didn't study this particular Claimant exhibit in anticipation of this.

PRESIDENT NARIMAN: But I want to -- tell us later. It makes no difference.

MS. MENAKER: I believe it was it was between 212 and 443 million.

PRESIDENT NARIMAN: That is the second part.

MS. MENAKER: Between 100 and 452 million.

PRESIDENT NARIMAN: Between 100 and --

MS. MENAKER: And 452 million, and these are alternative methods.

PRESIDENT NARIMAN: That's okay. That is the claim. But have they analyzed how they will have to pay this, because they have said 212 and 443? And, therefore, have they said that the GRP will have to pay in the future? Now, future means after 2005, for the past period, I take it.

MS. MENAKER: No, in fact, what
they looked at was they calculated how -- based on estimated future

Grand River Arbitration cigarette sales, how much they would have to place into escrow in order to comply with the escrow statutes. They did not, as far as I can tell, look at -- or, well, it's clear they did not take into account the penalties that had accrued because of non-compliance, or enforcement actions that were taken against them.

I mean, they simply looked at how much they would have to pay in order to bring themselves or to be in compliance with the escrow statutes.

And as LECG recognized, the amount of that calculation was relatively straightforward because the MSA, the model statute as Exhibit T, sets forth the precise amount per cigarette sold or per unit sold that needs to be placed in escrow. And that amount is incorporated into each and every one of the escrow statutes; so all you need to do is to do a projection to estimate what your

Grand River Arbitration future sales are going to be and where they are going to be. And you can easily calculate how much you will need to be placed in escrow.

It's not anything that is surprising. As soon as the MSA was concluded, you could have figured that out.

And, again, I just return to the point that, even if you were looking at the very last state that enacted its escrow statute in June of 2000 -- I just want to make two points about that.

And the first is, again, you need to look at their allegations of
breach, and then say:

"When was the first time that
they incurred a loss arising out of
that breach?"

And here we know that
Grand River sold cigarettes into at
least some states that had already
adopted escrow statutes back in 1999.

So at the very latest, by the
end of 1999, they had first incurred
loss or damage or a legal liability to
make a payment into escrow; and,
therefore, that would be the date that
we would say they first incurred loss
or damage.

Now, even if you wanted to look
at it, which we don't believe is at
all warranted, you know, by state, and
ignore the fact that they are just
challenging this MSA regime as a
complete whole, even if you look at
the state that it adopted its escrow
statutes at June 30, 2000, again, they
incurred a legal liability in that
state immediately thereafter.

That escrow statute was
effective as of June 30, 2000; and,
like the analogy I made to a credit
purchase, you don't only incur a
loss or liability when the payment
becomes due. You incur it as you
incure the legal obligation. A future
obligation to make a certain payment
is a legal liability or a loss that is
accounted as such by businesses that
would be a legal loss or liability
that would have been incurred well
before March 12, 2001.

PRESIDENT NARIMAN: Time, thank
you.

MS. MENAKER: I would also just
call the Tribunal's attention to the
case that Claimants cite in their
rejoinder from the European Court of
Justice. This is in a footnote, the
Quiller case.

And there the Claimants
challenged a regulation that failed to
grant to certain -- a certain class of
people the right to sell a specified
quantity of milk tax-free.

And the Court there found that
the Claimants incurred a loss as of
the date that the regulation was
enacted, because, as of that date,
Claimants were denied the benefit of

Grand River Arbitration
that tax exemption. And that is
really akin to what we have here,
because here Claimants -- again, they
first suffered a loss as soon as the
escrow statutes were enacted.

MR. CROOK: Ms. Menaker, let me
ask you about Quiller because, as I
recall, the Court there did say, yes,
they accrued the first loss, but they
did allow for recovery during the
period of following the time bar.

Now, how is that -- is that the case
we have here, or is the case we have
here different?

MS. MENAKER: The case we have
here is different, and I think it is
different in two important respects,
and they both go -- they are
reflective of the differences in a
limitations period at issue under the
NAFTA and that was at issue before the
European Court of Justice.

And the two significant
differences that we see in the

Grand River Arbitration
limitations period are, first, under
the ECJ's limitations period, it
allows for a period of interruption of
a limitations period. So in the NAFTA
it does not.

So under the ECJ regime, for example, if the Claimant takes certain steps -- it complains to an authority -- and this is well defined in everything -- it may actually stop the running of the limitations period.

But the NAFTA contains no such language. And as the Feldman Tribunal explicitly recognized, the NAFTA does not recognize any interruption in the limitations period.

The second distinguishing factor is that the limitations period in the Quiller case or in the ECJ ran from the event giving rise to the claim. Now, there, it is conceivable, as far as I can tell, because the Tribunal -- the Court in that case does not have a lot of analysis on this point.

Basically, in one paragraph it says it's going to start the limitation period at date X, and then it basically looks back and counts back three years or five years prior to the date of the claim for establishing damages.

But, there, if your limitations period merely runs from the event, and you have a continuing event, so to speak, then it's conceivable, as in the ECJ -- what they did was to run it from, you know, each event. Each time they were denied the ability to sell their milk tax-free, that was a separate event.

But here the NAFTA limitations is quite different. The NAFTA's limitations has to start running at the first time that they incurred loss or damage arising out of the breach; and that is the significant distinguishing factor in our view.
PRESIDENT NARIMAN: Yes. If you would like to break for coffee, we can do so now, or we can do so later.

MS. MENAKER: Yes, let me just say two more sentences, and then we can break.

Just to wrap it up, again, I just want to put on the time line, the next time line, where I have shown there -- and I have put on this time line you can see that we know that Grand River sold cigarettes in several MSA states back in 1999 when those states had enacted its escrow statutes.

So I have just highlighted that on the screen as well, because that is the date when Claimants would have first incurred loss or damage as a result of the escrow statutes. And the continuing or aggravating elements of that loss are all results of Claimants' non-compliance and do not extend the date on which they first incurred loss or damage arising out of the alleged breaches. And after our break, I can come back and discuss that.

PRESIDENT NARIMAN: Just one question, when you say Grand River cigarettes sold in several MSA states, on the record, do we know how many states?

MS. MENAKER: We don't. We only know what we have been able to find out. On the record, it is clear that they have sold cigarettes --

PRESIDENT NARIMAN: According to them, they sold cigarettes in how many states?

MS. MENAKER: They have not said. We know from losses that have
been filed against them for escrow payments that they failed to make, in those suits that the attorney generals brought they set forth the cigarettes that were sold by Grand River in their states in 1999, and thereby they are assessing the liability against them based on those sales.

So that is how we have determined that in at least those handful of states they did make sales in 1999; and for all we know, it's in many other states, too, but we don't have that information.

PRESIDENT NARIMAN: Okay. So shall we break for 10 minutes.

(A recess is held.)

PRESIDENT NARIMAN: How long more will you take? You are entitled to take the whole day, but please tell us roughly.

(There was a discussion off the record.)

PRESIDENT NARIMAN: Please proceed.

MS. MENAKER: Before the break, I said that I was going to pick up talking about the enforcement efforts and why that does not postpone the running the limitations period.

Before I do that, I just wanted to clarify something in response to a question that you, Mr. President, had asked before, which was -- when you posed the question, why would a cigarette manufacturer not have joined the MSA within 90 days if it knew about it.

And I gave you one reason, which was, perhaps, they did not want to be restricted to the advertising and marketing restrictions that were
in the MSA.

But there is another additional reason why Grand River, in particular, would not have wanted to join within that 90-day period. And you will recall that, when you calculate the payment exemption, it is based on the cigarette manufacturer's sales at the time of the MSA's conclusion or their 1997 sales.

And that is -- the payment exemption they received is, if their sales stay at that level or, you know, increase by a little bit, and then anything over that increase they do have to make payments.

PRESIDENT NARIMAN: They do.
MS. MENAKER: Yes, if they increase over a certain amount -- it's market share -- sorry -- not sales.

Now, as we discussed earlier, we know that Grand River did not manufacture any cigarettes for sale in the United States before 1999. So, therefore, if they had joined the MSA within 90 days, their market share would have been zero; their payment exemption would have been zero.

Every cigarette they sold would have been an increase in that market share; and, thus, they would have been liable to make payments under the MSA scheme.

So the payment exemption was really, despite LECG's report where they are valuing the payment exemption, to them it wasn't worth anything because they had no market share.

PRESIDENT NARIMAN: Because they were not manufacturers.
MS. MENAKER: Well, they are
manufacturers now.

PRESIDENT NARIMAN: Because they were not manufacturers.

MS. MENAKER: They were not manufacturers that sold cigarettes in the United States before 1999.

MR. ANAYA: So under that view they did not incur a loss.

MS. MENAKER: That's right. We do not -- what we think that they -- they did not incur a loss. We would certainly disagree with LECG's report because what they did was they valued the payment exemption based on these mergers and transactions and looked at the cigarette sales made by those companies and tried to calculate what that per cigarette value was. And

Grand River Arbitration then they applied it to Grand River. I believe it was their 2004 sales. But, no, they would not have gained an advantage in that respect; but they suffer a loss now from not having the payment exemption that an SPM has.

MR. ANAYA: By virtue of the escrow statute payments.

MS. MENAKER: Yes, by virtue of having a to make escrow payments.

That explained in our view why Grand River did not join the MSA within 90 days. Right, it wasn't lack of knowledge; but, again, their loss at that time was the denial of any payment exemption.

MR. CROOK: But to be clear they could join as an SPM today.

MS. MENAKER: They could, but they are not entitled to payment exemptions. Yes, they could. In fact, other SPMs have done that after the 90 days. They have decided for a

Grand River Arbitration
variety of reasons that it's in their
interest to become an SPM and not
remain an NPM.

PRESIDENT NARIMAN: So your
point is that one of the possible
reasons would be that Grand River did
not join the MSA and get the payment
exemption because they were not
manufacturers of cigarettes.

MS. MENAKER: For sale in the
United States.

PRESIDENT NARIMAN: For sale in
the United States.

MS. MENAKER: As of that --
PRESIDENT NARIMAN: In 19 --
MS. MENAKER: -- as of the time
the MSA was concluded, so they had
zero market share at that time.

PRESIDENT NARIMAN: I see.
Your point is that, if they had zero
market share, then what would be
their -- if they had joined, what
would be the position -- suppose they
joined. All right. Some

Grand River Arbitration
misunderstanding, whatever it is --
that the payment exemption -- then
what would be their obligation?

MS. MENAKER: The exemption
would be worth zero because it's set
at their -- so that means that for --
PRESIDENT NARIMAN: But what
is -- but what is -- but what is their
that obligation that --

MS. MENAKER: It's a payment
obligation.

PRESIDENT NARIMAN: -- makes
them pay the escrow payment
nonetheless?

MS. MENAKER: It's not the
escrow payment.

PRESIDENT NARIMAN: That makes
them pay --

MS. MENAKER: It's the payment
under the MSA, and it's roughly
equivalent proportionately to what the
OPMs pay under the MSA. So the SPMs,
to the extent that their national
market share rises above a certain

Grand River Arbitration
amount, they become subject to make
payments that proportionately are the
same as the payments --

PRESIDENT NARIMAN: Into --
into what? Into an escrow fund?

MS. MENAKER: Not into the
escrow fund, but into an MSA kind of
settlement account, which is then
disbursed to the various states based
upon a calculation that they use.

PRESIDENT NARIMAN: Which
clause is it in the MSA settlement?

MS. MENAKER: It's section
nine, little "i," paragraph one. And,
in fact, Renee, if we can go back to
the slide of the section nine -- it's
one of the first slides that we did
earlier today -- there.

You can see here that it says
that:

"The Subsequent Participating
Manufacturers have payment obligations
only in the event that their market
share exceeds the greater of its 1998
1997 market share."

But for their other -- if their
market share remains the same as their
'98 market share or doesn't go up over
125 percent over their '97 market
share, then they get the grandfathered
SPM status. They get that payment
exemption.

PRESIDENT NARIMAN: No, but, in
the example you gave of zero market
share, they would fall under what?
Which part? A subsequent -- they
would be a Subsequent Participating
Manufacturer. They would have payment obligations under this agreement.

MS. MENAKER: Yes, because under --

PRESIDENT NARIMAN: Only in the event that its market share in any calendar year exceeds the greater --

what -- I want to know what is this payment here.

MS. MENAKER: Well, the greater

Grand River Arbitration of -- one, its '98 market share is zero and because its 1997 market share is zero, 125 percent of that is zero.

So they would have --

PRESIDENT NARIMAN: I am saying where is the payment obligation.

MS. MENAKER: The payment obligations, it's right underneath that. It says here --

PRESIDENT NARIMAN: Please read that.

MS. MENAKER: Sure, I will quote from subparagraph two.

PRESIDENT NARIMAN: Subparagraph.

MS. MENAKER: Two.

PRESIDENT NARIMAN: Yes.

MS. MENAKER: "The base amount due from a Subsequent Participating Manufacturer on any given date shall be determined by multiplying" -- it's complicated.

MR. CROOK: To cut to the chase, Ms. Menaker, is it the case

Grand River Arbitration that a Subsequent Participating Manufacturer, with respect to market share in excess of the 125 percent, would pay precisely the same amount per cigarette sold as any other participant in the system or not?

MS. MENAKER: As they pay roughly the same amount that the OPMs,
the Original Participating Manufacturers, would pay, and the NPM escrow obligations are calculated to also be proportional to be no more than what an SPM would be paying.

MR. CROOK: We are dealing here with a case where they come -- this is an SPM not entitled to a grandfathered grabbed exemption.

MS. MENAKER: Yes.

MR. CROOK: So they are coming in. They sell 100 units of cigarettes. Would they pay an amount the same as or different than the amount per cigarette paid by any of the original four participating companies?

GRAND RIVER ARBITRATION

MR. VIOLI: It's different.

The federal state reduction reduces it by 12.5 percent.

MR. CROOK: Say that again, Mr. Violi.

MR. VIOLI: Mr. Lieblich, for them -- there is a previously settled state's reduction in the MSA that gives the OPMs, the original four, a 12 percent reduction in their payments.

So if it's $4 a carton -- let's say -- they would get $0.48 reduction that an SPM would not. The theory is that the OPMs settled with Minnesota, Florida, Mississippi, and Texas; and because payments are based on national market share and federal excise taxes paid throughout the country, the OPMs get the benefit of having settled with the four states -- other states that are not part of the agreement. So they essentially deduct $0.48 per carton for the OPM.

GRAND RIVER ARBITRATION

MR. CROOK: Okay. So is it
then the case that, were Grand River
to become an SPM today, they would
have to pay an amount per cigarette
that would be slightly higher than
Original Participating Manufacturers?

MR. VIOLI: Yes, under the MSA,
if you look at the MSA.

MR. CROOK: The answer is -- so
the answer to the question is yes.

MR. VIOLI: Yes.

MR. LIEBLICH: That is
certainly not our view. The issues
here are enormously complex. If you
look at the payment provisions, you
will see there is more than just one
type of payment. There are several
technical kinds of adjustments that
are applied.

PRESIDENT NARIMAN: No, but the
point being made is, if Grand River
did become a subsequent participating
manufacturer, not within the 90-day

Grand River Arbitration
period, no exemption, et cetera, what
would be its payment obligations under
the agreement.

MR. LIEBLICH: Approximately
the same as those of the Original
Participating Manufacturers.

PRESIDENT NARIMAN: Of the
Original Participating --

MR. LIEBLICH: Yes.

PRESIDENT NARIMAN: That is
more than the escrow or less than the
escrow?

MR. LIEBLICH: Approximately
the same as the escrow as well.

MR. CROOK: Is it the case
then -- do I correctly understand it
that -- is it common ground or not?
And I don't want a big argument. Just
yes or no will do.

Is it common ground that the
amount of the escrow payments are
roughly equivalent to what you would
pay if you were a participant in the
scheme as an SPM or an OPM?

Grand River Arbitration

MR. VIOLI: As an SPM, now --
and we will talk about it -- I'm sure
that Ms. Menaker mentioned it -- not
when the escrow statutes were
originally passed.

MR. CROOK: Understood.

MR. VIOLI: Now, the net escrow
or the escrow requirement is -- it's
intended or operates to equate an NPM
to a non-exempt SPM.

MR. CROOK: Understood. So on
that point there is basic --

MR. VIOLI: Not the OPM.

MR. CROOK: Understood. Thank
you.

MR. VIOLI: If you want, we can
look at the formula which shows the
OPMs getting this previously settled
state reduction. In early years OPMs
did pay for -- did pay -- they had
additional payments like upfront
payments for three years, three or
four years, that SPMs did not pay.
But that is gone.

Grand River Arbitration

MR. CROOK: I don't think we
need to get that far into it on this
point.

MR. LIEBLICH: Just to clarify
the record, the reason for the
adjustment that Mr. Violi is
referring to is that the OPMs also
entered into settlements with four
states that are not parties to the
Master Settlement Agreement that the
SPMs do not make. That's a new one.

MR. CROOK: I think he made
that clear.

PRESIDENT NARIMAN: That is the
12 percent.

MS. MENAKER: But our point is
that Grand River would have had no
incentive to join the MSA within
90 days because they would be making
the same payment if they joined within
90 days or if they had not joined
within 90 days.

PRESIDENT NARIMAN: You made
that point.

MS. MENAKER: Thank you. Now,
Claimants' principal argument upon
which really this entire case rests,
and I am going to quote from their
response at page four -- is that --
and I quote:

"It was only when compliance
with the escrow statutes was mandated
by the aforementioned contraband
laws" -- and I apologize. There is
not a slide on this quote, so I am
just quoting. It is the response at
page four. So it's only --

PRESIDENT NARIMAN: The
response where -- their response to
your objection?

MS. MENAKER: Yes.

PRESIDENT NARIMAN: Right.

MS. MENAKER: It says:

"It was only when compliance
with the escrow statutes was
mentioned, mandated by the
aforementioned contraband laws and
judgments were obtained against the

Grand River Arbitration
Claimants that they suffered loss or
damage." End quote.

PRESIDENT NARIMAN: Read that
again.

"It is only when compliance was
mandated by the" -- and obtained that
they suffered loss.

That doesn't fit in with that
with that -- with that report which is
annexed.
MS. MENAKER: That's exactly right. It does not. It is contradicted by their own Claimants' expert report.

And in our view, the time at which Claimants were prosecuted for violating the law and judgments were entered against them is immaterial for determining when Claimants first incurred loss or damage as a result of their NPM status.

PRESIDENT NARIMAN: Would you read the previous sentence. You read that page four. Read the previous sentence:

"The MSA in and of itself does not require" -- that is the case -- "a tobacco company to join the MSA and experience the discrimination inherent in the MSA states' allotment of exemptions or its freezing of market share at the 1997 or 1998 production levels."

Is that correct according to you -- just read that previously --

MR. CLODFELTER: We just found it. Let's look at it again if we can.

PRESIDENT NARIMAN: Yes, "The MSA in and of itself," page four.

MS. MENAKER: What they are saying is it is true that, of course, the MSA in and of itself doesn't require anyone to join the MSA.

PRESIDENT NARIMAN: No, they can remain outside.

MS. MENAKER: They can remain outside.

PRESIDENT NARIMAN: Yes.

MS. MENAKER: Of course, we disagree with the characterization of experiencing the discrimination that is inherent -- we will ignore all of
that.

So really all they are saying is that --

PRESIDENT NARIMAN: So do you agree with this other saying, next sentence that you read:

"It is only when compliance with escrow statutes was mandated by the contraband laws and judgments were obtained that they suffered loss and damage" -- damage?

MS. MENAKER: We absolutely do not agree with that sentence.

PRESIDENT NARIMAN: But you say, irrespective of that report, that they will suffer loss and damage if they don't join within the 90-day period of the date of the MSA settlement?

MS. MENAKER: They suffer loss

Grand River Arbitration or damage as soon as they incurred a legal liability to make the first of their payments into escrow as a result of the enactment of the escrow statutes.

PRESIDENT NARIMAN: So the mere enactment of the escrow statutes was sufficient to impart for them liability.

MS. MENAKER: Essentially, the enactment of the escrow statutes in a state in which they intended their cigarettes to be sold which brought about legal liability on their part was sufficient to establish a first loss as a result of the escrow statutes.

MR. ANAYA: The enactment or the selling of cigarettes within a state make the escrow statutes enacted.

MS. MENAKER: The selling of cigarettes in the state, because that is when they incurred that legal
President Nariman: No, but therefore -- therefore, we have to get to this, that -- in which of the states did they sell their cigarettes prior to the year 2001, March?

Ms. Menaker: You see, but, again, the articles 1116 and 1117 talk about when they first incurred loss or damage arising out the alleged breach. The alleged breach here is the requirement that NPMs pay -- make payments into escrow, which is mandated as part of the Master Settlement Agreement.

And every state that signed the Master Settlement Agreement was obligated to enact an escrow statute. They first incurred loss or damage as soon as they became obligated under those escrow statutes.

President Nariman: But if they had not enacted those statutes, they would not have been liable to pay.

Ms. Menaker: Right, but they all were enacted before June of 2000.

President Nariman: No, no, that's not what I am saying. If they had not -- theoretically, the mere fact that they entered into or signed the MSA did not fasten liability on them. The escrow statute enacted -- read with the master agreement, then established their liability. It can't be that the master agreement on its own fastened liability on them.

Ms. Menaker: I think that, in some respects, it did; in other respects, I agree with your statement, because the requirement that they place money into escrow did not become
a legal obligation until those escrow statutes were enacted.

MR. ANAYA: Until they sold cigarettes.

MS. MENAKER: Right.

MR. ANAYA: I am just trying to be clear on this. What you are saying, it's not when the statutes were enacted that they incur liability.

MS. MENAKER: It's when they first sold a cigarette in a state.

MR. ANAYA: Because you keep saying when the statutes are enacted and I am a little confused.

MS. MENAKER: Okay. It's just because they were all enacted within the three-year time period, to the extent that they were making sales anywhere in the United States.

MR. ANAYA: The point we are looking at precisely is the point where they are selling cigarettes; is that right?

MS. MENAKER: Yes, is when they first sold their first cigarette in any MSA state.

MR. ANAYA: Can we fix that date precisely?

MS. MENAKER: We cannot. I mean, that information is not in our hand. But we do know that in a handful of states we know they were selling cigarettes in 1999, so that's why, on the last time line that I had put up here, I say no later than December 31, 1999.

MR. ANAYA: So we can fix a precise date before March 12, 2001 when they were, in fact, selling cigarettes in certain states with escrow statutes and hence incurring
liability.

MS. MENAKER: Yes.

PRESIDENT NARIMAN: Which are those states, if you can just later tell us, according to the record.

MS. MENAKER: According to the record if you look at --

MR. CROOK: Missouri.

MS. MENAKER: Missouri, Oklahoma, and Iowa, for example, we know that they were making sales --

PRESIDENT NARIMAN: Wait a minute. Missouri. Yes.

MS. MENAKER: Missouri, Oklahoma, and Iowa, we know that they made sales in 1999.

PRESIDENT NARIMAN: Iowa. Yes.

MS. MENAKER: If you look at page 21 of our objection, we reference the petition that was filed against Grand River by Iowa.

PRESIDENT NARIMAN: That I will be asking you a little later because I'm a little confused. There are too many of these documents and so on. So if you can just tell us which are -- which are the documents prior to March 2001 that would show that something had occurred prior to March 2001, which are on record, either submitted by you or by them, and which are the documents which are after March 2001 which we can ignore except according to your statements that you may make.

MR. CROOK: I suspect,

PRESIDENT NARIMAN: The next presentation -- that is what you are going to do? That's --

MS. MENAKER: Yes.
PRESIDENT NARIMAN: That's okay then. I didn't know that.

MR. CROOK: You are going to go into the actual indications in the record that lead you to believe --

PRESIDENT NARIMAN: Yeah, if you can give us the enumeration prior to March and subsequent to March, so that when we divide these into two periods of time, if you have that ready -- otherwise, we will have to do the calculation on that.

Okay.

MS. MENAKER: So the time when Claimants were prosecuted for having violated the law and judgments were entered against them doesn't affect the time at which they first incurred loss or damage as a result of their NPM status, and we did introduce in some evidence of these enforcements, which, as we just mentioned, Ms. Guymon will discuss later.

We did that because some of those enforcement actions were commenced prior to March 12, 2001. Therefore, they provide further evidence that Claimants knew or should have known about the breaches and the losses of which they now complain.

But those enforcement efforts do not alter the date by which Claimants first incurred a loss or damage arising out of --

PRESIDENT NARIMAN: Sorry to interrupt.

But when you deal with that, will you please also tell us when were they served with that particular, because there is some problem about they were not served or their office had shifted and things of that sort.

Grand River Arbitration
So address that.

MS. GUYMON: I will.

PRESIDENT NARIMAN: Thank you.

MS. MENAKER: Okay. In their statement of claim -- and I have put this on the slide -- Claimants state -- and I quote:

"The investors and their investments 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."

PRESIDENT NARIMAN: But they are not bound to maintain pre-MSA prices; are they?

MS. MENAKER: No.

PRESIDENT NARIMAN: They can charge what they like, except they won't be competitive.

MS. MENAKER: That is what they are saying. They say:

"If they increase prices, however, their ability to offer Grand River Arbitration significant price competition to the Majors and SPMS, the exempt SPMs, is materially and adversely compromised," end quote.

PRESIDENT NARIMAN: How does this affect the point of jurisdiction?

MS. MENAKER: Because our point is that compliance with the law is not optional, so Claimants do not have a choice whether they wish to comply with the escrow statutes.

PRESIDENT NARIMAN: If they wish to comply.

MS. MENAKER: By manufacturing cigarettes that are sold in the United States, Grand River became subject to the statutes and incurred a loss as soon as its cigarettes were sold in an MSA state that had enacted an escrow statute. And Claimants
recognized that, had they complied
with the law, their ability to compete
would have been, quote-unquote,
"materially and adversely

But their decision to ignore
their legal obligation and attempt to
evade enforcement for as long as
possible does not postpone the time at
which they first incurred loss or
damage as a result of those laws.

So as I mentioned before,
Claimants' contention that they didn't
incur a loss until after they were
prosecuted for having violated state
law and judgments were entered against
them and their cigarettes were banned
or confiscated is also contradicted by
their expert report authored by LECG,
because, remember, LECG calculated
damages using those two alternative
methods.

First, it assigned a value to
the loss payment exemption. Then it
assigned a calculation -- it
calculated damages by estimating the
amounts that Claimants would have had
to have placed into escrow to be in

But LECG didn't limit its
accounting of losses to only those
states where enforcement efforts had
been brought, and -- nor did it incur
include penalties for non-compliance
with the escrow statutes in its
calculation of damages.

So, really, you recognize what
is really obvious, which is that the
escrow statutes impose liability. And
by virtue of the enactment of those
escrow statutes and Grand River having
sold cigarettes that were then sold in
MSA states, Grand River incurred a loss.

And so their own expert report confirms that they first incurred a loss as soon as their cigarettes were sold in an MSA state and not later when enforcement actions were taken against them.

Now, Claimants in their rejoinder, they also argue that any Grand River Arbitration liability that was incurred as a result of the escrow statutes was a contingent liability before enforcement proceedings were commenced, and now that we submit is incorrect.

Something is contingent if it's dependent upon some future and uncertain event. But a liability does not become contingent because there is uncertainty as to whether you will be caught and prosecuted for non-compliance with your legal obligations.

PRESIDENT NARIMAN: Isn't there some requirement in the escrow statutes in Exhibit T that, within one year, they have also to report to somebody, that somebody is controller or something -- do you agree with that?

MS. MENAKER: Are you talking about the requirement that the NPM has to verify in writing that they have placed funds in escrow?

PRESIDENT NARIMAN: Yes, that is correct. They have to report it to somebody. Somebody has to verify it. Who that somebody is, I forget now, some statutory authority.

MS. MENAKER: Yes.

PRESIDENT NARIMAN: Okay.
MS. MENAKER: But our point is that a current obligation to make a future payment is not contingent liability. And Claimants also argue, as Professor Anaya alluded to earlier, that Claimants say their liability was contingent because there was some certainty as to their legal obligation to pay into escrow; and that we also submit is factually incorrect.

The Claimants essentially attempt to create doubt where none exists. And in the rejoinder they state -- for instance -- and I have put this on the screen:

"Some escrow statutes targeted Grand River Arbitration the importer. Some only targeted the defined manufacturer. Some initially appeared to be concerned with direct sales in each state. Others and eventually all were focused on all sales in each state, direct or indirect." End quote.

PRESIDENT NARIMAN: Why are you citing this? How does it advance your case?

MS. MENAKER: I am citing it because it's just incorrect. They are trying to create uncertainty by stating that:

"Here, look at the differences in the escrow statutes. It was very unclear or uncertain that we had a legal liability before enforcement proceedings were based."

PRESIDENT NARIMAN: But is this correct, that some statutes targeted only the importer; some targeted only the manufacturer?

MS. MENAKER: It is absolutely incorrect.
Against the manufacturer.

MS. MENAKER: That's right. So one only had to have read the escrow statutes to ascertain that any Nonparticipating Manufacturer that intends for its cigarettes to be sold in an MSA state directly or indirectly has to make payments into escrow for each cigarette sold.

PRESIDENT NARIMAN: Why do they say eventually all were?

MS. MENAKER: I don't know why they say that. It is incorrect.

PRESIDENT NARIMAN: Possibly with the amendment or something.

MS. MENAKER: No, it has nothing to do with the amendment. None of the escrow statutes were changed in that regard, none of them.

PRESIDENT NARIMAN: You say that the large part is correct. All were focused on all states in each Grand River Arbitration state, direct or indirect --

MS. MENAKER: At all times.

PRESIDENT NARIMAN: At all times.

MS. MENAKER: So their statement that some statutes initially applied only to direct sales while others and eventually all apply to direct and indirect sales -- it's just plane wrong. Perhaps Claimants' comprehension changes over time. But the escrow statutes --

MR. ANAYA: You are stalking about the enforcement of the statutes. Was there some variance in enforcement by the different states?

MR. CROOK: This is Claimants' statement. I wonder if it would be more reasonable to ask them what they meant.

MR. ANAYA: I want to see what they have to say, if there is -- maybe
I should ask the question a different way.

Grand River Arbitration

Is there any variance; do you think --

MS. MENAKER: No.

MR. ANAYA: -- in the enforcement?

MS. MENAKER: No, the escrow statutes and the obligations they imposed did not change. As far as the enforcement efforts are concerned, as we mentioned earlier, there have been enforcement actions, I believe, in over 30 states now; but the fact that those enforcement actions -- you know, some states took longer to catch up -- I mean, it's a -- it's a large settlement. A lot of money is involved.

It's very bureaucratically difficult. It was difficult for some states to get information that they needed to identify the manufacturer of cigarettes that are being sold. So the fact that some states brought enforcement actions right away, other states took longer, some still haven't done it, that does not create uncertainty about the legal obligation.

MR. ANAYA: I think that you said that New York has not enforced the statute. If -- is that correct?

MS. MENAKER: That is not correct. And, in fact, what Claimants do is they point to four different things that they say has led them to believe that either the escrow statutes are not all the same or, like you said, the enforcement efforts are different. Perhaps I can go through each of those, and New York is one of
MR. ANAYA: All right.

MS. MENAKER: So the first thing that Claimants point to is a letter that they admittedly received from Oregon that was dated March 14, 2001; and it's attached as tab eight to the Williams affidavit.

PRESIDENT NARIMAN: Tab eight.

MS. MENAKER: And you don't need to pull it out. I mean, you can, of course, if you want; but I am going to put excerpts from it on the slide.

Claimants contend -- and this is --

PRESIDENT NARIMAN: This -- who has written this -- if you are subject to these statutory requirements -- I mean, who -- whose letter is this?

MS. MENAKER: This is a letter from the State of Oregon.

MR. CROOK: Ms. Menaker, can I just clarify -- and, again, we're giving you a very hard time, sorry about that -- but the date of this document was March 14, 2001. The magic date here is March 12, 2001.

MS. MENAKER: That's correct.

MR. CROOK: Do we need to go into this and if so why?

MS. MENAKER: This -- we are going into this not to show any sort of knowledge before March 12th, but

rather because Claimants say that the escrow statutes were unclear or uncertain or varied to some extent; and, therefore, their liability was only contingent before enforcement actions were actually bought; that it took those enforcement actions to make clear what were the legal obligations.

And our view is that that is not at all the case, that the escrow
statutes were always clear.
And what Claimants have done is
they have pointed to four different
things that they say created this
uncertainty. And one of the things --

MR. VIOLI: Mr. President, may
I just interject here -- the bracket
there where it says, "some escrow
statutes," if we look at the
rejoinder, the reference is not to the
escrow statutes, but as
Professor Anaya pointed out, the
enforcement.

It says in the immediately
preceding sentence:
"Even though prosecutions under
each of them varied, sometimes
dramatically from state to state, some
targeted the importer" --

PRESIDENT NARIMAN: That means
the --

MR. VIOLI: -- the prosecution,
not the statutes. So just -- I didn't
have it out quicker or sooner; but,
when it was brought up, I hurried to
get that. So -- and it's responsive
to what you had brought up, and that's
why I thought, for clarification for
the record, as well as for the
parties, that that be -- that that be
made.

PRESIDENT NARIMAN: Yes.

MR. VIOLI: Excuse me. I am
sorry.

MS. MENAKER: Our point is that
it's Claimants -- and if they are
referring to the fact that enforcement
efforts were varied, whether it's the
enforcement effort or the statutes,
that is not belied by the evidence in
the record and does not -- they have
not pointed to anything to show that
there was uncertainty regarding their legal obligations under the escrow statutes.

If you look at the escrow statutes on their face, they all make clear that they all target the defined manufacturer; and the fact that some states took actions at different times or that some were concerned they say with direct sales that -- that maybe they looked at direct sales first and only brought actions against them and some did it later -- I mean, that's all immaterial.

The legal liability is what is on the face of the statute.

And, again, if I could just refer to these four things that Claimants cited here in support of this contention that this is somehow 0157

Grand River Arbitration so varied and uncertain that their legal liability couldn't be ascertained until enforcement proceedings were brought, I think that it will clear that that is certainly not the case.

The first of these is the Oregon letter. And Mr. Williams in his affidavit he states, and I quote here that -- he states that the letter, quote?

"... suggested that the escrow statutes only applied to tobacco manufacturers who were selling cigarettes to consumers within an MSA state."

I'm sorry. This is what Claimants say at page five of their response.

PRESIDENT NARIMAN: This Oregon business, letter three -- what is this Oregon letter three? Sorry.

MS. MENAKER: So Mr. Williams --
MS. MENAKER: Tab A to the Williams affidavit, which is tab 14 to the appendix to Claimants' response. So in his affidavit Mr. Williams quotes a portion of the Oregon letter, and that states, quote: "If you are subject to these statutory requirements as a result of having cigarettes sold to consumers in the state of Oregon, then you must comply with the law." Mr. Williams then goes on to state that: "Grand River has never sold cigarettes to consumers in Oregon," and thus he had "no reason to believe that the law applied to Grand River."
enforced is of little consequence according to you.

MS. MENAKER: That's absolutely correct.

PRESIDENT NARIMAN: That's your case. I just want to know your case.

Grand River Arbitration
That's what -- the point on limitation is not -- is not whether anything is contingent or not. The point is whether they first acquired knowledge -- first acquired some knowledge that they would be liable for this consequence.

And that knowledge you fix with enactment of the statute itself.

There is no statute itself, and that doesn't shift to a future date. That is your case.

MS. MENAKER: Yes.

MR. CROOK: You argue both the knew or should have known.

MS. MENAKER: That's correct.

MR. CROOK: So the chairman has addressed part of that argument, and you presumably will address the rest of it.

MS. MENAKER: Ms. Guymon is going to be really be addressing the knowledge part. The reason why I raise this now is because, if it were the case that you had a law, but it was in its application -- or they had been given direct assurances that the law meant something else, that somehow could be binded on a state, then we would -- might have something to talk about.

And that in our view is what they have been trying to portray by casting the liability as so uncertain and making it appear that the escrow statutes did not apply to them or that
they somehow had been granted
assurances that they were entitled to
rely on, that it didn't apply to them
and therefore --

MR. ANAYA: What do you make of
the Oregon letter?

MS. MENAKER: So in the Oregon
letter, if you look at the Oregon
letter, the language that was omitted
in the ellipsis, in the Williams
affidavit, actually, says that, if you
are subject to the requirement as a

PRESIDENT NARIMAN: But that
letter is dated what?

MS. MENAKER: March 14, 2001 --
so two days after the limitations
period in this case. But along with
the letter, Oregon included general
information, and that information
sheet wasn't provided with Claimants,
along with the Oregon letter. But the
United States provided a copy to the
Tribunal. It can be found at tab 131
of our reply.

PRESIDENT NARIMAN: I didn't
follow that. Sorry.

MS. MENAKER: There was
attached to this letter -- there was
an information sheet that Oregon sent.

PRESIDENT NARIMAN: Attached to
tab eight.

MS. MENAKER: 131.

0163

PRESIDENT NARIMAN: 131 was
attached to tab eight.

MS. MENAKER: Excuse me -- I
don't think this is the time to --

MR. VIOLI: Yes, it is

actually. You are saying this as if
it's a fact. It was -- you are saying
that it was attached. We didn't
say -- you are presuming a fact that
that there was a statute attached to
this.

MS. MENAKER: I am not
presuming there was a statute
attached. I am presuming that an
informational sheet was attached.
MR. VIOLI: Had an attachment.
MS. MENAKER: That's correct.
MR. VIOLI: But please state
the case that that is your position.
MS. MENAKER: It is our
position that, in fact, it was
attached and we have retrieved it from
Oregon's file. There is a letter with
an attachment, and that is the

Grand River Arbitration
attachment.

PRESIDENT NARIMAN: Including
eight.
MS. MENAKER: Yes.
PRESIDENT NARIMAN: Eight has
an attachment which is 131.
MS. MENAKER: 131.
PRESIDENT NARIMAN: They have
only annexed tab eight.
MS. MENAKER: That's correct.
MR. CROOK: I think Mr. Violi's
position is he does not understand
that correctly, in that sense. So I
take it the case is that the document
in the Oregon attorney general's file
had the attachment, and we will hear
from Mr. Violi whether that document
was in their file or not.
MS. MENAKER: Yes.
PRESIDENT NARIMAN: Excuse me.
Did they say anywhere --
MS. MENAKER: Could I just note
that the NAFTA letter itself refers to
the attachment?

Grand River Arbitration
PRESIDENT NARIMAN: Yes. Do they say anywhere that they were advised by a particular lawyer or set of lawyers that these statutes -- these escrow statutes did not apply to them because of some uncertainty? Do they say anywhere?

MS. MENAKER: Not --

PRESIDENT NARIMAN: I have not seen it. That's why I am asking.

MR. ANAYA: They do point to the Oregon letter as one indication that this state may be taking the position that the statutes only apply to those who sell to consumers.

MS. MENAKER: Yes.

MR. ANAYA: So that is the uncertainty?

MS. MENAKER: Yes.

MR. ANAYA: And your response is there should be no uncertainty because of what was omitted.

MS. MENAKER: Exactly. What was omitted and the informational sheet that was referenced in the letter and attached to the letter which we have put in tab 131, and if you look at that informational sheet.

MR. ANAYA: Which according to you was attached to the letter.

MS. MENAKER: Presumably it was because, again, the letter referenced the general information sheet, and the Oregon attorney general's office.

PRESIDENT NARIMAN: This is evidence in the letter itself, that it was attached.

MS. MENAKER: Yes. And it says here, in the letter:

"The purpose of this mailer is to remind you of the deadline for complying with the model statute. It's fast approaching. A copy of the certificate of compliance by the
nonparticipating manufacturers regarding escrow payment" --

PRESIDENT NARIMAN: What is that deadline?

MS. MENAKER: The deadline here was -- this letter was in March 2001, so the deadline for them to put payment into escrow for the next year was April 15th of 2001, for their prior year sales. But, again, it says that here they have attached these things to the letter. And --

PRESIDENT NARIMAN: No, I just want to know -- is it correct that --

I didn't find anything -- that the Claimants have not stated anywhere that they were advised by their lawyers or advocates that the escrow statutes would not or may not apply to them. Have they stated that anywhere? As a matter of legal advice, have they stated that?

MS. MENAKER: I have not seen that.

PRESIDENT NARIMAN: I have not seen it. That's why I am asking you.

MR. CROOK: Ms. Menaker, you said there were four items that you were going to cover. You have done one.

MS. MENAKER: We are not quite finished with one. I'm almost there.

MR. CROOK: All right.

MS. MENAKER: It's the information on this attachment that I wanted to refer to. And it says two things. First it says that: "A certificate of compliance needs to be filed by every tobacco manufacturer that sells cigarettes within the State of Oregon, whether directly or through any distributor,
It also -- the second thing that it says of note is that: "A tobacco product manufacturer" is defined as, quote, "any entity that manufacturers cigarettes anywhere that such manufacturer intends to be sold in the United States, including cigarettes that are intended to be sold in the United States through an importer," end quote. So this information makes clear that the Oregon letter provided no basis for Mr. Williams's or Grand River's purported belief that only manufacturers that sold directly to consumers in Oregon were subject to its escrow statutes. Of course, I would also just say that this language that is quoted is from the statute, and the reference to the statute itself was made in the letter. So they could have also gone to the publicly available law of the statute and read it for themselves as well.

Now, the second thing that Claimants point to is the dismissal of the Wisconsin lawsuit, and we discussed that earlier. But, essentially, they say that the fact that that lawsuit was dismissed demonstrated that they had an initial good faith belief and understanding that the escrow statutes didn't apply to them. But as I discussed earlier, that was dismissed on the basis that the evidence that was introduced by the attorney general's office to establish personal jurisdiction was
hearsay. And so contrary to their assertions, that dismissal says absolutely nothing about the applicability of the escrow statutes to cigarette manufacturers like Grand River that intend for their cigarettes to be sold in an MSA state.

The third thing that Claimants have pointed to is the fact that certain defendants have been dismissed from lawsuits that have been brought for noncompliance with escrow obligations. And they seem to invite the Tribunal to draw the conclusion that this somehow evidences uncertainty concerning the effect of Grand River Arbitration the escrow statutes.

As we explained in our objection, in several cases, the states were not able to determine which entity was the manufacturer of the cigarettes, so that they named several entities. And in the case of Grand River, for example, they often name or sometimes named Native Tobacco Direct, for instance, because they couldn't tell who was the actual manufacturer of cigarettes. But when they learned that Grand River was indeed the manufacturer and therefore had the responsibility under the escrow statutes to make the payments, they dismissed those other defendants from the suit, and we provided an example of such a case where Native Tobacco Direct was dismissed. But contrary to the Claimants' argument, the fact that the AG's office had difficulty identifying the manufacturer of Claimants' cigarettes,
does nothing to bolster their view or
t heir supposition that the
applicability of the escrow statutes
was somehow uncertain.

And the fourth thing --

MR. CROOK: I'm sorry. We keep
hitting you with wild things. Answer
now or later.

But in looking at the Missouri
papers, I was struck that Arnold &
Porter were appearing of record for
somebody. Were they appearing for the
Seneca Nation who were dismissed, or
who were they appearing -- do we know,
now or later?

MS. MENAKER: I think --
Ms. Guymon reminds me that she thinks
it was Williams & Connolly for the
Seneca Nation.

The last thing is that
Professor Anaya referred to -- which
are Claimants' arguments that New York
Grand River Arbitration
has not enforced its escrow statute,
and that somehow leaves some
uncertainty regarding its application.
And that, too, we disagree with
because, even if a state had done
nothing to enforce its law --

PRESIDENT NARIMAN: That is
your point. Your main point is that
enactment of statute is sufficient to
pass liability.

MS. MENAKER: Right.

But in any case their
contention that New York has somehow
not enforced its law creating
uncertainty is not right.

As we explained earlier, the
model statute in each of the escrow
statutes provide that escrow payments
are based on units sold, and you can
see here that that definition of the
model statute -- I have put up the
definition of the New York statute
which is identical.
And units sold are the

Grand River Arbitration cigarettes. Are -- it's calculated by those cigarettes that are subject to excise taxes that are collected by the state. And New York, like some other states, does not tax -- does not impose excise taxes on cigarettes that are sold on reservation.

So for cigarettes that Grand River manufactures that are exported for sale to New York to be sold on the reservation -- and I say most, if not all, of their cigarettes fall into that category -- we don't know, but I believe that is what they allege -- Grand River doesn't incur an obligation to make escrow payments for those cigarettes.

But this is not an instance of New York not enforcing its escrow statute. It's just an instance of New York enforcing its escrow statutes in accordance with its terms.

PRESIDENT NARIMAN: No, that --
it's at variance with the model statute.

MS. MENAKER: It is not at all at variance with the model statute. The model statute provides that units sold means the number of cigarettes that are measured by excise taxes collected by the state on tax. Each state has the ability to determine its tax laws, what it's going to tax.

And New York, like some other states, does not tax -- does not impose an excise tax on cigarettes that are sold on an Indian reservation. And because they are not subject to the excise tax, pursuant to the model statute, the New York state
statute, all of the other escrow
statutes, they would not be subject to
escrow payments.
But it's just a matter of
enforcing the law in accordance with
its terms. It does not demonstrate
that the law is not being enforced.
MR. ANAYA: Doesn't it
demonstrate that they are not liable
in New York?
MS. MENAKER: It demonstrates
that -- to the extent that they don't
have any escrow liability for those
cigarettes that are not subject to
excise taxes.
MR. ANAYA: How about other
cigarettes?
MS. MENAKER: Well, if they
intend for cigarettes to be sold and
they are sold, whether directly or
indirectly, and they -- off
reservation when they are subject to
excise taxes, then they incur an
obligation with respect to those
cigarettes.
MR. ANAYA: Do you know whether
they are selling off the reservation
in New York?
MS. MENAKER: I do not know.
That is, I guess, information --
MR. ANAYA: It's not an issue,
but you are not relying on that.
That's information, obviously,
Claimants would have; but New York
people that monitor the escrow
statutes for New York -- they
certainly would know where the
cigarettes are, if they were being
distributed, you know, off
reservation, being sold off
reservation -- and if they were merely
being sold on reservation -- Native Tobacco Direct is certainly on reservation.

MR. ANAYA: Let's say they are being sold off reservation. New York is electing not to collect on those cigarettes under the escrow scheme. Would there be any significance to that?

MS. MENAKER: There is no significance to that.

MR. ANAYA: Is that not a failure to enforce?

MS. MENAKER: But it doesn't affect your legal liability. What if I decide not to pay taxes this year? Chance are I won't be audited next year, that they won't catch up with me for quite a while. That does not change the fact that I incurred a liability; and it's, you know, I will incur penalties, too, but that I had that liability at that time to make that payment. It doesn't make the tax law anymore uncertain because no one caught me. I can't say:

"Well, look, no one found me."

MR. ANAYA: A payment to the IRS -- would you get a payment to -- by the AG New York --

MS. MENAKER: You have to get that -- that your cigarettes weren't subject to escrow payment.

MR. ANAYA: Is that the position of the AG's office -- that is, that off reservation sales by this company would be subject to the Grand River Arbitration escrow?

MR. CROOK: I wonder whether if we could ask the factual question of whether there are off reservation
MR. VIOLI: I don't think we -- all of the sales by Grand River and Native Wholesale Supply take place on Indian reservation. The FOB --

PRESIDENT NARIMAN: In New York? 


MR. CROOK: Mr. Violi, do you know whether Native Wholesale Supply sells to any distributors that sell in New York?

PRESIDENT NARIMAN: Okay.

MR. ANAYA: Off reservation.

MR. VIOLI: Off reservation, I don't -- I don't -- does anybody who buys from Native Wholesale Supply sell Grand River Arbitration in New York? Do you know.

MR. WILLIAMS: There are no off reservation sales in New York.

PRESIDENT NARIMAN: Are you finished?

MR. CROOK: So just to clarify, Mr. Violi, it is the case that you believe there are no off reservation sales of Grand River Enterprise's product in the State of New York?

MR. VIOLI: Let me caution. I don't know for certain, but I do know that I believe there may have been a letter -- and I can check and supplement if you like -- a letter from the New York AG, attorney general, and -- but it was never followed up. There was no enforcement.

So if I don't -- if I see a letter from the New York attorney general, that must mean they are taking some kind of position that it does apply. And if they are saying it
Grand River Arbitration only applies if there is tax, then that would mean they have information that there was a tax stamp affixed to a product manufactured by Grand River. I can check again to see if that is the case. But I don’t know for certain.

MR. CROOK: It’s not a point worth pursuing now in terms of the time. I was just trying to clarify whether there was, in fact, a factual predicate for Professor Anaya’s questioning. And it sounds like the factual predicate is at least in question.

PRESIDENT NARIMAN: No, but you made -- you made a blanket statement that there are no sales outside reservations in any of the states.

MR. ANAYA: By Grand River.

MR. VIOLI: By these Claimants.

PRESIDENT NARIMAN: Of course, only the Claimants here concern me.

MR. VIOLI: Well, the statute doesn't apply that way, Mr. President.

If someone comes on the reservation and buys products from these Native Americans and takes it off the reservation, then the escrow statutes in the states make the Native Americans pay escrow for it.

PRESIDENT NARIMAN: But shouldn't that be your defense in all of those actions, that -- forget limitations now.

MR. VIOLI: They don't -- yeah, it is our defense, but they rejected it, and they say, if you make a cigarette in -- and I have a manufacturer in India -- if you make a cigarette in India, in Singapore, in Canada, and it ends up being sold in
Tennessee, Oklahoma, Oregon, as the case -- none of these Claimants sold in Oregon, have nothing to do with Oregon -- if you manufacture a cigarette and it ends up in that state, you are responsible for escrow.

President Nariman: But is your cigarette package to be sold only on reservation?

Mr. Violi: I don't think so, but there is packaging for on-reservation sales. But it doesn't say --

President Nariman: No, no -- because that would fix the excise part of it. That means it's subject --

Mr. Violi: Yes, in Oklahoma, yes. In Oklahoma, there is a Native American tax stamp that is affixed. It's a payment in lieu of a tax. We will get to it. But Oklahoma still requires escrow even for cigarettes sold on reservation having the tribal stamp.

When I went to the Oklahoma attorney general, he said it doesn't matter; it doesn't matter. They made us pay escrow.

So to answer your question, even if it's sold on reservation, even if it has a tribal stamp, there are states that still make you pay escrow.

Mr. Crook: Mr. Chairman, as I recall, we were on the question of whether there was variability of enforcement, and I --

Mr. Anaya: I apologize for getting too far afield.

Mr. Crook: -- and a reasonable argument on Claimants' part. And I'd like to hear the continuation on that point.
MR. ANAYA: I was just trying to get at how New York might be doing something that might be different from others that might create some question of ambiguity.

MS. MENAKER: It creates no ambiguity insofar as the enforcement of the escrow statutes are concerned in accordance with their terms.

Now, I don't know what the case is with Oklahoma, but, if Oklahoma chooses to subject on-reservation sales of cigarettes to excise taxes, then, pursuant to the model statute and pursuant to the Oklahoma escrow statutes, those state's sales would be subject to escrow requirements.

That, again, is not a variability. That is clear from the MSA itself, from the language in each and every one of the escrow statutes, that your escrow obligation only attaches to sales of cigarettes that are subject to excise taxes; and how states choose which cigarettes to tax -- to impose the excise tax upon and which not to may vary.

But that is not spoken to in terms of the escrow statutes. New York is enforcing its escrow statutes in accordance with its terms because it does not tax on-reservation sales of cigarettes.

It does not impose escrow obligations on them. If other states do it differently, they do it differently. They all link to the excise tax, which is very clear; and the model statute is clear in each one of those escrow statutes.

MR. ANAYA: It would be clear if the states -- if it were absolutely
clear if the states could choose
whether or not to tax on-reservation
sales. Is that clear, that states can
do that? Or is there some ambiguity
of that under US law?

MS. MENAKER: I mean, there is
no challenge to state excise tax laws
here. I mean, that is not what we are
talking about.

So we have to take the excise
tax laws as they exist, and I am not
an expert in that field; nor am I an
expert in Indian law and the taxation
powers of the state, you know,
vis-a-vis the reservation. So I don't
know.

MR. ANAYA: It was unclear.
Say some states took the position that

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they could under federal law tax
on-reservation sales, and other states
say, "Maybe we can't." That was a
legal ambiguity itself.

MS. MENAKER: But that doesn't
create -- that doesn't create legal
ambiguity as to the validity of a
state's excise tax. It does not
create any legal ambiguity with
respect to the escrow statute
obligation, which is tied to the
excise tax laws as they are on their
books, as they exist at that time.

So the fact that, you know,
Claimants don't like one state's
excise tax laws, well, they can
challenge that in court if they want.
But that doesn't create any legal
uncertainty with respect to their
escrow obligation, unless and until
one of those laws is overturned, or is
invalid for some reason.

And as far as we know, they are
not; but that is a whole different

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issue. That is just not something
that is implicated by this here.

As far as Mr. Violi's statement
regarding, again, sales in Oregon, I
would just, again, point you to the
provision in the model statute which
is, again, in every single state's
escrow statute, that shows -- if you
go to slide 23, please -- that shows
that the obligation to pay into escrow
statutes is imposed on tobacco product
manufacturers, again, whether they
sell directly or through a
distributor, retail, or similar
intermediary, or intermediaries.

So the fact that they did not
sell to a consumer in Oregon is just
immaterial under the definition that
is in the MSA, that is in each and
every one of the escrow statutes. If
their cigarette are sold in an MSA
state, that -- and those sales are
subject to excise taxes, the
obligation to make those escrow

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payments is placed on the
manufacturer.

PRESIDENT NARIMAN: I want to
know what is the case of the
United States. Forget what the states
may say. What is the state of the
respondent in the present case?

MR. CROOK: Sorry, with respect
to what, Mr. Chairman?

PRESIDENT NARIMAN: I have -- I
am asking -- just one minute.

With regard to the obligation
of the case of the United States, with
regard to the escrow statutes, do they
apply to sales on reservation,
whatever they are? Do they apply, or
do they not apply?

MS. MENAKER: I think it would
depend upon whether the state in
question exempts those cigarette sales
from excise taxes.

PRESIDENT NARIMAN: Only if they do exempt from excise taxes, then they would not be.

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MS. MENAKER: That's right, because, if you look at the obligation to make the escrow payments, it's only an obligation on what they call units sold. And the definition of "units sold" is tied to those cigarettes for which there are excise taxes paid. So like I said, some states like New York do not impose excise taxes on sales of cigarette that are made in that reservation.

PRESIDENT NARIMAN: In some states. Is that the only state that does not exempt, or are there other states, because there are 47 of them?

MR. VIOLI: To the extent we know, Nebraska, Mr. President. If you would like to know, Washington -- state of Washington. This is to the extent I know so far.

MS. MENAKER: I believe --

PRESIDENT NARIMAN: That's not enough. It must be all of the 46 states.

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MS. MENAKER: Well, no, no, it does not, because it does not create any uncertainty with respect to the regime, because here the regime is very clear, that you have an escrow obligation if your cigarettes are sold in an MSA state and if those cigarettes are subject to excise taxes.

MR. ANAYA: On its face, the regime is clear. Let's assume that. But there still is the question about whether or not under federal law, outside of the statute, the
statute applies on any reservation.

MS. MENAKER: The excise tax statute, is that what you are talking about?

MR. ANAYA: The statute, the operation of the statute.

MS. MENAKER: The escrow statute or excise tax law?

MR. ANAYA: The escrow statute of the states.

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MS. MENAKER: I don't believe that that is -- that -- I don't think -- I mean, if you have a law that is enforced, that imposes a legal obligation on you.

MR. ANAYA: I understand.

MS. MENAKER: You have that obligation. If you want to challenge the law for, you know, unconstitutionality, there are challenges to the MSA right now. There are challenges to escrow statutes based on, you know, antitrust issues, for instance.

That does not create uncertainty as to your legal obligation or as to your liability, so to speak.

I mean, you don't wait until that suit, you know, or hope that someone else might bring a suit and wait until that is resolved. It does not limit your liability up until that time. It does not give you a free pass to ignore the law because you think it might be challenged successfully later, is what I am saying.

If I think that a tax law is somehow unconstitutional, if I can go to a court, and if I can gain an injunction or something like that,
that's one thing. If not, I need to comply with that law. And if I challenge it, my legal liability may change later. It doesn't create uncertainty, certainly with respect to the enforcement or the application.

I don't think that by merely stating that they don't like the escrow statutes or they think that they somehow breach, whether it's international law or whether it's federal law, that somehow that tolls the limitations period because you can't say that they suffered a loss under that law until all of their challenges were resolved.

I mean, that kind of stands the limitations period on its head, right. It would never start to run until -- I mean, until your challenge was --

PRESIDENT NARIMAN: The way I look it is, through the escrow statutes -- on their own, the escrow statutes themselves, do they exclude sales on reservation? According to your case, do they exclude -- the escrow statutes, which are enacted in all of the 46 states, as a matter of law, as a matter of constitutional law, as a matter of federal law, are they -- are they excluded?

That means they don't extend to tribal reservations?

MS. MENAKER: Again, that's not --

PRESIDENT NARIMAN: That's nobody's case at the moment. But, I mean, when you are putting it in this form, and since it's mentioned that sales on reservation -- everything that is sold on the reservation, because it may be exempt, may not be
exempt -- are they exempt?

MR. CROOK: Mr. Violi -- Mr. Chairman, perhaps we can ask Mr. Violi to help us here. He's familiar with the situation at Grand River.

Are you -- do you know, sir, whether you are now engaged in litigation with any state on the ground that it unlawfully applies the escrow statutes to on-reservation sales? Are we -- is your present litigation solely dealing with --

MR. VIOLI: No -- yes. We raised what is called the Indian Commerce Clause claim for the grounds that I mentioned.

MR. CROOK: Right. I understand that. My question precisely is:

Are any states now applying the escrow statutes with respect to on-reservation sales?

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MR. VIOLI: Yes. The State of Oklahoma, I know for certain, is, because I sat across the table from the attorney general. And I said: "You do not affix the state excise tax stamp on these cigarettes. How can you charge" --

MR. CROOK: Okay. So we know one state.

MR. VIOLI: Yes, and they said it doesn't matter. It's a unit sold.

Even though it says that, it doesn't matter. It was sold in this state.

The excise tax stamp collection doesn't matter. So I know that for certain in Oklahoma. I know the Squatson Tribe in Washington had some litigation, and that was resolved.

MR. CROOK: All right. You gave us an exhibit on that.

MR. VIOLI: Yes.

MR. CROOK: Right.
MR. VIOLI: So you have that.

There was litigation there, and it was

Grand River Arbitration resolved. It shouldn't apply.

MR. ANAYA: Did not apply.

MR. VIOLI: Well, the attorney -- see, they don't -- they won't come out and say, everyone together, "Yes, it does not apply."

They don't want to take that position.

MR. ANAYA: No, but in Washington --

MR. VIOLI: They did. In Washington, the attorney general of Washington entered into an agreement that said:

"We won't charge you escrow for on-reservation sales."

In New York, they haven't thus far, although the attorney general is taking a different position now as of two weeks ago. So --

MR. CROOK: Well, you have answered the question. There is at least one state where escrow laws are being applied with respect to sales on reservation.

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MR. VIOLI: Yes.

MR. CROOK: Okay.

MR. CLODFELTER: He says that that here at this hearing, but none of this is on the record.

PRESIDENT NARIMAN: It's nobody's case on the record that -- it does not apply in this record.

In fact, we are really straying from the point. The point is whether they knew or ought to have known before March 2001. They don't say that they did not know within the three-year limitation period.

MR. CLODFELTER: They are saying, "We were uncertain."
And we are saying, none of the examples of uncertainty hold water.

PRESIDENT NARIMAN: Okay.

MS. MENAKER: Right, just in response to something that Mr. Violi said with respect to the Squatson Tribe, when he said that, you know, the issue was resolved there, I

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would note that some of their cigarettes are, indeed, subject to escrow requirements, and they recognize that fact.

And if you look closely at the exhibit which Claimants put in with respect to the Squatson Tribe, you will see that they acknowledge they are making escrow payments. They are subject to the escrow statutes with respect to certain sales of their cigarettes.

And we happen to know that they are actually contemplating becoming an SPM, not a grandfathered SPM -- because it's too late -- but an SPM to the MSA.

So they obviously recognize that they have incurred and will continue to incur obligations under the escrow statutes.

But the main point really is that -- the fact that there may be variation among states with respect to

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how they implement their excise taxes, whether they tax on sale -- sales of cigarettes on reservation or not, does not create uncertainty with respect to the escrow statutes themselves.

They are under an obligation to find out what the law is, to know the law, and to find out what the excise tax law is in every state in which their cigarettes are being sold, in
which they intend for their cigarettes
to be imported into the stream of
commerce.

So there that uncertainty or
variation among the state excise tax
laws doesn't create uncertainty with
respect to the escrow statute regime.
And, certainly, there has been no
argument, nor could there be one, that
there is any uncertainty with respect
to off-reservation sales. And we know
that Grand River's cigarette are
imported into the United States for
off-reservation sales as well.

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They have Tobaccoville, which
they say is their exclusive
distributor for off-reservation sales.
So, certainly, the sales that
Tobaccoville is making are going to be
subject to escrow statute liability,
and there is no uncertainty in that
respect either.

Now, Claimants also reference
the penalties that they have suffered
as a result of non-compliance with the
escrow laws. And as they acknowledge
in their notice of arbitration, they
state, and I quote:
"If an NPM does not make the
payment required under a state'S
escrow statutes, the NPM is subject to
civil penalties and its products" -- I
don't have a slide on this; I'm
sorry -- "its products will be
prohibited from being sold in the
state."

Now, without exception, the
model statute provides that a
manufacturer can be enjoined from
selling cigarette in an MSA state if
it fails to make required payments for
two years.
And so the penalties that Claimants incurred for failing to make timely payments into escrow do not postpone the date that Claimants first incurred a loss or damage as a result of the escrow statutes.

And, similarly, the enforcement of the escrow obligations undertaken pursuant to the complementary legislation also do not postpone the date that Claimants first incurred loss or damage arising out of the escrow statutes.

PRESIDENT NARIMAN: What is this complementary legislation?

MS. MENAKER: Well, the complementary legislation prohibits the stamping and sale of an NPM cigarette if the NPM is not in compliance with its escrow obligation, but it imposes no new payment obligations on cigarette manufacturers. Their obligations remain exactly the same; and a measure that causes no loss or damage to a claimant can't serve as the basis for a claim and can't postpone the date on which the Claimants first incurred a loss or damage arising out of an alleged breach.

And if you will indulge me for just a new minutes, I want to discuss the Methanex case, because the Tribunal in that case was faced with a somewhat similar situation, albeit in a different procedural context, and I think analogous to this case. But it -- I think it may take me a few minutes to give you the relevant background to place it in context.

The Claimants in that case produced methanol, which, among other things, is an ingredient in MTBE and
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is a gasoline additive.
And Claimants challenge regulations that ban the use of MTBE in California gasoline. Those regulations also conditionally ban the use of all other oxygenates, other than ethanol. And that's ethanol, not methanol.

Now, the Claimants later sought to amend the claim to challenge the amended regulations, which kind of changed the effective date of the original regulation, but what for -- what was important for these purposes, is that the amended regulations identified a list of oxygenates including methanol, that were conditionally banned from use in gasoline.

So I think there were two analogies to be drawn here. The first thing is the Tribunal denied the Claimants' leave to amend and found that, even if it had

Grand River Arbitration permitted it to amend its claim, it would not have had jurisdiction over the amended claim.

And it found this because the Claimants could not -- have not and could not credibly allege that it had suffered any additional or different loss or damage as a result of the amendment to the regulations.

The original regulations conditionally banned all oxygenates other than ethanol. The amended regulations merely listed a number of oxygenates that were conditionally banned; so but the effect on the Claimants was unchanged.

All right. So nothing changes as far as the Claimants are concerned.
The effect of the regulation was exactly the same. And the same is true here, because the complementary legislation imposes no new payment obligation on Claimants or on cigarette manufacturers.

Their obligations under the escrow statutes remain unchanged.

MR. CROOK: Let me ask you two questions, Ms. Menaker. First, we have the theological question of whether this is complementary legislation or contraband laws. Does it matter what nomenclature the Tribunal uses? And maybe clear that up for us.

Secondly, I mean, I assume Claimants would respond to the argument you just made, essentially: "Hey, wait a minute. In fact, we are in the real world in a much worse position because we can no longer sell cigarettes in these markets, and that, while perhaps our antecedent legal responsibilities are the same, the sanctions to which we are now subject are much greater."

Now, is that the Methanex case, or is that different from the Methanex case?

MS. MENAKER: It is the Methanex case, I believe, for two reasons. First, the sanctions are not much greater. It is -- what has changed is the enforce mechanism. The sanctions are the same that exist under, you know, the model statutes and in each escrow statute, which is that your cigarettes can be banned if you don't comply with the obligation to make payments into escrow.

What the complementary
legislation did is it made it easier
for the states to identify those NPMs
that were in breach of their legal
obligation.

MR. CROOK: So under the escrow
statutes there, if you did not make
the escrow payments, you were not
legally authorized to sell in that
jurisdiction.

MS. MENAKER: After -- yes --
if you were in breach for two years, I
believe it was.

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MR. CROOK: A period of time.
So in that sense the
complementary legislation, contraband
law, whatever you call it, did not
change that underlying prohibition.
It just simply changed the mechanism
by which it was enforced.

MS. MENAKER: I changed -- it
did two things. It made it easier for
the states to recognize when the NPM
was not complying with its escrow
obligation. But that is not a new
additional obligation on the cigarette
manufacturer because you don't have
any --

MR. CROOK: Let's focus on the
issues --

MS. MENAKER: And then the
other thing that it did is it
changed -- under the complementary
legislation, the attorney general,
rather than a court, can ban the
cigarettes for sale for
non-compliance, or it can seize
by the executive or the legislative branch.

So the complementary legislation, essentially, it changed the mode of enforcement of a preexisting obligation. So the penalty, which was the ban on the sale of cigarette, was the same under the escrow statutes and under the complementary legislation. And the only difference is that, under the former, the obligations were enforced by a court, while, under the latter, they are enforced by the executive branch. And Claimants concede in their response that the complementary legislation merely made quote-unquote Grand River Arbitration more immediate the harm that was already imposed on them by the escrow statutes. But it did not impose any new obligations on them. And so any loss that they incurred as a result of their escrow payment obligations were incurred first when they became legally obligated to make the payment under those statutes and not when they incurred penalties for noncompliance or when enforcement actions were taken against them under either the escrow statutes or under the complementary legislation.

PRESIDENT NARIMAN: Is that complementary legislation in all -- what is it -- the states?

MS. MENAKER: No.

PRESIDENT NARIMAN: Only some states have complementary legislation.

MS. MENAKER: Yes.

PRESIDENT NARIMAN: And the others.

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MS. MENAKER: The others are still -- it's the same still obligation, so they are just continuing to just enforce their obligations under the escrow statutes as they have been doing.

MR. VIOLI: I think it has been enforced in all states now.

MS. MENAKER: I have just been informed that I think it's up to about 45 that have some sort of complementary legislation. Some states have essentially done the same steering through different means, so it may not be the exact complementary legislation, but essentially accomplishes the same purpose.

But, again, the point is that it doesn't impose any different obligation. The penalties are still the same, too. It's just the mode of enforcement and whether your legal obligation is being enforced initially by the executive branch or whether it's enforced through the judicial branch. It doesn't make any difference as far as identifying the time at which you first incurred loss or damage as a result of that legal liability.

PRESIDENT NARIMAN: Right.

MS. MENAKER: Again, to sum on the Methanex case, the Tribunal there didn't permit the Claimants to basically get around what was a fatal jurisdictional defect in their claim by focusing on an additional measure, the amendments in that case to the regulation.

When -- the amendments in a superficial manner appear to correct the defect, but under scrutiny it was clear that it didn't. And in that respect -- again, here, the Claimants'
claim is fatally defective because it's time barred, and Claimants can't correct this defect by identifying the complementary legislation which is a later in time measure because the measure did not and cannot be deemed the cause of any different loss or harm. And so their challenge to the complementary legislation can't make their claims timely because it cannot change the date on which they first incurred a loss or damage arising out the breaches which they allege. Now, there are only two more point that I was going to make today. One is to discuss briefly Claimants' challenge to the allocable share amendments and then to discuss their challenges to the Michigan and Minnesota tax assessment laws. Now, Claimants also try to get around the time limitations periods by challenging the allocable share amendments. Again, what is necessary is not to merely identify a later-in-time measure; but you have to that show a breach in the loss arising therefrom first arose within or outside of the limitations -- within the limitation period. And so let me turn to that. And let me just say, as a preliminary matter, that the Tribunal, as you well know, you gave clear instructions at the first procedural meeting that the Claimants should identify with particularity and specificity the measures that they were challenging and to set forth the facts in support thereof in their particularized statement of claim.
And, yet, the allocable share amendments were mentioned by the Claimants for the very first time in their response, and they were only identified as a measure that breached the NAFTA in their rejoinder. And there is no mention of them at all in their notice of arbitration -- notice of intent, their notice of arbitration, or in their particularized statement of claim.

So for this reason alone, their claims challenging these amendments should be dismissed. But I will go on to discuss them to the extent that the Tribunal considers them, notwithstanding their untimeliness.

PRESIDENT NARIMAN: What do you mean by challenges to the amendments?

MS. MENAKER: That they, for the first time in their rejoinder, they actually list the allocable share amendment as a measure that breaches the NAFTA.

So, now, they have said: "Look, those amendments were only made recently, and therefore our claim is timely."

And in our submission, the Tribunal ought not to even consider that claim because it was not properly brought before you. It is not properly before you.

But in the event that you do consider it, I feel compelled to address it; so I was going to do that now, and to explain why, even if you do consider that claim, it should be dismissed because it does not make their claim timely.

So as I have mentioned before, by virtue of Claimants' NPM status and
the mandate that states impose escrow requirements on NPMs, Grand River suffered a loss by becoming legally obligated to make escrow payments. According to Claimants the provision at issue, which is the allocable share provision, permits them to mitigate the damages that they incurred under the MSA regime.

PRESIDENT NARIMAN: This is done by all 46 states.

MS. MENAKER: I do not believe so. No. No. I don't have that count, but not all of them.

MR. LIEBLICH: Practically all, but not all.

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MR. VIOLI: 44 on the last count.

PRESIDENT NARIMAN: Thank you.

MS. MENAKER: Now, Claimants, like I mention, their response at page 13, they say that the allocable share provision -- this is the provision that was in the original escrow statute -- allowed them to mitigate their damages that they incurred under the MSA regime, because, under that provision, they were able to secure a release of some of the funds that they were required to place in escrow.

And Claimants say that this allowed them to better compete with the SPMs, especially those that had the grandfathered SPM status.

But, now, more recently, the states have amended their escrow statutes to close a loophole that had permitted the NPMs to obtain a release of some of the amounts that they had already made into escrow.

So the amendments are intended to close a loophole that had allowed
the NPMs to obtain a release of some
of the amounts that they were required
to place into escrow by consolidating
their sales in only a few states.

So after the amendments were
enacted, Claimants were under the same
obligations to make payments into
escrow. But they lost the opportunity
to mitigate these losses by obtaining
the release of some of the required
payments.

And the amendments according to
Claimants made it more difficult for
them to then compete with the
grandfathered SPMs.

But Claimants first suffered a
loss or damage by having to make the
payments for which the grandfathered
SPMs were exempt. That the amendments
were adopted after March 12, 2001
doesn't changes the fact that the
Claimants first incurred losses as a
result of the alleged breaches well
before that date. And that the
allocable share amendments may change
the effect -- or may affect the amount
of the loss is immaterial.

And, again, the Monduff case,
which we cited in our written
submissions, is instructive on this
point. And in that case the Tribunal
rejected Claimants' argument that it
couldn't be certain that it had
suffered a loss until the court
proceedings were concluded and the
Claimants knew if and how much it had
recovered for the damage that it had
allegedly sustained.

But the Monduff Tribunal
correctly determined that the loss at
issue predated the court proceeding
and that the Claimants had first
suffered a loss before it filed that
proceeding, even if the quantification
of the loss was uncertain at that time.

And earlier, Mr. President, I know you referred to the travaux and asked if there was anything in the travaux that sheds light on the issue of when someone first incurred a loss or damage. And although this is not -- what I am referring to is not the travaux, I would direct your attention to Canada's statement on implementation, which is a document that was -- that Canada submitted to its legislature signed concurrently with the implementation of the NAFTA.

And in that statement of implementation, it says that, under article 1116:

"A claim may be submitted if an investor has incurred a loss or damage as a result of the breach."

So, again, it doesn't say all of the loss or damage. It just talks about a loss or damage, which I think also confirms that -- it just emphasizes that what we are looking at here is we are looking at when they first incurred a loss or damage, one loss or damage, that the full extent of your loss and damage need not be known in order to trigger the beginning of the limitations period.

And so, here, the claim is Claimants first suffered a loss or damage as soon as they incurred the legal obligation to make the escrow payments. Now, the fact that penalties were later assessed in accordance with the escrow statutes doesn't change that fact. And the fact that their cigarettes were banned from sale
either pursuant to court judgments that were rendered under the escrow statutes or pursuant to the complementary legislation, when they failed to comply with their escrow obligations, also doesn't change the fact that they first incurred a loss or damage as a result of the escrow.

And, similarly, the fact that the amounts that were released from escrow pursuant to the allocable share provision, the fact that that changed over time does not change the fact that Claimants first incurred a loss or damage as a result of having to make escrow payments imposed by the MSA regime well before March 12, 2001.

PRESIDENT NARIMAN: Is it your case that they could now make a claim apart from this claim, based on the allocable share provision amendment?

MS. MENAKER: No, they could not in our view, and that is because, if they would now bring a claim for their loss or damage arising out of the allocable share amendments, we would say that is time barred because they first incurred a loss or damage arising out of the breaches that they would be alleging as a result of their legal liability to make payments into escrow, which arose more than three years before they had submitted that claim to arbitration; that all the allocable share amendments did was to change the amounts that were released from escrow.

And, thereby, it may have exacerbated their loss. It may have increased their loss. But you first
incur a loss or damage before the full extent of your damage is known. And the Monduff Tribunal addresses this point head on because there they found that some of the claims were time barred. And that was because, even though the Claimants did not know the full extent of its losses until a later in point time, it knew that it had first incurred a loss or damage that arose out of the alleged breach much earlier in time.

PRESIDENT NARIMAN: But 1116 doesn't that first. It says "first

MR. CROOK: The first relates to the acquisition. Am I correct that the first relates to acquisition of knowledge. But there is -- your position is essentially that any damage, even if it may be inconsequential in amount, is sufficient to trigger the running of the three-year period.

MS. MENAKER: That's correct.

MR. CROOK: That in order for you to prevail all that is required is that you show that the Claimants suffered any damage and had or either had the requisite knowledge or should have had the requisite knowledge. If those requirements are met, then the door slams down on all claims.

Is that your position?

MS. MENAKER: That's correct, that you need to have incurred a loss or damage arising from the breach at that time and have knowledge thereof,
instructive or actual. And at that
time the limitations period begins.
And it is not extended by mere virtue
of the fact that your damages
accumulate over time.

MR. CROOK: So what was
different in the Monduff case is that
you had subsequent -- events
subsequent to the three-year bar; you
had a new event happening. And that
Tribunal said you could claim with
respect to that, but you couldn't
claim with respect to that which went
before.

MS. MENAKER: Absolutely,
absolutely.

PRESIDENT NARIMAN: Could they
now not claim -- make a claim, because
article says an investor may not make
a claim -- a claim has been made with

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regard to various aspects that have
taken place, the MSA, the statutes, et
cetera. But there is no claim made
with regard to this aspect.

MS. MENAKER: But it arises out
of the same breach. You see the
difference different in the Monduff
case, Monduff complained about conduct
of -- it was the Boston Redevelopment
Authority, basically a city agency --
and they complained -- they had an
option to purchase a certain amount.
And they complained that the
city or the BRA breached the NAFTA by
not -- by doing -- engaging in sorts
of conduct that didn't allow them to
exercise on that option.
And then they also claimed that
they had tortuously interfered with
their contractual relations with other
parties so that breach -- let us
say -- the conduct occurred at day
one.
Then what happened is Monduff
sued in court. It was going through the court process to see if it could recover on this loss. And then at some later point in time, it brought the NAFTA claim. The Tribunal found that the earlier in time events, all of the conduct that was by the city, was too early in time. It was out of time. Some of it even predated the entry into force of the treaty. They said: "No, you can't bring a claim with respect to any of that conduct." They said: "But, look, we don't know that we suffered a loss until we" -- "we, you know, if maybe we lose our -- the court proceeding." And, in fact, by the end of the day, they had lost the court proceeding; and it wasn't until that time that "we knew we had suffered a loss."

The Tribunal disagreed and said: "No, you knew you suffered a loss arising out the alleged breach which was conduct of the city officials way back earlier when that conduct first took place." That is when that claim arose that is time barred. The only conduct that took place within the three-year period was this court proceeding. And they said the only claim that they had --

PRESIDENT NARIMAN: That's right.

MS. MENAKER: -- that we had to consider, but they did not consider the conduct. The only claim that they had was an entirely different claim,
which was, if the court had denied
them justice, if, during the
prosecution of their claim, they had
been denied justice -- if they could
have made out a claim for that,
ultimately, they failed. That was a

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different loss and damage arising out
of an entirely different breach. It
had nothing to do with the conduct of
the city officials, entirely separate.

This was whether the court had
procedurally denied them justice.
That was the only claim they
considered. And so that is here.
This is different because Claimants,
if they brought a claim, say -- hard
to think of something -- but if they
claimed an entirely new claim that
they had in a court --

PRESIDENT NARIMAN: I would
have thought the matter -- your answer
would be that this is not the claim.
MS. MENAKER: This is not.
PRESIDENT NARIMAN: That's all.
I don't know why all of this is
necessary. If they want to make a
claim, they will make a claim. How
does that affect your position because
if -- that's the problem. You say:
"Oh, no, they can't make a

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claim now."

Why can't they make a claim.
Suppose they make a claim by saying,
by reason of the allocable share
provision, they have suffered loss.
They can make that claim.
This is not that claim. That's
all. That's not the opposition. I
don't know why you want to argue, even
that claim they cannot now make. But
they can. If they want to, they can
make it, and we will judge it on its
merits.

MS. MENAKER: That is the problem, is that that should not be dealt with on the merits because that claim too is time barred, so they should not be permitted to amend now add this claim because it is time barred.

PRESIDENT NARIMAN: They are not asking for any amendment.

MS. MENAKER: Well, if the Tribunal --

PRESIDENT NARIMAN: They are not asking for any amendment. I have not read any amendment. I have not read any amendment application.

MS. MENAKER: If the Tribunal is inclined to dismiss --

PRESIDENT NARIMAN: I don't know about the Tribunal. I have not read any amendment applications. That's all I am saying.

The Tribunal is not accepting your point. I am only saying that there is no amendment application, not at all.

They have made a claim.

There -- a claim is made in either the statement of claim or the earlier notice of arbitration. If that contains something, it contains it.

MR. CROOK: I think, if I understand correctly, Claimants' point, neither the notice nor the preliminary statement of claim contained this particular element.

This is all brand new.

PRESIDENT NARIMAN: That's what I am saying. Then why go into this question about whether they can make a claim in the future arguing from a particular case which had an entirely
different set of facts because I find it very difficult to argue from -- by analogy.

MR. CROOK: I believe, in fairness, Mr. Chairman, Ms. Menaker basically invited us to rule on that issue, and not hearing anything back felt she needed to go on to address the merits. We can look at the transcript, but I think she did make that point.

MS. MENAKER: Like we said, we are more than happy if you want to dismiss the claim, because it's not properly before you -- that would be fine. This is only in the event that you were so inclined to consider it that we wanted to explain to you why Grand River Arbitration

it is time barred.

PRESIDENT NARIMAN: Thank you.

MS. MENAKER: Now, for my very last point, I will address the Michigan and Minnesota tax assessment laws.

PRESIDENT NARIMAN: What is that? I don't know. It's beyond -- just explain what it is. What is the point made by them?

MS. MENAKER: Well, the Claimants brought these claims again in an untimely manner. They were not properly noticed, so, again, if the Tribunal is not going --

PRESIDENT NARIMAN: Please tell us what the claim is.

MS. MENAKER: The Michigan -- it's a challenge to two tax laws. One is a Michigan tax law. The other is a tax law of the State of Minnesota. They both impose taxes on sales of cigarette that are made by NPMs in their state.

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PRESIDENT NARIMAN: That's not in the claim either.

MS. MENAKER: We believe that it is not properly in the claim. So if the Tribunal is not going to consider their challenges to those claims, I do not need to discuss it.

PRESIDENT NARIMAN: How do we have jurisdiction to determine the challenge to the claim?

MS. MENAKER: I believe that the Tribunal does not have jurisdiction to determine the challenge.

PRESIDENT NARIMAN: Because the state of whoever has enacted the law will have to respond.

MR. CROOK: Ms. Menaker, let me be clear here. Your position that this is not properly before us is because the separate procedure for pre-vetting of tax measures was not taken. This was one of your original jurisdictional objections, which the Grand River Arbitration Tribunal said would be joined on merits. So in that sense your argument now, to the extent you are going to the merits, is out of order. But are you making a different argument that they brought this into the case too late, or is it the argument that they did not comply with the procedural requirements of NAFTA applicable to tax matters.

MS. MENAKER: I was not -- I just simply wanted to remind the Tribunal that we had those jurisdictional objections. But, again, being aware that you did not bifurcate on those, I also wanted to argue that, you know, it is our view that the entire case should be dismissed for failure to abide by articles 1116, 1117, and that the
addition -- as we would say, the
improper addition of these measures,
the Michigan and Minnesota tax
assessment laws, does not make their
0236

And that is the issue that I
wanted to address. I will not, unless
the Tribunal is interested, address
those other reasons why we believe the
Tribunal lacks jurisdiction because
it's not properly before you, because
they didn't go through the tax code,
et cetera, so is that --

PRESIDENT NARIMAN: So your
case is that the challenge to these --
the Michigan, Minnesota laws does not
make the claim timely.

MS. MENAKER: That's correct.
And it is for a similar reason -- a
reason similar to the reason that
their challenge to the complementary
legislation does not change the date
on which they first incurred a loss or
damage arising out of the measures,
with one slight difference.

And Claimants in their
0237

statement of claim, they allege that
the obligations imposed by the escrow
statutes have made it impossible for
them to stay in business.

And I have put up a slide here
where they say, quote:
"The effective compliance with
these MSA implementation measures is
the complete destruction of the
investor's business and their
investments."

Now, this is in the portion of
their statement of claim when they
discuss the escrow statutes before
they discuss the complementary legislation, or have any reference to the Michigan or Minnesota tax laws. Now, they go on to say: "The effect of noncompliance accordingly is a complete prohibition against the operation of the investor's business and their investments within the territory claimed by the USA, again resulting in complete destruction," end quote. So Claimants thus contend that the effect of the escrow statutes themselves have completely destroyed their business.

PRESIDENT NARIMAN: Well, they can't be more than "complete destruction."

MS. MENAKER: Exactly. If that is really the case, then these Michigan and Minnesota laws, which were only recently enacted, could not have caused them any losses or damage.

And, again, this is confirmed by their expert report on damages created by LECG. I noted earlier that LECG calculated Claimants' damages using two alternative methods. One was to value the lost payment exemption, and the other was to quantify the amount that Grand River would have to pay into escrow in order to be compliant with its escrow obligations.

But nowhere does LECG calculate or take into account any loss or damage allegedly sustained by Claimants by virtue of Michigan or Minnesota's tax assessment laws. So as I discussed earlier, the Methanex Tribunal did not allow the
Claimants to challenge the amended regulation in an attempt to get around its ruling that it lacked jurisdiction over Claimants' claim, because the Claimants had not alleged that it suffered any loss or damage as a result of the measure.

And likewise Claimants here should not be permitted to rely on the Michigan and Minnesota tax assessment laws as a means to get around the jurisdictional time bar, when they have not alleged any loss or damage as a result of those tax measures. And, indeed, any such allegation belatedly made would directly contradict the Grand River Arbitration allegations which they have made in their statement of claim.

So, now, to just sum up very briefly, I want to refer again to the time line. You will see that here we have shown the Claimants first incurred a loss or damage as a result of the breaches they allege well before March 12, 2001.

They first incurred loss or damage arising out of the breaches they allege regarding the MSA negotiation and their not having obtained a grandfathered SPM status in February of 1999 when the opportunity to become a grandfathered SPM expired.

MR. ANAYA: Let me ask you about that because when we came back after the break you said that they didn't -- they weren't a manufacturer prior to the MSA and hence that was -- that is why they didn't join it. They had no incentive to, so the suggestion is that they did -- in fact, didn't suffer a loss.

MS. MENAKER: Again, we are
taking their allegation as pled for --
we are not just -- in the same way,
that by saying they first suffered a
loss or damage as a result of the
breach, we are not conceding that
there was a breach.

We are also not conceding any
loss per se. If we were at a
liability stage and into a damages
stage, we would have a different view
of damages.

But according to their own
allegations, they allege certain
breaches and certain losses arising
therefrom. And certainly if you look
at their claim, they are alleging that
they suffered a loss as a result of
not having obtained that status as
grandfathered SPM.

MR. ANAYA: When you say that
you are referring to the damages
assessment report.

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MS. MENAKER: The damages
assessment. And, also, it permeates
throughout their submissions -- their
submissions. They always are
comparing themselves to the
grandfathered SPMs and saying they
should have been afforded that same
treatment, that that is what they
want. They want the payment
exemption.

We are saying, as a matter of
fact, we think that, because they
didn't have any market share, it would
have been zero.

By the same token, we think
from their calculation of the damages
that are estimated by virtue of their
having to comply with the escrow
obligations is entirely incorrect,
that that methodology is entirely
incorrect. So that is something that
is not before you now -- so is that
Also, as you can see, Claimants first incur loss or damage arising out of the escrow statutes as soon as their cigarettes were sold in any MSA state that had enacted an escrow statute. We have also said that this occurred in 1999 because we know that Grand River cigarettes were sold in at least Iowa, Missouri, and Oklahoma during that time.

All of the remaining losses claimed by Claimants are merely extensions of the losses that were first incurred as of these earlier dates. They do not change the date on which Claimants first incurred losses arising out of the alleged breaches. So if this is a good time to pause, I will gladly do so.

PRESIDENT NARIMAN: So your claim in short is -- I mean, your contention in short is that the Claimants cannot make a claim because the breaches and the losses allegedly suffered arose prior to March 2001.

Grand River Arbitration first by reason of the MSA having been concluded with the model statute, and thereafter the 46 settling states enacting the escrow statutes.

MS. MENAKER: Yes, and now we will show that they knew or should have known of those things.

MR. CROOK: Let me just clarify. The chairman said the losses. I take it your position is not the totality of the losses, but any loss is sufficient to bring down the -- to open the three-year time bar period.

MS. MENAKER: Thank you. Yes. It's loss, any loss arising out of the
alleged breach.

PRESIDENT NARIMAN: Okay.

Should we break for lunch now, if

that's okay. You have one more person
to address us.

MR. CLODFELTER: Ms. Guymon

will be addressing the issue of
knowledge.

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PRESIDENT NARIMAN: That will
be about an hour, I suppose,
however -- it is good.

MS. GUYMON: It's about
40 minutes with no questions.

PRESIDENT NARIMAN: I'm a very
free-speaking man. I'm sorry I
interrupt and so on. I know it may
upset you if you are a lawyer.

MS. GUYMON: I welcome the
interruption.

PRESIDENT NARIMAN: I have been
used to it for 55 years.

MR. CROOK: It would appear,
Mr. Chairman, that we are almost
certainly going to go into day two.

PRESIDENT NARIMAN: How long
will you have if she finishes by
about, say, 3:30 or 4?

MR. VIOLI: I would expect an
hour and a half to two hours.

PRESIDENT NARIMAN: Therefore,
I mean, you will certainly go into
tomorrow then.

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MR. VIOLI: I don't think
it's -- I don't know what that their
proof is. I know what mine is. I
don't see the need to go into
tomorrow. If it goes on, that's fine.

PRESIDENT NARIMAN: We may have
some real questions for you.

MR. VIOLI: Sure.

MR. CROOK: Mr. Chairman, I
don't know what your practice is, but
did you envision a point at which the
members of the panel might ask
questions that are of interest to them
that might not have been and then do
that before the final final round.
PRESIDENT NARIMAN: Yes,
because we have to be clear, have some
clarity in our mind. Whatever you may
address, we have to be certain about.
So I think we can break for lunch, and
how long one hour. Is 45 minutes
eough? One hour, yes. Shall we meet
at quarter past 2, 2:15? Is that all
right.

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(A lunch recess was taken.)
PRESIDENT NARIMAN: Ready.
MR. CLODFELTER: Mr. President,
Ms. Guymon will present our arguments
at this time on real and constructive
knowledge.

OPENING PRESENTATION OF MS. GUYMON

MS. GUYMON: Mr. President,
Members of the Tribunal, it has been
an honor to appear before you today.
My name is CarrieLyn Guymon, and I
will now demonstrate that Claimants
first acquired or should have first
acquired knowledge that they had first
incurred a loss arising from the
alleged breach prior to the
jurisdictional cut-off date, March 12,
I thought, before I started, I
would just return to the screen a
slide that was from Mr. Clodfelter's
presentation which gave us the texts

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of article 1116(2) and 1117(2), which
are essentially the same, which 1116
relates to the investor, and 1117
relates to its enterprise.
This sets up a standard by which the limitation period is determined to run, and the period is determined to run. And that standard is at the first point in time when investor first acquired or should have first acquired knowledge of the alleged breach, and knowledge that the investor has incurred loss or damage.

And we can we read -- we read "the first acquired or should have first acquired" in combination with both pieces of knowledge, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

And that's why in Ms. Menaker's demonstration she often said they first acquired a loss because it's the time -- point in time at which they

Grand River Arbitration first acquired or should have first acquired knowledge of the loss as well as knowledge of the breach.

Now, I will be talking about that knowledge. This limitations provision in NAFTA Chapter 11 uses an objective standard for assessing knowledge. The Tribunal thus must consider the earlier of Claimants' actual knowledge, when they first acquired knowledge, or constructive knowledge, when they should have first acquired knowledge.

Thus, even if Claimants were slow to recognize that the MSA impacted their businesses, and that the escrow statutes impose payment obligations on them, that blindness would be irrelevant.

If they should have understood the application of the law to them at an earlier point in time, then that point in time starts the limitations period, not the much later point in
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time when Claimants allege that they first sensed their loss.

United States has demonstrated in its written submissions that Claimants should have known about the breaches and losses that they now allege more than three years prior to submitting their claim to arbitration.

The Claimants have not adequately explained how they could possibly have been unaware of the obvious impact of the MSA regime on their businesses. Thus, their claims are not timely.

Moreover the evidence also shows, beyond what we would need to satisfy the 1116 standard, that Claimants actually knew they first incurred losses under the MSA regime well in advance of March 12, 2001. They had both actual and constructive knowledge.

My presentation today will be divided into two parts. First, I will

Then I will show that there is overwhelming evidence as well that Claimants actually knew about their first losses arising out of the MSA and escrow statutes before the jurisdictional cut-off date.

First, their constructive knowledge about the MSA:

Claimants should have known about the MSA’s impact on their businesses well before March 12, 2001.
Even before the MSA was concluded, major newspapers reported on the negotiators' discussion that bringing smaller tobacco product manufacturers into this payment system, paying the states for the cost of tobacco-related illnesses, would be a part of the deal.

On the screen is a quote from the Financial Times on November 12, 1998, before the MSA was concluded, that the draft agreement, quote: "Proposes that the tobacco company payouts should fall to the extent that they lose market share to nonparticipants in the agreement. Alternatively, the states may impose quote-unquote license fees on nonparticipating companies."

PRESIDENT NARIMAN: Is this an exhibit?

MS. GUYMON: Yes, it is. This can be found at US tab 81.

Thus, Claimants and the public were on notice that the MSA would have an industry-wide impact on everyone, nonparticipating and participating manufacturers, even before the MSA was concluded. We are again using our time line.

The first point in time that I'll be discussing is that, on November 16, '98, the lead negotiators of the MSA held press conferences.

PRESIDENT NARIMAN: Sorry to
take you back, this Financial Times --
tab 81 is it a half sheet or --

MS. MENAKER: It's the entire
article from the Financial Times.

PRESIDENT NARIMAN: Right. I
mean, how does it look? It occupies
the entire sheet or half sheet of the
Financial Times? Do we have it here?

MS. MENAKER: We do. I still
don't think -- I'm sorry. I don't
understand.

PRESIDENT NARIMAN: Is it
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prominent in the newspaper, or a
little headline, or something like
that?

MS. GUYMON: I think it was on
page two of the Financial Times. I
don't know for sure if we always can
tell from the electronic databases.
But it did have -- it had the
headline:
"Smoke signals say relief is in
sight for tobacco companies.
Settlement of states' lawsuits may
cost $220 billion, but Congress is the
And it's two and a half pages
of printed eight and a half by 11
paper. I don't know how much it took
up in the newspaper.

PRESIDENT NARIMAN: I just
wanted to see what it looked like in
the newspaper. That's not possible.
It's okay. That's all right. What is
this? This is tab 81.

MS. GUYMON: Tab 81. Yes. So

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if we return to our time line, this
March -- or I'm sorry.

PRESIDENT NARIMAN: I just want
to know, sorry, if -- I thought it was
concluded. There must have been
several other articles.
MS. GUYMON: There were. There were.

PRESIDENT NARIMAN: That's not put on in your exhibits.

MS. GUYMON: We did not provide in our exhibits every article that mentioned the MSA and its negotiation. There were many. There were leaks and other reporting during the negotiations.

PRESIDENT NARIMAN: Since you are speaking of constructive knowledge and the constructive knowledge always postulates a pattern. You see one issue of the Financial Times, I mean, I may subscribe to it. I may not read it, or the company may not read it so that it may -- that doesn't make

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much --

MS. GUYMON: Right. I am going to walk through that pattern. This is just representative of the earliest of the articles. There are over 30 articles in our submission, and I will discuss some of the later ones in time as I march through.

But this Financial Times article is just a representative sample of articles that existed pre-conclusion of the MSA. There are articles post-conclusion of the MSA, and we just thought this was one to highlight for the Tribunal's purposes that showed that the negotiations themselves were being reported on in the media, including in the Financial Times.

On November 16, 1998, as indicated on our time line, the negotiators of the MSA held press conferences to announce it. And at Exhibit 15 to the Claimants' statement

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of claim is the full transcript of
this media briefing held in
Washington, DC, by attorneys general
from seven states.

Other attorneys general also
held press conferences on that same
date to announce the agreement in
their own states. At the Washington,
DC press conference, Christine
Gregoire, attorney general for the
State of Washington, and one of the
lead negotiators for the MSA,
disclosed the opportunity for all
tobacco product manufacturers to join
the MSA. And a quote from
Ms. Gregoire is now projected on the
screen:

"We are hopeful that we will be
able to get many -- many, if not all,
of the tobacco manufacturers in
America to sign onto the MSA."

PRESIDENT NARIMAN: What is
this tab number?

MS. GUYMON: This is in the
Grand River Arbitration
Claimants' statement of claim, Exhibit
15.

PRESIDENT NARIMAN: Yes.

MS. GUYMON: Also, at that same
press briefing, there was a question
from a member of the press that was in
attendance. And attorney general
Heidi Highcamp from North Dakota
answered that question repeating what
Christine Gregoire had said, that it
there was a desire and invitation for
all manufacturers to join the
agreement.

The question was:
"Are there protections for the
tobacco companies that sign on against
the so-called rogue tobacco companies
that do not sign on, and thus can sell
their products at a cheaper price?"

Attorney General Highcamp
"Within the payment section of the documents is something called the Nonparticipating Manufacturers. We are deeply concerned about so-called renegade or rogue manufacturers, who are not subject to these same restrictions, and so, consequently, there are incentives built into this deal all around for us to bring as many of those folks in as what we can."

PRESIDENT NARIMAN: This is exhibit --

MS. GUYMON: It is still in the same exhibit, tab 15 to the statement of claim. It's a fairly lengthy transcript. Both of these statements are found within it.

The reference there to incentives, Ms. Menaker and the President -- you were discussing earlier why would someone join, and there was that incentive to get the grandfathered SPM exemptions. So she is directly referencing that incentive:

"Why would you want to join?"

"Well, here is what you can get if you join."

PRESIDENT NARIMAN: Do the Claimants say when they came to know since this is their document?

MS. GUYMON: It's their document. They insist that they did not know of it until recently.

PRESIDENT NARIMAN: No, no, but where is that statement they did not know.

MS. GUYMON: Where is their statement that they did not know of it?
PRESIDENT NARIMAN: Did not know of it until recently. I mean, where do they say that -- this document which they have annexed and put as part of their documents -- was not known to them. Where is that statement?

MR. CROOK: I don't believe there is such a statement.

PRESIDENT NARIMAN: That's what Grand River Arbitration I want to know.

MR. VIOLI: There is.

MS. GUYMON: I think Claimants have denied seeing this.

PRESIDENT NARIMAN: No, please, if you don't mind, just give it to me. On tab 15, let's have a look where they say they didn't.

MR. VIOLI: In addition -- this is paragraph 18 of the Williams affidavit, which is tab 14 to Claimants' factual materials in opposition to the objections, volume two of two. Mr. Williams states here -- and he's here to state it if need be:

"In addition in its memorial the Respondent refers to various newspaper and other media articles about the MSA and the alleged opportunity to join the MSA. The Tribunal should be advised that the Claimants are not and never were subscribers to any of the periodicals mentioned in Respondent's memorial, and they did not see, nor were they ever provided with copies of these articles."

That is the first proof that Claimants did not see these -- this press release, which is in printed form, or these other articles that are
MS. GUYMON: Can I ask that Mr. Violi hold off his argument, his presentation. He answered the Tribunal's question, I think.

MR. VIOLI: The second point, I submitted an affidavit. I -- you notice that this is -- this article that they are referring to was submitted by Claimants. I submitted it attached to the particularized statement of claim. It was a documents that I found in 2002.

PRESIDENT NARIMAN: Where is that stated?

MR. VIOLI: Okay. Let's get that.

PRESIDENT NARIMAN: All right. You answer it when it's your turn, right. Sorry.

MS. GUYMON: I remind the Tribunal, also, that, right now, I am addressing their constructive knowledge, so I am not asserting that Claimants actually saw this article.

PRESIDENT NARIMAN: No, it was my fault. I wanted to know whether they had asserted that they came to know of this on a particular date.

That's all. They will deal with it. Okay. Go ahead. Please.

MS. GUYMON: These announcements by the attorneys general that are transcribed in the exhibit that Claimants provided, the United States also provided documents that show that the attorneys general's announcements were broadcast by the broadcast media.

CNN carried excerpts of the

PRESIDENT NARIMAN: Okay. Go ahead.
Broadcasting System's News Hour, with Jim Lehrer carried an interview that night with Washington Attorney General Gregoire. The text of the MSA was readily accessible.

At the Washington press briefing, Attorney General Gregoire announced that the entire text of the MSA would be posted on the web site of the National Association of Attorneys General, or NAAG.

Mealy's Litigation Report on Tobacco and other sources also made the full text of the MSA publicly available. Anyone including the smallest tobacco company or companies not even yet present in the US market could have read the provisions of the MSA shortly after it was announced. It would have been unreasonable for anyone in the tobacco industry not to read and analyze the MSA, the Grand River Arbitration largest civil settlement in US history, with a monumental impact on the industry.

PRESIDENT NARIMAN: How many articles are there that you refer to apart from saying there were many? Can you tell us how many?

MS. GUYMON: We have supplied over 30 articles to the Tribunal. We did not supply to the Tribunal every article out there about the MSA. There are, I know for a fact, more than just the ones we submitted. We tried to present a representative sample for the Tribunal's review.

MR. CROOK: Would it be accurate to say that all of your exhibits, 80 through 120, are articles dealing with the MSA?

MS. GUYMON: Yes, beginning at tab 80. Then there are some additional exhibits that we have
provided as exhibits to our rejoinder, a few additional there.

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MR. CROOK: So there are a few in addition to the 40.

MS. GUYMON: Yes.

MR. ANAYA: You say it will be unreasonable for a tobacco manufacturer not to be aware. Is there any difference in the standard of "reasonableness" between -- from the standpoint of the US manufacturer and a foreign manufacturer?

MS. GUYMON: I think anyone who had an interest in the US market, whether they were a foreign manufacturer manufacturing abroad for import into the US or a US manufacturer manufacturing for sale in the US, they would still have that same interest.

PRESIDENT NARIMAN: Were the articles in the Canadian newspapers?

MS. GUYMON: There were.

PRESIDENT NARIMAN: Have they been put in?

MS. GUYMON: Yes they have in that same range that Mr. Crook referred to.

MR. ANAYA: You say the same standard of reasonableness would apply. You wouldn't say that you would need more information out there, more press releases, more press releases in the foreign press of the investor -- of the country of the investor.

MS. GUYMON: If the investor has the interest in the US market, then they should be investing -- they should be investigating where they are making their investments.

MR. ANAYA: I understand that.
Is the standard of reasonableness that you keep referring to, implicit in your argument, is it the same?

MS. GUYMON: I believe it is, although, when we were talking about article 1116, we are automatically only talking about the foreign company. So it really is a standard

Grand River Arbitration that applies to a foreign investor only. We wouldn't be --

MR. ANAYA: Yes, that's what the statute applies -- but the NAFTA provision applies to. You are talking about -- in your argument you are talking about, it would be unreasonable for a tobacco manufacturer. When you say that, you know, what comes to my mind is an American manufacturer. I might say, yeah, that might be the case.

But when I think about a foreign manufacturer, which is what the NAFTA provision addresses, as you point out, I just want to know is your argument the same standard of reasonableness?

MS. GUYMON: My argument is that it is the same. In the footnotes that we cited at 173 and 174 in our objections to jurisdiction, we cited the MTD versus Chile case that we have already discussed as well as other Grand River Arbitration cases that the Tribunal found that it was the responsibility of the investor to find out about the market they were investing in, that the investors bore that responsibility.

It wasn't the responsibility of the state to send out additional notices or to directly inform the investor. It was up to the investor to take that step of learning how to.
PRESIDENT NARIMAN: Toronto Star and Toronto Sun, they are Canadian newspapers.

MS. GUYMON: They are.

PRESIDENT NARIMAN: They circulate where, Toronto?

MS. GUYMON: I believe that those newspapers are equivalent to some of our major mass market media newspapers in the US where the circulation would be broader than just Toronto. I am not Canadian. I can't say for sure.

MR. CROOK: I notice there are Grand River Arbitration a number of items here from the Buffalo News. Is that the media market for the Six Nations?

MS. GUYMON: Well, we included the Buffalo News and the Omaha newspaper because Claimants' allegations indicate that that's where they were residing at the time, or close to Buffalo and close to Omaha. Some of the Claimants were working with the Omaha Nation Tribe in 1998 at the time the MSA was announced. And others of the Claimants with residing in upstate New York where Buffalo would be the major media market. So we included those articles to show that regional papers in the area where Claimants resided also reported on the MSA.

PRESIDENT NARIMAN: This is -- Buffalo is US.

MS. GUYMON: Buffalo, New York, yes.

MR. ANAYA: Do you know if Grand River Arbitration there is anything in the Global Mail?

MS. GUYMON: I don't believe -- I don't recall that we put anything in from Global Mail. The other paper
from Canada, Hamilton Spectator.

Hamilton is --

PRESIDENT NARIMAN: That's that
Kathleen lady --

MS. GUYMON: I'm sorry, Kate
Barlow.

PRESIDENT NARIMAN: The lady
Kate Barlow.

MS. GUYMON: Yes, Kate Barlow
who Mr. Clodfelter referred to in his
opening.

The Hamilton Spectator, that is
a newspaper that reports on
Grand River territory news and their
events frequently.

If I can just summarize all the
articles we have, we have put in
reports from major US national
newspapers, like the New York Times,
the Washington Post, the LA Times, and

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the Chicago Tribune -- major media
market papers that get a nationwide
circulation.

We also included these regional
newspaper that I mentioned, the
Buffalo News and the Omaha World
Herald; then we included Canadian and
international media. Some of the
Canadian reports that we included were
broadcast as well as newspaper
reports.

And then, finally, the other
category, if I can just summarize them
in categories that we included, are
tobacco industry publications.

So there is Smoke Shop, for
example, that is specifically geared
toward that industry, to report on
events of import to members of that
industry.

All of those different
categories of media and press and
broadcast outlets reported on the MSA
and its impact.
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But the availability of the MSA as a publicly available document is also key. Anyone would have -- could have access to the document and read it for themselves. They need not have relied on the media reports of it. The document itself, the primary source, was available.

Thus, Claimants should have known about and read the MSA provisions shortly after it was made public.

And if we apply this objective standard, should they have known in articles 1116(2) and 1117(2), it's clear they should have known. Anyone in the tobacco industry at the time should have known, not only of the MSA's existence, but of its actual terms and of its impact on the market.

This knowledge of the MSA should have caused Claimants to acquire knowledge with regard to many of their allegations of breach and damage that Ms. Menaker has already discussed, including knowledge that the MSA was allegedly negotiated in a non-transparent way; knowledge that states would enact legislation following the model statute -- Exhibit T to the MSA -- imposing payment obligations on tobacco product manufacturers with US sales that were not party in the MSA, including Claimants themselves; knowledge that certain tobacco product manufacturers -- the grandfathered SPMs -- were granted an exemption, a payment exemption for joining the MSA in the first few months after it was conclude; and knowledge that cigarette sales, for which no excise tax is
20 paid, do not give rise to any
21 obligations to make payments into
22 escrow.
23 All of those things could have
24 been determined and known simply by
25 reading the MSA.
26
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28 As Ms. Menaker explained, the
29 breaches alleged by Claimants relating
30 to their denial of grandfathered SPM
31 status caused Claimants to incur their
32 alleged loss shortly after the MSA was
33 concluded.
34 In other words, their national
35 treatment, and their Most Favored
36 Nation treatment claims, which have to
37 assert a differentiation, that there
38 was some group of people given
39 treatment that they were denied --
40 that claim had to arise as soon as
41 that differentiation was established.
42 That differentiation was
43 established when the MSA was concluded
44 and when the 90-day period passed.
45 And Claimants should have known at
46 that time simply by reading publicly
47 available documents that that should
48 have occurred.
49 MR. ANAYA: Are you saying --
50 you are saying they should have known.
51 It's not actually on the record what
52
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54 that means. I'm assuming -- they
55 should be reading publicly available
56 documents? They had some kind of duty
57 to be reading publicly available
58 documents, so that they could have --
59 just because you are speculating that
60 everybody reads them.
61 MS. GUYMON: As you were asking
62 with your previous question, what
63 would it be reasonable for them to do.
64 Would someone who is in the
65 business of investing in an enterprise
that is going to have sales in the --
cigarette sales in the US market, what
would -- what would they do?
Would they want to know about
this monumental development impacting
the US cigarette market? It's
reasonable.

MR. ANAYA: It seems like that
doesn't then to depend upon someone
being a avid newspaper reader.

MS. GUYMON: It does not.

MR. ANAYA: I am trying to
figure out why we are concerned with
the quantity of newspaper articles out
there.

MS. GUYMON: That is just one
means by which they could have been
alerted to the fact.

MR. ANAYA: You say "could."
That is my confusion, is that they
could have -- by probability they
could have, because of the amount of
newspaper articles.

If it's they should have, then
maybe you are saying they should be
out there reading newspapers or they
should be discovering these facts
regardless of how many newspaper
accounts there are.

MS. GUYMON: Right. Our
assertion is that they should have
known about developments in their
industry. They need not have learned
about those by reading these newspaper
articles. They could have gone about
acquiring their knowledge in some
other way. But they should have known
this monumental development in the
industry in which they were making an
investment.

MR. ANAYA: So the relevance of
the quantity of newspaper articles is
then --

MS. GUYMON: It's just a
demonstration that it was very easy to
know about this and very hard not to
know about this. It was everywhere.
It was -- it was announced everywhere.
There was enough out there to make
anyone interested in this industry
want to know more.

MR. ANAYA: That seems to me
that that goes more to the actual
knowledge, the probability that they
actually were on notice, that it was
out there -- or, no, maybe I am --

MS. GUYMON: We are not
asserting that they read any one of
these articles. And that would be
actual knowledge, I believe. We are
arguing that --

MR. ANAYA: They don't have a
duty to read these articles. They
don't have a duty to read the
Toronto Star.

You are not saying that.

MS. GUYMON: They do not. We
are not trying to --

PRESIDENT NARIMAN: Your
case -- your case is that all of this
news was in the public domain. And
being in the public domain, it is a
reasonable assumption that they knew
about it.

MS. GUYMON: Yes.

MR. CROOK: Is that your case?
Is your case that -- we are talking
about the meaning of the word "should"
here, and how do you give content to
that word.

And what I am hearing, I think,
is the proposition that we assess that
in terms of a hypothetical reasonable
investor, that a reasonably prudent
A business person looking to go into the US market as a consequence or corollary of that reasonable prudence, should have done certain things. And that is the standard of assessing "shouldness" that is being advanced? Have I understood it correctly or not?

PRESIDENT NARIMAN: Is there any difference between "could" and "should" -- "could have" first or "should have."

MR. ANAYA: I keep hearing both words.

MR. CROOK: Let's hear the answer to this, and I have got a follow-up to this.

(There was a discussion off the record.)

MS. GUYMON: I think there is a difference between "could" and "should." Our argument is that they should have known because it was publicly available, because it was easy to find out. It's also that they should have known, because, as an investor making an investment in this market, they should have investigated the market. They had an obligation as the entity to know what they were getting into, to know what they were jumping into. And they could have found that out because of all of this news. They could have found that out by pulling down that little computer and doing an Internet search.

We are not asserting that they had to have to find it out by any particular means. We are pointing out that it was readily available. They could have found it out by hearing the news. They should have found it out by some means or another.
The massive media coverage is just an indication that it would be very difficult, and it's impossible to believe that they were not on notice about the MSA.

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MR. CROOK: Is it that, or is it that, had they carried out that investigation which you maintain an prudent investigator should have carried out, it would have been easy for them to ascertain these things?

MS. GUYMON: That's also true. It's both. I think it's both.

MR. CROOK: So just so -- I'm sorry to be slow here -- just so I am clear, the panel should be applying essentially -- or at least it is open to the panel to apply a standard of a hypothetical prudent foreign investor in applying what it means to say that they should have known something.

MS. GUYMON: Yes. We believe the "should have inquired knowledge" language suggests constructive knowledge. And that constructive knowledge is that concept of what a reasonable person would have known in these circumstances.

MR. CROOK: I am just wondering whether we are talking about one thing or two. You will clarify, I guess.

MS. GUYMON: I think it's two. It's "should have known" because they had an -- had -- as the investor making this investment, they had an obligation to look into what they were getting into. And it also should have known because it was readily known.

MR. CROOK: The nature of the thing, it was readily knowable. So there are two tests.
MS. GUYMON: Yes, it was readily knowable. It was everywhere to be found. But those are not tests. Those are demonstrations that we have made.

MR. CROOK: They are two modes of analysis or inquiry that the Tribunal might make.

MS. GUYMON: They should have known both because a reasonable Grand River Arbitration investor in this market would have done this investigation; and furthermore they should have known because the news about it was everywhere. The talk about this was on the street, in the markets, and in the industry, in the newspaper, on the Internet. It was everywhere to be heard.

So it is both. I think it's both of those two reasons, Mr. Crook, that you have identified. Claimants cannot show and have not shown that it was reasonable for them to remain ignorant of the MSA's terms for over two years after it was concluded. Given the importance of the MSA to everyone in the industry, and the publicity surrounding it Claimants must have known. They should have known.

Now, I am going to talk about constructive knowledge as to the Grand River Arbitration escrow statutes. Claimants likewise should have first acquired knowledge that the escrow statutes caused them to incur loss before March 12, 2001, simply by reading the escrow statutes enacted by all the MSA states. Whether or not Claimants had
actual knowledge of the application of
the escrow statutes prior to March 12,
2001, is immaterial. It is well
accepted, as the Chair has mentioned
already, in both municipal and
international law, that ignorance of
the law is no excuse.

And our authorities in the
objection at notes at 173 and 174,
including the MTD versus Chile case,
discuss this principle of ignorance of
the law being no excuse in the
municipal law context as well as the
international investment law context.

Claimants, like everyone else,
are presumed to know the law. All 46
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MSA states had enacted their escrow
statutes before the jurisdictional
cut-off date, as Ms. Menaker has
shown.
PRESIDENT NARIMAN: What you
are saying is that they should have
known the law in a trade that they
were engaged in.
MS. GUYMON: Precisely.
PRESIDENT NARIMAN: The law was
in connection with this -- this
business that they were in, not any
law that a state may enact. They are
not supposed to read every single law,
but something that pertained to their
own business and therefore vitally
affected by it.
MS. GUYMON: Precisely.
Claimants have admitted it was
there intent for their products, their
cigarettes to be sold in various
states within the United States. And
that's what make those laws, as the
Chair was mentioning, applicable to
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them, because these laws apply to
cigarette manufacturers who intend
their sales of cigarettes to have been in the United States. They were therefore responsible for ensuring awareness of and compliance with all applicable laws to what they were doing, to the sale of cigarettes. Claimants' suggestion that they had to be directly notified by state governments that the escrow statutes applied to them is without support and represents an assault to the orderly functioning of government. Market participants are expected to ensure knowledge of and compliance with applicable laws and are not entitled to direct, individualized notice of any and all legislation that might impact them. Claimants' insistence that they should have received direct individualized notice of the MSA and Grand River Arbitration the MSA regime is somewhat ironic, given the evidence showing that no MSA state could possibly have identified Grand River as a manufacturer of cigarettes for sale into the US market prior to its 1999 or subsequent entry into that market. In any event, Claimants' contention that they remained unaware of legislation passed in nearly every state in the United States, that significantly affected the sale of cigarettes, the business they were in, defies logic. There was widespread media coverage of the MSA states' enactment of the escrow statutes. The United States has provided beginning at tab 103 of its factual appendices sever newspaper articles reporting on the state legislature's bill to enact the model statute, all published
before this jurisdictional cut-off
date.

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For example, the Associated
Press reported on the South Dakota legislature's consideration of a bill
to enact the model statute on January 21, 1999.

As shown on the slide, this article reported:
"The legislation proposed to the Senate judiciary committee is being introduced in all of the states. The nonparticipating companies could agree to the terms of the master agreement or pay into the escrow account subject to the conditions of the bill."

PRESIDENT NARIMAN: Where does this operate? Is this American news?
MS. GUYMON: This is South Dakota.
MR. ANAYA: It's a fairly small market. Aberdeen is a pretty small town.
MS. GUYMON: We have provided other examples from Georgia, which is

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a state that Claimants have purported to be interested in doing business.
It's just again a sampling.
MR. ANAYA: Those stories also go a level of detail about the character of the MSA?
MS. GUYMON: It's not verbatim -- it's not as if this Associated Press article in Aberdeen was carried word for word in Georgia.
The Georgia article is different.
PRESIDENT NARIMAN: What tab is this?
MS. GUYMON: The South Dakota article is --
MR. VIOLI: 103.
MS. GUYMON: Well, 103 is where we have -- it may be 103. At 103, 104, and 105 we have several of these articles reporting on state legislatures' actions to enact the model statute. So there is -- the South Dakota legislature is at 103.

PRESIDENT NARIMAN: No, the

MS. GUYMON: Yes, these articles were each reporting on the fact that state legislators were enacting the model statute, and the model statute presents this choice of either joining the agreement or paying into escrow accounts. So these articles are all reporting on state legislatures' consideration of and enactment of the Master Statement Agreement's model statute, which presents precisely the choice described here in the South Dakota -- in the article reporting on South Dakota's legislators.

PRESIDENT NARIMAN: What about

MS. GUYMON: It's 107, actually. It's one from the Investors Chronicle. It says:

"House approves tobacco
Georgia lawmakers Monday overwhelmingly approve legislation that will set the stage for the state to begin collecting its share of a $206 billion national tobacco settlement. The state house voted 153 to 9 to require small tobacco companies that are not part of the national settlement to establish escrow accounts to pay legal claims brought by the state or individual smokers."

PRESIDENT NARIMAN: Roughly the same, yes. Is that 107?

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MS. GUYMON: That is tab 107.

PRESIDENT NARIMAN: And where do you get the fact that they are selling cigarettes in that state?

MS. GUYMON: In their own statement of claim, they relate that Tobaccoville, I believe, their distributor for the southern United States, is making sales into Georgia.

PRESIDENT NARIMAN: Right.

MS. GUYMON: As I had mentioned earlier, the trade press also reported on the implementation of the MSA's model statute. And so we have provided as one example of this, an article -- an article from Smoke Shop.

PRESIDENT NARIMAN: What is this Smoke Shop?

MS. GUYMON: Smoke Shop is a trade industry publication that is addressed to retailers of the cigarette and tobacco products.

PRESIDENT NARIMAN: And where does it -- it's circulated where?

MS. GUYMON: It's tab 109 in our appendices.
PRESIDENT NARIMAN: Tab 109, yes. Where does it circulate?

MS. GUYMON: I'm afraid I don't know precisely its circulation. It is also an online publication, so it can be accessed on the Internet. I don't know as far as the publication of the hard copy, if it's by subscriber. Often, trade publications work that way, that everyone in the industry will sign up to receive a publication that is geared to their particular business.

PRESIDENT NARIMAN: No, I mean, where is this published, the Smoke Shop -- it's a journal?

MS. GUYMON: It's a trade publication.

PRESIDENT NARIMAN: No, is it a monthly, a weekly?

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MS. GUYMON: I think it's less than a monthly because this issue was February and March of 2000. It may be more akin to a newsletter than a journal. I don't subscribe to it, but it is available online. It is available to the public and to its audience which is the --

PRESIDENT NARIMAN: See, it's a bit of a far cry to say that whatever is online they should have known. I mean, it's difficult to say that. That's why I am asking you these pointed questions, that where does this Smoke Shop newspaper or newsletter or whatever you call it, circulate? I mean, which part of America or Canada?

Since you are speaking of constructive knowledge, then you must be able to tell us where this is published.

MS. GUYMON: Our argument as to constructive knowledge is not that
they saw this particular publication.

PRESIDENT NARIMAN: We are not saying that that is your case. But when you are propounding something and you are saying, look at Smoke Shop, we want to look at Smoke Shop. But we don't know where this thing is, whether it's in the air, online, whether it's a newsletter, whether it's a journal. At least, let us know that if it's monthly journal, a weekly journal, a quarterly journal, something.

MS. GUYMON: Our assertion as to Smoke Shop is that someone in this industry might not read the New York Times, the Financial Times. Perhaps instead they might --

PRESIDENT NARIMAN: I'm sorry. My question is different. I am not saying whether they read or do not read. We will come to conclusion a later. I am only asking you a simple question.

Do you know where it is published and where it circulates, and whether it's a journal? You should find out. You are relying on it.

MS. GUYMON: I will try to find out more about the publication. What I wanted to reiterate is the purpose for which we are using it.

PRESIDENT NARIMAN: That we follow.

MS. GUYMON: This is another direction in which the information could be obtained, is another avenue.

PRESIDENT NARIMAN: But Smoke Shop may be in one little corner of the United States which they may not read, because -- forget just now who has to prove what. We will come
This is a very good statement that you have shown us, but kindly assist us by telling us where this Smoke Shop is published. Is it a journal? Is it a weekly? Your Grand River Arbitration document doesn't show it, doesn't show where it's published, whether it's a weekly, whether it's a monthly, and whether people do subscribe to it. Then we can say that, yes, this is a trade journal. But when you characterize it as a trade journal, it doesn't appear to be so because there is no indication in the annex that you have given in tab 109, although it contains what you are attempting to tell us, no doubt about that.

MS. GUYMON: We will endeavor to find out more about the publication. 

PRESIDENT NARIMAN: Yeah. 

MS. GUYMON: The statement from the publication though -- you probably already had a chance to read it -- but it did let readers know that: "All 37 states as of that time had approved model statute legislation which required manufacturers not participating in the MSA agreement to establish and maintain escrow accounts for any potential state Medicaid related recovery claims. Manufacturers pay into the escrow accounts bases on their volume of cigarette sales in each state."

PRESIDENT NARIMAN: Speaking for myself, I find this very important. That's why I am pursuing it, and I am requesting you to assist us. But you are not in a position to assist us. You don't know whether
it's a newsletter, whether it's a
journal.

MR. CROOK: Unless I am much
mistaken, Mr. Chairman, one of the
attorneys for the Claimants appears to
have left the room and perhaps is
going to attempt to answer your
question.

PRESIDENT NARIMAN: You are
more prescient than I am.

MR. CROOK: I noticed there was
an Internet terminal outside the room.

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Perhaps they will be spending some
time on that.

PRESIDENT NARIMAN: This is
useful information. We are not saying
it's not.

MR. CROOK: I don't think this
information is any different from any
information that appears elsewhere in
the record, Mr. Chairman.

PRESIDENT NARIMAN: No, but I
think it's important. That's why I
would like to know whether this is --
what sort of a publication it is.

MR. CLODFELTER: We will find
out everything we can about it.

MS. GUYMON: We did,
Mr. Chairman, just for the background
and the rest of the Tribunal, before
putting this in evidence, we did
investigate what Smoke Shop is. And
Smoke Shop describes itself at least
as one being one of the major -- and
called itself the "superlative" trade
publication for the industry.

PRESIDENT NARIMAN: Where is
that?

MS. GUYMON: We did not provide
that, but we certainly would be happy
to. We did do that at the preliminary
step -- we can make sure.
PRESIDENT NARIMAN: Yes, because is Smoke Shop circulating among five people, 50 people? We don't know.

MS. GUYMON: No, it is not.

PRESIDENT NARIMAN: Then you must tell us.

MS. GUYMON: We will provide that document that shows that it describes itself as being a major industry publication.

PRESIDENT NARIMAN: Major, even the claim that it's major, okay.

MS. GUYMON: Regardless though of any of this media coverage of the escrow statutes, the escrow statutes themselves were enacted into law and as such were publicly available as

Grand River Arbitration laws applicable to Claimants because they were in this industry.

As those laws were made available, it was readily discernible that they were all following a pattern. They were all following the model statute. They were not different in any material respect.

MR. CROOK: Mr. Chairman, do I observe the secretary just pulled up information on Smoke Shop?

PRESIDENT NARIMAN: You are remarkably prescient.

MS. GUYMON: It may be the same information that we also just pulled up, that says that Smoke Shop is published by:

"Lockwood Trade Journals, publishers of Smoke, Pipe Smoke, Tobacco International, Tobacco Asia, and the TM Copy Trade Journal. With a 30-year history of serving the tobacco industry, Smoke Shop has become one of the oldest and most respected trade

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journals in the industry. Our mission is to provide in-depth information to our readers concerning the ever-changing tobacco industry, including cigars, pipes, cigarettes, accessories, and other tobacco products."

And the address of the Smoke Shop magazine is 26 Broadway, New York, New York.

PRESIDENT NARIMAN: Would you give us a copy of this?

MS. GUYMON: Yes, we would be happy to.

PRESIDENT NARIMAN: It's not on the record. Okay.

MS. GUYMON: Reading the model statute, though, or the escrow statutes enacted in any of the states should have imparted knowledge to the Claimants that they were incurring the losses they now allege and that Ms. Menaker has discussed; namely, the Claimants should have read the escrow statutes in states where their cigarette were intended for sale and acquired the following knowledge prior to March 12, 2001:

Knowledge that Grand River, as the manufacturer of cigarettes sold in the US, was required to make annual payments into escrow for US sales of its cigarettes beginning in 1999; knowledge that Grand River was responsible for making payments, whether its cigarette were sold directly to consumers or indirectly through any number of intermediaries, because that language is in the plain text of the escrow statutes; knowledge that the amount of the escrow payment was calculated using the volume of sales subject to excise taxes -- that was clear on the face of the statute;
knowledge that failure to place funds
into escrow subjected the manufacturer
to penalties up to three times the
amount owed in escrow and a ban on

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further cigarette sales.

Claimants deny acquiring such
knowledge, insisting that they did not
understand that the escrow obligation
applied to them. As Ms. Menaker
explained, Claimants cannot be excused
for allegedly believing that they were
not subject to the escrow statutes
because they did not make sales
directly to consumers.

Claimants' suggestion that they
were unaware and therefore not
accountable for the subsequent resales
of their cigarettes that were subject
to excise taxes and, therefore, the
escrow obligation that arose, must
also be rejected.

The evidence shows that
Grand River was aware in early 1999
that its products were being sold
through distributors in MSA states,
and that at least some of these sales
were subject to excise taxes, giving
rise to the escrow obligations.

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On the screen is one of several
letters that were sent in March, April
and September of 1999. And the one on
the screen is tab 133 in our
appendices.

Chantell Macinnes Montour,
in-house counsel for Grand River
Enterprises, sent these letters in
support of White River Distributors'
application for state and federal
tobacco licenses in various states.
The letter on the screen, as I
mentioned, is the earliest of these,
the March 1999 letter.
PRESIDENT NARIMAN: What does it show?

MS. GUYMON: This shows -- as you can see, it's a letter from the in-house counsel for Grand River. It shows that Grand River is supporting the efforts of a distributor called White River Distributors to obtain state and federal tobacco licenses. As the letter indicates, White River is being authorized to sell Grand River cigarettes, and Grand River is thereby aware that its authorized distributor is being subject to state and federal tobacco licenses, which carry with them state and federal obligations to comply with laws such as excise tax requirements. Therefore, Grand River knew that its sales of cigarettes through its distributors were going to give rise to tax obligations, to excise tax obligations. And it is those excise taxes which make the definition of units sold in the model statute and escrow statutes applicable to Grand River as the manufacturer.

PRESIDENT NARIMAN: That's a long jump --

MS. GUYMON: Because it's a two-step jump. It combines their actual knowledge as shown in this letter that their cigarettes were being sold under conditions that would give rise to excise tax obligations. And all you have to do is add the second step, which is what I have already discussed -- they should have known the law. They should have read the escrow statutes that applied to them.

They knew, for example, that in
the State of Missouri, where this
dletter on behalf of White River
Distributors was sent, that someone
was selling their cigarettes and that
those cigarettes were giving rise to
excise taxes, and because they should
have read the law, they also should
have known that those excise taxes
triggered an escrow tax obligation.

PRESIDENT NARIMAN: But this
doesn't show any knowledge of the law,
the fact that they knew the law is not
shown by these letters.

MS. GUYMON: This shows they
knew the excise tax law. They knew
the federal and state legal
requirements.

MR. ANAYA: I'm sorry. I
didn't quite see that.

MS. GUYMON: There is another
letter that shows it more clearly. I
will switch to that letter now. And
this letter -- you are right; it
doesn't say "excise tax" anywhere in
the letter. But it says "various
state and federal tobacco licenses."

Requiring -- a state tobacco
license carries with it the
requirement to comply with state laws,
including state excise tax laws.

But we have another letter
which is now on the screen that Native
Tobacco Direct, Mr. Montour sent, to
the State of Missouri, reporting on
sales of Grand River cigarettes
through that same distributor, White
River Distributors, and reporting, as
it was obligated to do, that there
were no sales for a certain period of
time, the month of October, and,

PRESIDENT NARIMAN: Yet, again,
there is no reference to the escrow laws.

MS. GUYMON: You are correct. This is a two-step showing. They knew -- this letter shows they knew about the tax requirement. Their constructive knowledge of the escrow laws should have caused them to acquire knowledge that, if excise tax was paid, escrow obligations followed.

PRESIDENT NARIMAN: That is what tab number?

MS. GUYMON: This is tab 15.

PRESIDENT NARIMAN: 15.

MS. GUYMON: 15 in the US appendices.

MR. CROOK: Can I interrupt with a question -- or answer now -- you may be getting to this later in your argument. But I notice that this particular letter uses the 14 -- 14411 Four Mile Level Road address. And one

Grand River Arbitration of the issues is whether that was an appropriate address at varying times for communications. And will you be addressing that?

MS. GUYMON: I will be addressing that when I talk about actual knowledge.

MR. CROOK: Thank you.

MS. GUYMON: Claimants thus knew well before March 12, 2001, that Grand River cigarettes sold through distributors were subject to excise taxes. They also should have known from reading the escrow statutes that any such sales caused Grand River to incur an obligation to make payments into escrow.

Even if Claimants at this point had not read the model statute or the MSA or any of the escrow statutes, they had a legal obligation -- or they should have known and complied with
those laws in the places where their
products were being sold.

PRESIDENT NARIMAN: May I just
interrupt you. Is there any evidence
on record -- because I am not quite
sure -- that they paid any sums of
money into escrow accounts before
March of 2001? Is there any document
on record?

MS. GUYMON: I don't believe
there is in the record any evidence
that shows there were actually paying.
There is record evidence that shows
they should have been paying.

PRESIDENT NARIMAN: Yes.

MS. GUYMON: Claimants thus
first should have acquired knowledge
of the MSA regime and the escrow
statutes in particular well in advance
of March 12, 2001. Claimants had a
responsibility to know the law, and
they had the ability to know the law,
to access and read the MSA and the
escrow statutes.

Claimants must be presumed to
have known the law and the application

MR. ANAYA: And you are saying
there is no ambiguity in the law -- if
they go and read it, they did this, if
they do what you say they should have
done, read the law, there is no
ambiguity in it?

MS. GUYMON: There is no
ambiguity.

MR. ANAYA: One kind of
potential ambiguity --

MS. GUYMON: And that's the
discussion, I think, that was engaged
in earlier, was about the excise taxes
and how that law may vary from state
to state.

MR. ANAYA: That was one kind of potential ambiguity.

MS. GUYMON: And that is not an ambiguity in this law. That is not an ambiguity in the escrow statutes. And it's not really an ambiguity. It's a variation. Some states do it one way.

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Other states do it another way.

That also was knowable at the time the escrow statutes were enacted. A reasonable cigarette manufacturer with sales in the state would have inquired into the legal obligation under the escrow statutes, would have inquired into what the excise tax regime was in that state, because their sales of cigarettes were being made in that state.

And so those things were knowable and actually should have been known by the Claimants at the time that their sales were being made.

As Ms. Menaker explained, Claimants' first losses were incurred as soon as the MSA and escrow statutes were in effect. Thus, the knowledge they should have acquired of the MSA and the escrow statutes carried with it knowledge that Claimants had first incurred loss or damage.

Even in the absence of any additional evidence therefore, their entire claim is time barred. The constructive knowledge showing alone is enough to bar their claims without any evidence of actual knowledge. But I will turn now to that evidence of Claimants' actual knowledge.

MR. ANAYA: Wait. Are you saying that they are time barred by constructive knowledge about the
breach, apart from any knowledge or
about a loss? I mean, they make this
big difference between the two. And
are you saying the two -- one of those
two will suffice to --

MS. GUYMON: No, both are
required. But constructive knowledge
as to both is sufficient. So
constructive knowledge that they had
incurred a loss, that they had first
incurred a loss is sufficient.

So in other words, the escrow
statutes were in place. They had a
legal obligation to make a payment

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under that escrow statute.

Even if they say they didn't
know that, they had -- they should
have first acquired knowledge that
they had incurred that loss because
they should have known the law. The
law applied to them. They took the
step by making the sales of their
cigarettes in those states. That made
the law applicable and be in force as
to them and cause them a loss, and
they should have known about that.

They should have known.

MR. ANAYA: As of the time they
began selling cigarettes.

MS. GUYMON: As of the time
they began selling -- of both, the
breach and the loss.

MR. ANAYA: Right.

MS. GUYMON: I turn now to
their actual knowledge.

The United States has uncovered
evidence that reveals that Claimants
most certainly did know that they had

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incurred losses about which they now
complain more than three years prior
to submitting their claim to
arbitration.
It's important to keep in mind as I just mentioned that this evidence is additional and extra. It goes beyond the necessary showing of constructive knowledge and shows that they, in fact, should have known and did know about the breaches and the losses they now allege more than years before submitting their claim.

The evidence of actual knowledge that I will discuss falls into three categories: One, knowledge acquired through direct notices to Claimants from MSA states --

PRESIDENT NARIMAN: Just a little slowly please.

MS. GUYMON: So the first category, knowledge acquired through similar notices that were sent to Claimants' business affiliates.

And the third category --

PRESIDENT NARIMAN: One second.

Yes.

MS. GUYMON: -- knowledge acquired through similar notices that were sent to Claimants' business affiliates.

And the third category --

PRESIDENT NARIMAN: One second.

Yes.

MR. ANAYA: They say these were prior.

MS. GUYMON: They do. I will discuss that in turn. I am setting out my road map here. Then I will discuss each of the three categories in much greater detail.

The third category that I will review is knowledge -- Claimants knowledge that Missouri had filed a lawsuit against them for their failure to make escrow payments.

PRESIDENT NARIMAN: Missouri
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had filed a lawsuit. That's one of the documents against them -- for not making payments.

MS. GUYMON: For their failure to make escrow payments.

PRESIDENT NARIMAN: Okay.

MS. GUYMON: So although the states were under no obligation to do this -- they were not required to directly notify Claimants of their obligations to comply with state laws -- as I already mentioned, it was Claimants' obligation to find out about the law and comply with them -- nonetheless, several states did send notices to cigarette manufacturers, including Grand River, and its distributors and affiliates, reminding them of the operation of the escrow statutes.

Three letters to Claimants predating March 12th, 2001 --

PRESIDENT NARIMAN: One second.

Three letters, dated --


PRESIDENT NARIMAN: You don't have the date of the letter.

MS. GUYMON: I am about to show them on our time line. So there are three letters. Each of these letters has been noted in our time line.

PRESIDENT NARIMAN: Can you just give us the dates, please.

MS. GUYMON: As shown, there is an Iowa letter from April 7, 2000.

PRESIDENT NARIMAN: This one is Iowa. That is April 7th.

MS. GUYMON: April 7th, 2000 from Iowa.

PRESIDENT NARIMAN: And this what is tab, please?
MS. GUYMON: I am actually going to discuss the letter in great detail.

PRESIDENT NARIMAN: What tab is it?

MS. GUYMON: The Iowa letter is Grand River Arbitration 132B.

PRESIDENT NARIMAN: B.


MS. GUYMON: At tab 16.

PRESIDENT NARIMAN: Tab 16 US.

MS. GUYMON: Yes.

And the third letter I'm going to discuss is an October 11, 2000 letter from Iowa, this one to Native Tobacco Direct.

PRESIDENT NARIMAN: To Native Tobacco Direct. That comes in your second category, affiliates.

MS. GUYMON: No, Native Tobacco Direct is a Claimant.

PRESIDENT NARIMAN: Yes. Okay.

MR. CROOK: That's tab 132 as well.

PRESIDENT NARIMAN: That's tab 132.

MS. GUYMON: No, that is -- I'm going to discuss it in a moment, but I believe it is tab 129.

PRESIDENT NARIMAN: Tab 129. Okay.

MS. GUYMON: For now I want to briefly note them, so you can place them in the chronology on our time line, but I would like to discuss each of them in turn. Claimants do not deny by the way receiving the two letters from Iowa.

PRESIDENT NARIMAN: Wait a
minute.
Where do you get that, that
they don't deny.
MS. GUYMON: They put in an
affidavit by Mr. Williams that
protests that the Missouri letter is
not currently in the company files.
But that affidavit does not address
the Iowa letters directly.
PRESIDENT NARIMAN: Not in
company files, and no mention of Iowa
in their reply.
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MS. GUYMON: There is no
mention in -- in their rejoinder, in
responding to the Iowa letters, they
refer back to the Williams affidavit.
However, the Williams affidavit was
provided with their response, and
directly addresses only the Missouri
letter.
PRESIDENT NARIMAN: That's it.
MS. GUYMON: If the Tribunal is
ready, I will turn to each of these
letters, and we will look at each one
of them individually.
PRESIDENT NARIMAN: Please.
MS. GUYMON: So starting with
Iowa's revenue department, their
letter -- their reminder letter -- so,
again, in reminding them -- tab
132B -- reminding them of what they
already should have known, they sent a
letter to Grand River, dated April 7,
2000. And that letter is projected on
the screen. It --
MR. ANAYA: "To whom it may
concern"? Can you help me figure out
how --
MS. GUYMON: In tab 132, there
is an affidavit from a Dale Feedy of
the Missouri Department -- or I'm
sorry -- of the Iowa Department of
Revenue. He explains the various exhibits including this letter at 132B. He explained who it was sent to. He provides a spreadsheet that lists everyone who received it from the state.

PRESIDENT NARIMAN: Received it.

MS. GUYMON: The spreadsheet indicates addresses to which it was sent, dates on which it was sent, whether or not it was returned.

PRESIDENT NARIMAN: Can you just tell us from 132, if you don't mind, when was it sent, and when was it received.

MS. GUYMON: It was sent -- the Grand River Arbitration spreadsheet doesn't show when it was received. The spreadsheet shows that it was sent April 7, 2000, and shows that it was not subsequently returned.

PRESIDENT NARIMAN: April 7, 2000.

MS. GUYMON: As undelivered.

PRESIDENT NARIMAN: Sent April 7, 2000, to Grand River.

MS. GUYMON: To Grand River.

PRESIDENT NARIMAN: At which address?

MS. GUYMON: I'm going to talk about that --

PRESIDENT NARIMAN: That's later.

MS. GUYMON: If you will permit me to --

PRESIDENT NARIMAN: No.

MS. GUYMON: I thought first we would take about what the letter says.

PRESIDENT NARIMAN: No difficulty.

MS. GUYMON: Just to be clear,
that this letter did notify Claimants
of all of their obligations. The
letter enclosed a copy of the statute,
so the statute was enclosed for them
to read.

But the letter also outlined
the obligations in that statute, the
steps that manufacturer must take if
its cigarettes are sold in Iowa,
quote: "Whether through a
distributor, retailer, or similar
intermediary or intermediaries."

PRESIDENT NARIMAN: Pardon me.
But tab 132 is an affidavit.
MS. GUYMON: It is of
Dale Feedy.
MR. CROOK: The gentleman at --
PRESIDENT NARIMAN: The
gentlemen -- that's right.
MS. GUYMON: He's the sender of
the letter, and his affidavit explains
the methodology and process by which
these letters were sent to numerous
listed recipients. And the
Grand River Arbitration
spreadsheet that is also in Exhibit 2,
his affidavit lists all of those
recipients, including Grand River, for
the April 7, 2000 letter.
PRESIDENT NARIMAN: Neither
responded to nor returned.
MS. GUYMON: Precisely.
You may recall, when we were
discussing the Oregon letter,
Claimants suggested some ambiguity as
to their obligation to make payments.
This letter clearly states that the
payments had to be made whether sales
were made directly or indirectly.
It's clearly set forth in the letter
as it is clearly set forth in the
statute.
PRESIDENT NARIMAN: It's units
sold and all of that.
MS. GUYMON: It does -- it
reported that the manufacturer was the
one that had the responsibility to
establish an escrow account, deposit
funds into the escrow account based on

Grand River Arbitration
the number of cigarettes sold, and
verify in writing that it has done so.
The Missouri letter is very
similar. The Missouri letter was sent
on April 25, 2000, and is shown on the
screen. This letter from Missouri's
Department of Revenue enclosed a copy
of Missouri's escrow statute and again
reminded Grand River of the
requirements to establish and fund an
escrow account if any cigarettes it
manufactured were sold in Missouri.

PRESIDENT NARIMAN: And where
do you get the Quinton Wilson
affidavit?

MS. GUYMON: We did not provide
an affidavit from Quinton Wilson. But
as you can see, this letter actually
shows Grand River's address on the
face of the letter: Grand River
Enterprises, RR Number Two, Oshweken,
Ontario, Canada.

PRESIDENT NARIMAN: And then
the reply is that it is not in the

Grand River Arbitration
company files.

MS. GUYMON: Yes, I will get to
that in one minute if you will permit
me. Unlike the Iowa letter, because
Grand River is identified, we did not
find it necessary to seek an affidavit
from Missouri, because the address is
on the letter.

PRESIDENT NARIMAN: There is
another letter of Iowa.

MS. GUYMON: There is another
letter of Iowa which I will get to in
a minute. So these are the two
letters that we put in to Grand River.
And as you mentioned Steve Williams in
his affidavit attests that the
Missouri letter cannot be found
currently in Grand River's files. But
he says nothing about the Iowa letter.

PRESIDENT NARIMAN: But he
doesn't deny the receipt of this
letter. Does he say --

MS. GUYMON: He says it cannot
be found currently in the company

PRESIDENT NARIMAN: But he
doesn't deny the receipt of this
letter. Does he say --

MS. GUYMON: I do not think he
does directly deny receipt of the
letter.

PRESIDENT NARIMAN: Not what
you think. Let's see. Please go
through this.

MR. CROOK: I think Mr. Violi
may have the affidavit.

PRESIDENT NARIMAN: I can
interrupt -- let her deal with it.

MS. GUYMON: I believe
Mr. Williams in his affidavit says:
"After extensive review of the
books and record of Grand River, I can
state with absolute certainty that the
first communication that Grand River
received concerning any of the
measures at issue is correspondence
dated March 14, 2001," which is a
reference to the Oregon letter.

The correspondence is addressed

to Grand River Enterprises and so on.
It describes the Oregon letter.
So the implication there is
that the first communication
Grand River admits receiving is not
until Oregon's --

PRESIDENT NARIMAN: He doesn't
deal with these three letters.
MS. GUYMON: He doesn't deal specifically with the Iowa letter. The Iowa letter was not in evidence at that point.

PRESIDENT NARIMAN: Iowa was not in evidence, but your Missouri letter was in evidence?

MS. GUYMON: Our Missouri lettered was in evidence at that point so his affidavit --

PRESIDENT NARIMAN: Williams's affidavit is what date, please.

MS. GUYMON: Williams's affidavit is --

PRESIDENT NARIMAN: Can you give us the date, please.

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PRESIDENT NARIMAN: He says it's not -- he didn't say not in the company files. He said the first letter.

MS. GUYMON: He says that "after reviewing the books and records of Grand River." So the implication is that he went searching through their records to find letters.

PRESIDENT NARIMAN: This is in answer to that tab 16. That is the April 25th, 2001.

MR. CROOK: I think it was more in the nature of a generic statement, Mr. Chairman. He was not addressing this particular document, but generally.

MS. GUYMON: The important point is that both of those letters were sent to Grand River in April of 2000, and the direct response --

PRESIDENT NARIMAN: No, please -- I'm sorry. I'd like to get this clear if you don't mind. I just want to know.
Where did you rely upon this in your affidavit, in your statement at this tab 16?

MS. GUYMON: Where did we rely upon it?

PRESIDENT NARIMAN: Yes, because this is supposed to be an answer of the Claimants.

MS. GUYMON: It's in our objection to jurisdiction in our appendices at tab 16.

PRESIDENT NARIMAN: In the appendices?

MS. GUYMON: Yes, it is in the objection itself.

PRESIDENT NARIMAN: Can you just give me the background.

MS. GUYMON: Yes, we discuss it in our statement of facts earlier, but in our legal argument we discuss it on page 43.

PRESIDENT NARIMAN: Page 43.

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MS. GUYMON: Of the objection to jurisdiction.

PRESIDENT NARIMAN: No -- Missouri Department of Revenue, for instance, mailed a letter to Grand River on 25 April, 2000. I see.

MS. GUYMON: So both the Missouri letter and the Iowa letter were sent to Grand River in April of 2000. Claimants say that they moved to a new address on March 15, 2000, mere weeks before these letters were sent, and suggest therefore that they did not receive them. Claimants' excuse for not having received these letters are not credible. First --

PRESIDENT NARIMAN: No, but one minute, this Missouri letter is sent to number 2 -- what is that.

MS. GUYMON: RR Number Two.

PRESIDENT NARIMAN: Oshweken.

MS. GUYMON: Yes. The Iowa
letter is also to the same address as Dale Feedy's affidavit has.

1 Grand River Arbitration
2    PRESIDENT NARIMAN: You are not dealing with the Iowa letter. See, it's not in your objections to jurisdiction, the two Iowa letters.
3    MS. GUYMON: You are correct.
4    PRESIDENT NARIMAN: Let's please -- if you don't mind, first give us Missouri. Then go back to Iowa. Don't say all three together because otherwise it's very confusing because you are relying on the fact that the Claimants has not specifically dealt with it in his reply to your objections to jurisdiction.
5    MS. GUYMON: But their justification for not receiving the letter is the same. It's that they moved to a different address.
6    PRESIDENT NARIMAN: You deal with Missouri first. Then we can have the same justification for Iowa.
7    MS. GUYMON: Sure.

1 Grand River Arbitration
2    Yes, even if Claimants did move in mid March, they should have either arranged to forward their mail, or periodically gone back and retrieved their mail from that address from which they had just moved weeks before.
3    PRESIDENT NARIMAN: But you are not a position to say that they did not move.
4    MS. GUYMON: No.
5    MR. ANAYA: Is that what you just say -- does that go to constructive knowledge?
6    MS. GUYMON: It's again an intermingling of constructive
knowledge because the standard is what they should have known. A reasonable business should have arranged to retrieve its mail or forward its mail a few weeks after it had moved. Claimants should therefore be deemed to have known about these letters because any reasonable business person would have followed these steps.

PRESIDENT NARIMAN: Don't mix up the Iowa with the -- if you don't mind, deal with it separately. Then I can understand it. Otherwise I cannot. You have --

MR. CROOK: I believe she is discussing Missouri.

PRESIDENT NARIMAN: Only Missouri.

So in the Missouri your point is that there was a letter which was addressed -- there was a letter -- because this is specific knowledge which you are alleging. That is why we have to go through a little carefully, please.

And this is a Missouri letter sent as recorded, and in tab number 16. And the answer given is that in their searching their files, when the first letter happened to be, the March 21 or something, 2001, not earlier. And because -- and the further statement is that they had already shifted.

Now, the shifting you don't deny, and I mean, you are not in a position to deny.

MS. GUYMON: Actually, I believe Claimants themselves have denied it in their own allegation. I was going to march through that.
PRESIDENT NARIMAN: Whichever way you want to deal with it.

MS. GUYMON: Okay. There are three reasons why it's not credible to believe that they didn't receive this letter despite their have moved.

PRESIDENT NARIMAN: So you say the two Iowa letters are also of the same --

MS. GUYMON: Just one, the one that is April 25, 2000, that is addressed to Grand River.

PRESIDENT NARIMAN: Only one.

MS. GUYMON: Yes, the other Grand River Arbitration Iowa letter.

PRESIDENT NARIMAN: No, that's Missouri.

MR. VIOLI: April 7th, you mean.

PRESIDENT NARIMAN: April 7th, you mean.

MS. GUYMON: April 7 of 2000 and April 25 of 2000 are the two letters to Grand River. One is from Iowa to Missouri.

PRESIDENT NARIMAN: And they are both addressed to this RR-2, Oshweken.

MS. GUYMON: Correct, yes, April 7th from Iowa, April 25th from Missouri, both addressed to RR-2 Oshweken, Ontario.

PRESIDENT NARIMAN: And what do they say precisely, if you don't mind -- what do the Claimants say in their reply about the address?

MS. GUYMON: Claimants say that, in paragraph 17 of

"Grand River ceased operations at RR Number Two, Oshweken, on March
15, 2000."

So less than a month before.

PRESIDENT NARIMAN: On March 2nd.

MS. GUYMON: March 15th.

PRESIDENT NARIMAN: 2000, right. Okay. AND you have a comment on that.

MS. GUYMON: Yes, I have three comments on that.

First, what the reasonable business person would have done, which is either arrange for forwarding, which you can do through Canada Post, or just go back to your old address and periodically pick up your mail. It's just not reasonable business practice to abandon your place of address without making any other arrangement to continue to receive crucial mailings.

Second, the evidence shows that Grand River did receive the letter from Iowa. Now, we are talking about Iowa only. As I mentioned there is an affidavit at tab 132 from Mr. Feedy of the Iowa Department of Revenue, and the United States provided this in an appendix to its reply.

PRESIDENT NARIMAN: No, but 132 is addressed to whom?

MS. GUYMON: 132B is addressed to Grand River, I believe.

PRESIDENT NARIMAN: At what address?

MS. GUYMON: The same address, RR Number Two.

PRESIDENT NARIMAN: 132, addressed to Grand River.

MS. GUYMON: In tab 132, the actual affidavit from Mr. Feedy, he explains that Iowa kept a record of which letters were returned to it, as undelivered. And this Iowa letter to
Grand River Arbitration

Grand River was not returned as undelivered.

My third point as to --

PRESIDENT NARIMAN: On this, the Claimant says nothing on the affidavit of Feedy.

MS. GUYMON: They refer -- the Claimants -- in response to the Iowa letter that we presented in our reply, Claimants come back in their reminder and refer back to the Williams affidavit that they had previously provided.

PRESIDENT NARIMAN: Like that --

MS. GUYMON: Yes.

PRESIDENT NARIMAN: They only restate what was stated.

MR. CROOK: Let me see if I have got the sequence.

MS. GUYMON: What was it as to Missouri --

MR. CROOK: The Williams affidavit is sometime in January. You come back with your final pleading in early February, which has tab 132, which is the Feedy affidavit and the documents from Iowa. So there is then the final closing Claimants pleading, the precise date of which I have now forgotten.

But in that final pleading, they did not specifically address the Iowa documents which you had put in the first time in your previous pleading, but instead referred generally back to Mr. Williams's statement that he -- after reviewing the record, he can attest that the first time they learned was at a certain time.

Is that the sequence?
MS. GUYMON: Yes, in their rejoinder, they refer directly back to paragraph two, the paragraph that I read earlier that says that: "After extensive review of the books and records, I can state with absolutely certainty that the first communication that Grand River received was this Oregon letter." They felt that was sufficient to address the Iowa as well as the Missouri letter, apparently. I don't know for sure what they thought.

My third point, as to these two letters sent to the RR Number Two address in April of 2000, is that, even if Grand River had moved, the evidence suggests that it would still have received mail that was sent to the RR Number Two address. This is an address on the reservation; and in the Williams affidavit and in Claimants' response, they admit receiving the Oregon letter that Ms. Menaker discussed earlier. If we look at the address for the Oregon letter, it simply says Grand River Enterprises, Six Nations of the Grand River Territory Oshweken, Ontario, Canada -- with no street or

PRESIDENT NARIMAN: What is this exhibit?

MS. GUYMON: This was in Claimants' exhibits -- I believe it was tab A as in "apple" to the Williams affidavit, where he identified this as the first letter that they allegedly ever received. And I am just pointing out the address on that letter, which didn't include any kind of a street address
or a rural route number of any kind, rather simply directed it to the Six Nations of the Grand River Territory in Oshweken, Ontario.

PRESIDENT NARIMAN: It's only addressed to Grand River -- will you just spell that out.

MS. GUYMON: Sure, Grand River Enterprises, Six Nations of the Grand River Territory, Oshweken, Ontario, Canada, without even a postal code.

Grand River Arbitration

PRESIDENT NARIMAN: But where did that shift to? From Oshweken where did they go --

MS. GUYMON: According to them they moved --

PRESIDENT NARIMAN -- in March when they said that they had moved earlier -- where did they go to? Did they go to Oshweken or somewhere else?

MR. CROOK: They went to highway number --

MS. GUYMON: It's paragraph 17 of the Williams affidavit, they state that -- Mr. Williams states that on March 15, 2000, quote: "We moved to 1001 Highway Number Six, Caledonia."

However. In their statement of claim, Grand River alleged a couple of things. They alleged, one, that they are the, quote, "largest employer on the Grand River Reserve," unquote and they represented that they, quote, "maintained a principal office and tobacco products production facility located on the Grand River Reserve in Oshweken, Ontario, at all relevant times since incorporation."

They represented that they remained a presence on the
PRESIDENT NARIMAN: Read that, again.

MS. GUYMON: Sure, I will refer you -- it's in their statement of claim in the very first paragraph of the factual allegations where they state, quote: "Maintained a principal office."

PRESIDENT NARIMAN: Grand River maintained a principal office.

MS. GUYMON: And tobacco products production facility.

PRESIDENT NARIMAN: And tobacco what?

MS. GUYMON: Products production facility located on the Grand River Reserve.

PRESIDENT NARIMAN: Finish that.

MS. GUYMON: Grand River Reserve in Oshweken, Ontario. And they say they did so and maintained these offices and production facilities, quote, "at all relevant times since incorporation."

And I believe their allegation is that they were incorporated in 1996.

MR. CROOK: What paragraph is that, please?

MS. GUYMON: That's paragraph one of the statement of claim.

PRESIDENT NARIMAN: Where does that lead us to? I mean, what is your
submission on that? Therefore, that what they say -- that they ceased operations in Oshweken is not correct, or what is your conclusion?

MS. GUYMON: It's directly contradicted by their own prior allegation which leads to doubt as to the credibility that they did not receive this letter.

PRESIDENT NARIMAN: Where is that address? Where is that located?

MS. GUYMON: Where is the other address?

PRESIDENT NARIMAN: Where they moved to.

MS. GUYMON: Where they moved to. They have moved twice actually according to the paragraph that I cited before. They briefly were in Caledonia --

PRESIDENT NARIMAN: Where is that?

MS. GUYMON: Paragraph 17 of the Williams affidavit.

Grand River Arbitration

PRESIDENT NARIMAN: Moved to Caledonia.


MS. GUYMON: And then it says: "When we then moved to our current facility located at 2176 Chiefs Wood Road, Oshweken, Ontario.

PRESIDENT NARIMAN: What road?

MS. GUYMON: Chiefs Wood Road.

PRESIDENT NARIMAN: They went back to Oshweken.

MS. GUYMON: They went back to Oshweken after what they allege to be a short absence. However, that's contradicted --

PRESIDENT NARIMAN: Where is
Caledonia?

MR. VIOLI: On the Reserve.

MS. GUYMON: About 20 miles south of Oshweken from our attempt to locate it on the Internet map.

MR. VIOLI: It's on the Reserve.

PRESIDENT NARIMAN: Thank you. This is from one part of the Reserve to another.

MR. WILLIAMS: It's not 20 Miles.

MR. VIOLI: 45,000 acres, it's not 20 Miles.

MS. GUYMON: Our point here, to sum up:

As the largest employer here on the reservation, a move from one location to another location on the reservation shouldn't have prevented them from getting their mail. They were able to get mail that was addressed merely to them on the reservation on March 14, 2001, just days after the cut-off. But they would like us to believe that they weren't able to receive mail on the reservation before...

PRESIDENT NARIMAN: What about this letter from Iowa to Native Tobacco Direct?

MS. GUYMON: That's my -- what I would like to discuss next.

PRESIDENT NARIMAN: Sorry. Please.

MS. GUYMON: Native Tobacco Direct also received notice by mail of
the application of the escrow statutes
prior to March of 2001.

PRESIDENT NARIMAN: This is on
October 11, 2000.

MS. GUymoon: October 11, 2000,
the letter we are now showing on the
screen, that is at US tab 129.
(There was a discussion off the
record.)
PRESIDENT NARIMAN: October 11,
0353

Grand River Arbitration
2000.

MS. GUymoon: Again, Iowa
Department of Revenue, they sent the
letter to Native Tobacco Direct on
October 11th. Iowa's letter informed
Native Tobacco Direct not only of the
obligations imposed on manufacturers
by the escrow statutes, but also
requested that, if Native Tobacco
Direct was not the manufacturer --
here, again, as Ms. Menaker explained,
there was somewhat uncertainty and
doubt as to who the manufacturer
was -- so Iowa asked Native Tobacco
Direct, if it was not the
manufacturer, to identify the
manufacturer of the cigarettes that it
was selling, using reporting forms
that were enclosed with the letter.

PRESIDENT NARIMAN: This is
supported by the affidavit of
Dale Feedy.

MS. GUymoon: It is. Contrary
to the misstatement in Claimants'
rejoinder, the affidavit submitted by
Arthur Montour, Junior, does not deny
that the Iowa letter to Native Tobacco
Direct was received. It merely echoes
the excuse presented by Grand River
for not receiving its notices, that
Native Tobacco Direct also moved on
PRESIDENT NARIMAN: Not denied by.

MS. GUYMON: Does not deny receiving the letter.

PRESIDENT NARIMAN: Who does not.

MS. GUYMON: Arthur Montour, Junior, presented an affidavit responding to this Iowa letter.

PRESIDENT NARIMAN: What date is that affidavit?

MR. VIOLI: February 23rd.

PRESIDENT NARIMAN: Thank you.

MS. GUYMON: Our copy of his affidavit is just blank day of February of 2006, but their rejoinder, Grand River Arbitration I believe, was provided on February 23rd.

PRESIDENT NARIMAN: So he doesn't deal with this at all.

MS. GUYMON: He deals with the issue of the address, which I will discuss; but he does not directly deal --

PRESIDENT NARIMAN: The address of 14411 Four Mile?

MS. GUYMON: Precisely. He does not deny receiving the letter, however.

PRESIDENT NARIMAN: Okay.

MS. GUYMON: For -- again, I have -- I have several points that show that it's fair to deduce that Native Tobacco Direct did, in fact, receive the Iowa letter dated October 11, 2000. First, if it did --

PRESIDENT NARIMAN: One second.

Iowa letter of October 11th, I'm sorry. That is tab --

MS. GUYMON: That is tab 129.

Grand River Arbitration

PRESIDENT NARIMAN: Yes, thanks.
MS. GUYMON: And the next slide I have is a summary of the reasons why this letter -- it's reasonable to deduce that Native Tobacco Direct did, in fact, receive this letter. First, like Grand River, if Native Tobacco Direct did move, it should have either arranged for forwarding --

PRESIDENT NARIMAN: Where do they say it moved, moved from where to where.

MS. GUYMON: I believe it's 137 -- I am remembering -- Main Street Salamanca, New York. That is paragraph nine.

PRESIDENT NARIMAN: Moved from 14411 Four Mile.

MS. GUYMON: No, let me -- they do not concede that 14411 Four Mile Level Road was ever an address of the company. Instead, the Montour affidavit says that that address was

Grand River Arbitration actually the address -- a home address of the company's president.

PRESIDENT NARIMAN: This is a company that is registered under the company, or is it a --

MS. GUYMON: Native Tobacco Direct is incorporated under the charter of the Sac and Fox nation of Oklahoma.

PRESIDENT NARIMAN: Do they have a register of companies in the register of companies and reservations as well, like you have some corporate offices here? You can go to the company's law office and find out where the address of the company is for any other corporation -- I don't know whether reservations have that.

MR. ANAYA: Some do.

PRESIDENT NARIMAN: Some do. Some don't.

Anyway, sorry. Otherwise.
Carry on.  
So they don't say they moved from?

MS. GUYMON: No, but even if they had moved, they again should have arranged to forward their mail.

PRESIDENT NARIMAN: No, no, but what is according to them their address? They don't say.

MR. VIOLI: 137 South Main, Salamanca.

PRESIDENT NARIMAN: According to Claimants.

MR. VIOLI: Yes, the Montour affidavit, I believe.

MS. GUYMON: I believe, though, they do not provide what was their admitted prior address. They say that the operations of Native Tobacco Direct were carried out at 137 Main Street, Salamanca, New York.

PRESIDENT NARIMAN: Where is the registered office? Is there such a thing as a registered office on the Reserve?

MS. GUYMON: Grand River has not identified what their registered office on the Reserve is.

PRESIDENT NARIMAN: They use their office on the Reserve -- do they call it a registered office? They don't.

MS. GUYMON: I don't know. I don't know. Again, we are taking -- we are taking the allegations as they have been made by Claimants and assessing them.

PRESIDENT NARIMAN: Operations were carried out at 137 Main Street, Salamanca, New York. There must be then an address because Salamanca, New York is not -- is it a reservation,
MR. VIOLI: Yes, that is.

PRESIDENT NARIMAN: That's again a reservation.

MR. CROOK: It's a town inside the reservation.

PRESIDENT NARIMAN: Thank you. Right.

MS. GUYMON: So all we know -- these are not our businesses -- we know what Mr. Montour told us in his affidavit, which is that, on June 4, 2000, they located at this 137 address.

They don't tell us what their prior address was. However, the address to which the Iowa letter was sent is the same address that was used on the previous correspondence. So if they had moved --

PRESIDENT NARIMAN: Which previous correspondence?

MS. GUYMON: I guess I will mention that first and then go backwards.

PRESIDENT NARIMAN: Native Tobacco Direct addresses letter to this address in which correspondence.

MS. GUYMON: In the Missouri letter which we previously showed, a November 3, 1999 letter from Arthur Montour, to the State of Missouri.

That is tab 15 in the US appendices.

PRESIDENT NARIMAN: I don't have that; do I? It's not in this compilation.

MS. GUYMON: It is.

PRESIDENT NARIMAN: It is. Go on. Tab 15, oh, I see. Yes.

MS. GUYMON: So this letter shows that Arthur Montour used this address 14411 Four Mile Level Road on
the territory of the Seneca Nation as
the address of the company, Native
Tobacco Direct, in correspondence with
the State of Missouri.

PRESIDENT NARIMAN: Just one
minute. Montour is vice president of
what -- Arthur Montour?

MS. GUYMON: Native Tobacco
Direct. The president by the way of
Native Tobacco Direct is one Ross
John, of Native Tobacco Direct. So at
this time Arthur Montour is the
vice president, apparently. Ross John
is the president. We find out from

Grand River Arbitration
Arthur Montour's affidavit provided
with Claimants rejoinder.

PRESIDENT NARIMAN: So when you
say that November 3, 1999, the address
according to Montour himself was 14411
Four Mile Level Road.

MS. GUYMON: Well, according to
this letter, Arthur Montour used that
address. According to his affidavit
provided in the rejoinder, that
address is just the home address of
the company president, Ross John.

PRESIDENT NARIMAN: According
to affidavit of Montour, home address,
Ross John. So this letter of October
11, 2000, Iowa letter should have gone
to Ross John?

MS. GUYMON: It went apparently
to what Arthur Montour of late
identifies as the home address of Ross
John, the company president.

Now, even if the letter did
just go to the home address of the
compny president, that is enough to

Grand River Arbitration
show that it went to the company. The
home address of the company president
is certainly a way for a letter to get
to the company. If it got to the
company's president, it got to the
corporation.

But, furthermore, this now
identified as home address was
actually a business address, at least
according to this November 1999
letter, when Arthur Montour, as
vice president, was addressing
correspondence to the State of
Missouri.

And there is another letter
where Grand River identified this
14411 Four Mile Level address as the
company address for Native Tobacco
Direct. This is a September 16, 1999
letter. It's tab 135 in our
appendices.

And it's a letter from
Ms. Montour, representing herself as
the in-house counsel for Grand River

Grand River Arbitration
Enterprises, where she explains to the
State of Arkansas that Grand River is
operating by sending its products into
the US to Native Tobacco Direct and
providing this address 14441.

PRESIDENT NARIMAN: This is tab
what?

MS. GUYMON: This is tab 135.

This letter is similar to the March
1999 letter we looked at earlier.
It's one of these letters where
Ms. Montour is representing on behalf
of the distributor, White River
Distributors, that it is authorizing
that distributor to sell its products.

PRESIDENT NARIMAN: Just a
minute.

(There was a discussion off the
record.)

MS. GUYMON: You will notice --
it's approximately right in the middle
of the letter, where the address for
Native Tobacco Direct is identified as
14411 Four Mile Level, Gowanda,
PRESIDENT NARIMAN: All right.

MS. GUYMON: That is the same address to which Iowa's October 2000 letter was sent.

PRESIDENT NARIMAN: Same address as Iowa -- as Ohio --

MR. CROOK: Iowa. There is just Iowa and Missouri, Mr. Chairman.

PRESIDENT NARIMAN: Iowa. Right. Same address as Iowa of October 11th -- what does this letter of October 11, 2000 say?

MS. GUYMON: The October 11th letter -- go back to it.

PRESIDENT NARIMAN: 123.

MS. GUYMON: Yes. It does a couple of things.

PRESIDENT NARIMAN: Yes.

MS. GUYMON: On the first page, it asks Native Tobacco Direct basically whether it's the manufacturer or the distributor. And if it's not manufacturer, please identify the manufacturer.

On the second page, it sets out very much like the earlier letters we looked at a summary or an outline of what the responsibilities of the manufacturer are, that a manufacturer has to establish an escrow account, place funds into escrow --

MR. ANAYA: Is that the one?

MS. GUYMON: It should just be probably two or three pages back from the --

MR. CROOK: It looks like that.

MS. GUYMON: -- from the Arkansas letter.

MR. ANAYA: It doesn't have those lines? There it is. Okay.

PRESIDENT NARIMAN: Omaha
Nation Tobacco. That's the wrong one.

MS. GUYMON: Sorry. Go back probably about four slides, I think.

PRESIDENT NARIMAN: And Native Tobacco Direct Company is a Claimant.

MS. GUYMON: Yes.

Grand River Arbitration

MR. VIOLI: Actually, no.

MS. GUYMON: It's Claimants' investment, purported investment.

PRESIDENT NARIMAN: No? He's saying no.

MR. CROOK: I think the Respondent just elaborated on that.

MS. GUYMON: You recall that we showed both 1116 and 1117 on the screen. The knowledge of the investors gives rise to the limitations period. Likewise, alternatively, the knowledge of the enterprise, the investors' investment, triggers the knowledge. And so Native Tobacco Direct is purportedly owned by Claimants.

PRESIDENT NARIMAN: Owned by Grand River.

MS. GUYMON: It's their purported investment. The knowledge that that investment acquired or should have acquired triggers the three-year period.

Grand River Arbitration

PRESIDENT NARIMAN: That is 1117.

MS. GUYMON: Yes. 1117 or 1117 of NAFTA Chapter 11.

MR. CROOK: Just so I am clear, the position is that Mr. Arthur Montour is the owner of Native Tobacco Direct.

MR. VIOLI: That's correct.

MS. GUYMON: Is that letter clear now?

PRESIDENT NARIMAN: Yes.
MS. GUYMON: This October 11, 2000 letter we have stated should be presumed to have been received by Grand River, and there were four reasons if I can just recap and just make sure that we hit them all. We did them somewhat out of the order. But on this slide, it was reasonable for them to forward their mail if they had moved from their previous address.

PRESIDENT NARIMAN: No, but, in fact, your first point would be that it was the address.

MS. GUYMON: That was how we wound up going about it, yes.

PRESIDENT NARIMAN: That is your point, that you made by pointing out all of these three letters.

MS. GUYMON: Except that they do say --

PRESIDENT NARIMAN: Nobody says they have shifted.

MS. GUYMON: The Arthur Montour affidavit does say that, in June of 2000, Native Tobacco Direct re -- I forget what the word is they used -- were combine, that the operations of Native Tobacco Direct --

PRESIDENT NARIMAN: Were carried out in Salamanca.

MS. GUYMON: Were carried out in Salamanca.

PRESIDENT NARIMAN: From June 1, 2000.


So they allege that they have moved away from an address without telling us what address they moved away from. Then their other explanation is that the address to which the letter
was sent, this 14411 address, was actually the home address for the company president. And we have said, well, even sending it to the home address of the company president is good enough to get it to the president.

PRESIDENT NARIMAN: Right.

MS. GUYMON: And we have also shown that that supposed home address --

PRESIDENT NARIMAN: Is really --

MS. GUYMON: -- was really used as a company address, both by Grand River in identifying Native Tobacco Direct's address, and by Arthur Montour on behalf of Native Grand River Arbitration Tobacco Direct. And as with the previous Iowa letter, the Iowa letter to Grand River Enterprises, this Iowa letter is also listed in Dale Feedy's affidavit with the attachment of the database listing all the letters that were sent and whether the letter was returned as undelivered. And the Iowa letter from October 2000 to Native Tobacco Direct also was not returned as undelivered.

PRESIDENT NARIMAN: So this is all on your first point, namely by direct notices to the Claimants.

MS. GUYMON: Yes, we are still in the first category.

PRESIDENT NARIMAN: All of these three letters, according to you --

MS. GUYMON: Yes.

PRESIDENT NARIMAN: -- are actual knowledge.

MS. GUYMON: Correct.

MR. CROOK: Mr. Chairman,
before we move on, I would just like
to note so that the Claimants can deal
with it if they want. There is other
correspondence showing the 14411
address as a business address. There
is the trademark registration for
Seneca, which was one of the
Claimants' original exhibits, which
uses that address. So that will be
part of what the commission -- the
Tribunal would consider in connection
with that issue.

PRESIDENT NARIMAN: Yes, let's
make a note of it, yes. Please
proceed -- as part of the trademark.

MR. CROOK: It is the
registered address for the trademark.

MS. GUYMON: The evidence thus
clearly demonstrates that, despite
Claimants' denials, they had received
actual notice, not only of the fact of
the escrow statutes' enactment, but of
the fact that cigarette manufacturers,
including Grand River, were required

Grand River Arbitration
to make payments into escrow if their
cigarettes were being sold directly or
indirectly in any MSA state. All of
that was made plain in these notices.
In addition, moving to our second --

PRESIDENT NARIMAN: Your point
is that any one notice suffices
because it says "first acquired"?

MS. GUYMON: Yes, precisely.

PRESIDENT NARIMAN: Any one
notice?

MS. GUYMON: Exactly. And
that's part of the reason why
initially we put in the Missouri
letter, because that Missouri letter
alone was sufficient.

Claimants responded with their
excuse that they've moved. We then
put in, as we later discovered, there
were additional letters. We may be
unaware of other letters that are out
there. These are the letters that we
have been able to uncover having had
no discovery in the case and having

Grand River Arbitration
had only limited knowledge as to
Claimants' actual operations that they
were dealing with White River
Distributors.

We did not have that knowledge
at our disposal, so we did the best we
could to come across the notices that
we could learn about. And these are
the three that we have been able to
uncover and that we have provided to
the Tribunal.

MR. ANAYA: The Claimants were
actually already selling tobacco, or
their tobacco products had already
been sold in these states?

MS. GUYMON: In Missouri and
Iowa in 1999, yes, in both of those
states.

MR. ANAYA: Under the theory
you discussed earlier, they were
incurring losses.

MS. GUYMON: They were
incurring loss in those states. The
obligation to make payment into escrow

Grand River Arbitration
arose in 1999. Missouri had enacted
an escrow statute in 1999 and
Grand River's cigarette were being
sold at that point.

MR. ANAYA: So these letters
provide evidence of their knowledge?

MS. GUYMON: Yes.

PRESIDENT NARIMAN: So
cigarettes were being sold.

MS. GUYMON: No, Missouri and
in Iowa in 1999, and both Missouri and
Iowa had enacted escrow statutes in
1999.

PRESIDENT NARIMAN: Yes.
Right. That's your first point.

MS. GUYMON: So if the Tribunal is ready, I would like to move on to the second category of notices that were sent to affiliates and business partners.

PRESIDENT NARIMAN: Oh, business affiliates, who are these business affiliates?

MS. GUYMON: There are two that Grand River Arbitration I will discuss. We have indicated on our time line notices sent to Star Tobacco; that is the July 8, 1999.

PRESIDENT NARIMAN: Just one minute. Let me see.

MS. GUYMON: It should be right after the September 16th letter from Ms. Montour, if you remember where that was. It should be the very next slide after that.

MR. VIOLI: Actually, that's a return of service, at least in my book.

MS. GUYMON: I'm in the slides, not in the book.

(There was a discussion off the record.)

PRESIDENT NARIMAN: Where did you say it was?

MS. GUYMON: The Chantell Montour letter from September 16, 1999, if you can find that in the slide -- we were looking at that previously -- if you can see that, it should be the next slide after that.

PRESIDENT NARIMAN: Okay.

MR. VIOLI: It's after the October 11, 2000 letter, but it says to the Omaha Nation -- is that the one that says "to whom it may concern"? Does it have an address on
President Nariman: No, no, she is referring to the September 16, 1999 letter from Chantell Montour --

Ms. Guymon: Letter from Chantell Montour --

President Nariman: -- to Janice Campbell.

Ms. Guymon: -- to Janice Campbell, the very next slide after that -- is the timeline that is currently up on the screen, this one.

President Nariman: This one.

Ms. Guymon: Yes. That time line indicates the notices to Claimants affiliates that I'll be discussing. There are notices several notices to Omaha Nation Tobacco that are shown.

President Nariman: Where?

Ms. Guymon: On April 7, 2000, a notice from Iowa, that is the same notice that went to Grand River; it also went to Omaha Nation Tobacco.

There is a Nebraska letter, May 17, 2000, that went to Omaha Nation Tobacco. And there is another October 11, 2000 letter, the same date as the letter to Native Tobacco Direct, also, on the date a letter was sent to Omaha Nation Tobacco.

President Nariman: Can you just give us the tabs if you don't mind.

Ms. Guymon: Sure, as before I will go through these each in turn. I wanted to give you the overview.

President Nariman: Okay.

Ms. Guymon: So we have three notices to Omaha Nation Tobacco --

Grand River Arbitration Direct. We also have one notice, July 8, 1999, to Star Tobacco. And I will
start with Omaha Nation Tobacco.

PRESIDENT NARIMAN: Omaha Nation Tobacco, that is Omaha -- who says it's an affiliate?

MS. GUYMON: Claimants do.

PRESIDENT NARIMAN: Okay.

MS. GUYMON: In 1998 when the MSA was being negotiated, Claimants were allegedly operating Omaha Nation Tobacco. That's what they were doing in 1998.

They allege that they helped the Omaha Tribe launch its tobacco manufacturing facility and resided there helping them with that production facility in 1998. That manufacturer that they helped launch Omaha Nation Tobacco received these three notices that are on our time line.

PRESIDENT NARIMAN: Received three notices dated -- could you just say?

Grand River Arbitration

MS. GUYMON: April 7, 2000, from Iowa, and you may -- this may look familiar to you because it is the same April 7, 2000 letter that was sent to Grand River.

PRESIDENT NARIMAN: Tab number.

MS. GUYMON: And that is -- I'll tell you in a minute. I didn't note it for this slide. I apologize. This is 132B, so it is part of the Dale Feedy affidavit.

PRESIDENT NARIMAN: Second notice. Then second notice.

MS. GUYMON: The April 7, 2000 letter from Iowa, that's the second notice.

PRESIDENT NARIMAN: Omaha.

MS. GUYMON: To Omaha Nation Tobacco, is 17.

PRESIDENT NARIMAN: No, April 7, 2000 is tab 132B.

PRESIDENT NARIMAN: May 17, 2000 from Nebraska.

MS. GUYMON: Yes.

PRESIDENT NARIMAN: Yes. Is what tab, please?

MS. GUYMON: 17.

PRESIDENT NARIMAN: 17.

MS. GUYMON: Yes.

PRESIDENT NARIMAN: US. The third?

MS. GUYMON: The third is Iowa's October 11, 2000 letter. It's the same content as the October 11, 2000 letter to Native Tobacco Direct. And it's tab 130 in the US appendices.

PRESIDENT NARIMAN: So these are all -- I see -- Omaha Nation Tobacco -- what do they say about Omaha Nation Tobacco?

MS. GUYMON: They say that they --

PRESIDENT NARIMAN: Where do they say that, the claim?

MS. GUYMON: The Claimants explanation for these is that they were no longer actually working with Omaha Nation Tobacco.

PRESIDENT NARIMAN: No, I mean, what did they say about they started or conducted Omaha tobacco? Where?

MS. GUYMON: In their statement of claim.

PRESIDENT NARIMAN: What do they say exactly?

MS. GUYMON: Actually, in their statement of claim and in the affidavit of Jerry Montour, which was attached to their statement of claim, in paragraph six of that affidavit.
18              PRESIDENT NARIMAN: Yes.
19              MS. GUYMON: They say that, in
20  1998, they were -- some of the
21 Claimants were living on the Omaha
22 Tribe Reservation, and were partners
23 in and were helping to run this
24 tobacco production facility.
25              PRESIDENT NARIMAN: What is the

0383
1  Grand River Arbitration
2 exact language they used about
3 partners? What do they say, statement
4 of claim?
5              MS. GUYMON: In paragraph six
6 of Montour's affidavit --
7              PRESIDENT NARIMAN: Montour's
8 affidavit --
9              MS. GUYMON: And this is Jerry
10 Montour's affidavit.
11              PRESIDENT NARIMAN: Right.
12              MS. GUYMON: Which is attached
13 to their particularized statement of
14 claim. Tab five, to the
15 particularized statement of claim,
16 says:
17 "In 1996, I" -- meaning Jerry
18 Montour, one of the Claimants in this
19 case -- "entered into a partnership
20 with an Omaha Tribe where, in return
21 for capital and management expertise,
22 I would receive 50 percent of the net
23 profits of a tobacco manufacturing
24 facility. I resided in the Omaha area
25 in 1997 and 1998 and operated the

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1  Grand River Arbitration
2 tribe's tobacco manufacturing
3 facility. Both Mr. Hill and Mr.
4 Arthur Montour were partners with me
5 in that venture."
6              PRESIDENT NARIMAN: Yes. Okay.
7              MS. GUYMON: So the thinking
8 here was, if this is what Grand River
9 was doing, or -- I'm sorry -- this is
10 what the Claimants were doing in 1998
11 when the MSA was negotiated -- then
perhaps as Grand River, they at that
time might not have heard about the
MSA. But as the Omaha Nation Tobacco
cOMPANY they might have heard about
the MSA.

And, indeed, Omaha Nation
Tobacco received these same kinds of
notices. The same notices that were
sent to Native Tobacco Direct and to
Grand River itself were also sent to
Omaha Nation Tobacco.

Claimants have provided no
specific explanation for severing
contact with Omaha Nation Tobacco, an

Grand River Arbitration
enterprise which they helped launch
and had a significant stake in. So
it's reasonable to think that they
would have heard from Omaha Nation
Tobacco about these obligations to
make payments into escrow.

MR. ANAYA: So you are saying
they still have a relationship with
Omaha Nation, when Omaha Nation
received these letters.

MS. GUYMON: No, they, in fact,
deny that. They say they did not have
a relation. We are saying it's
reasonable that, having had such a
stake in its operation, they would
still have maintained some contact.

PRESIDENT NARIMAN: But who
conducted Omaha Tobacco after they
left?

MS. GUYMON: Presumably, the
tribe, the Omaha Tribe.

PRESIDENT NARIMAN: They don't
say that?

MR. ANAYA: They had -- they no

Grand River Arbitration
longer had some relation with them,
you are saying they said.

MS. GUYMON: They no longer
were running their facility. They
were no longer -- they say they were
just residing there in '97 and '98.
But having established such a major
stake in their enterprise, it's
unreasonable, absent some explanation
to assume they severed contacts
completely.
MR. ANAYA: How is that
unreasonable if they left? Maybe they
had a falling out. I am not saying
they did. I am just saying, who knows
why they left. Why are we to assume
that they had this ongoing
relationship?
MS. GUYMON: I would put this
evidence more in the category of
constructive knowledge, that this
doesn't show that Grand River actually
learned. But it shows another avenue
by which they should have found out,

Grand River Arbitration
if they didn't find out by the other
avenues, which we believe they did.
It shows another avenue by which they
should have acquired knowledge.
MR. ANAYA: So they should have
maintained contact with Omaha Nation
to find out whatever Omaha nation was
finding out.
MS. GUYMON: Their own evidence
shows that they do monitor what
happens to other companies in the
industry and other tribal companies --
the Omaha Nation -- the Omaha Tribe
company in which they had a take would
be a logical company for them to keep
tabs on.
MR. ANAYA: Well, that is more
like the "could"; isn't it -- that we
were talking about before -- they
"could" have found out?
MS. GUYMON: It's they should
have. They should have acquired the
knowledge by some means. They should
have acquired it because they got
these direct notices. They should have acquired it by taking the steps to investigate. This is yet another way that they could have acquired it, and because of that, because of the multiple avenues by which they could have acquired it, that amounts to should have acquired the knowledge.

PRESIDENT NARIMAN: That means notices to Claimants' erstwhile affiliates.

MS. GUYMON: Former affiliates, former business partners.

PRESIDENT NARIMAN: That is your point.

MS. GUYMON: Yes.

PRESIDENT NARIMAN: May not fall in your actual knowledge category.

MS. GUYMON: Correct, it's a notice that was actually sent, but it was actually sent in the same way --

PRESIDENT NARIMAN: Actual knowledge of their -- okay.

MR. ANAYA: Now, Omaha Nation is a tribal enterprise, right?

MS. GUYMON: Correct.

MR. ANAYA: Okay. And do we know if they ever actually -- have come to this escrow payment requirement?

MS. GUYMON: Omaha Nation Tobacco, I believe, was sued in enforcement proceedings just like Grand River has been, and I don't believe that they have continued in operation.

PRESIDENT NARIMAN: Did any of their affiliates pay into an escrow account before March of 2001, not -- they didn't -- Grand River didn't -- but did any of their affiliates pay...
into any escrow accounts?

MS. GUYMON: They have not disclosed that to us, so we don't know. The two affiliates that I am talking about here, neither of them made payments into escrow. They were sued. The Omaha Nation Tobacco was sued for failure to make payments into escrow.

MR. ANAYA: Do we know what happened to Omaha Nation?

MS. GUYMON: They lost the lawsuit. Enforcement proceedings were found -- you know, the judgments were entered against them. They were found to be --

PRESIDENT NARIMAN: Yeah, but in those --

MR. VIOLI: Actually, I think they sued in Federal Court. They sued in Federal Court on Indian Commerce Claus grounds, and lost. There was an enforcement proceeding. They entered into a settlement with the State of Nebraska and the State of Iowa. There were no judgments. But then they had to go out of business because they couldn't -- they couldn't afford the escrow. They are no longer in business. That is correct.

MS. GUYMON: Well, I think this suggests that they were monitoring the Omaha Nation tribe, and what was happening to it.

MR. VIOLI: No, I was. I was, and in conferring with counsel, Indian law counsel in Minnesota, on some Indian affairs.

MS. GUYMON: At any rate, it shows what was happening to Omaha Nation Tobacco should have been of interest to them.
Turning to the second former
business partner, Star Tobacco,
Claimants described in their statement
of claim that they had a production
sharing agreement with Star Tobacco by
which Star actually manufactured
Claimants own brand.
They don't specify -- this is
in their statement of claim at
paragraph 14 -- they don't specify or
disclose to us the period during which
they maintained that production

Grand River Arbitration
sharing agreement. So we don't know
when exactly it ceased. But
Star Tobacco received very early
notice directly of the application of
North Dakota's escrow statutes.
PRESIDENT NARIMAN: Received
notice from North Dakota, that is.
MS. GUYMON: That is tab 14 in
our appendices. It's the next slide
in your packet actually. Yes.
PRESIDENT NARIMAN: Yes.
MS. GUYMON: I'm sorry. You
are now looking at the Iowa letter.
PRESIDENT NARIMAN: That goes
to Omaha Nation.
MS. GUYMON: Okay. So flip
past Omaha. There are three Omaha
Nation Tobacco letters. Then you will
get to a letter from North Dakota,
Office of the State Tax Commissioner,
July 8, 1999.
PRESIDENT NARIMAN: That is the
one.
MS. GUYMON: That is the one.

Grand River Arbitration
That is tab 14 in the US appendices.
In this July 8, 1999 letter
sent to Star and other NPMs, North
Dakota's Office of State Tax
Commissioners explained that:
"Manufacturers of cigarettes
sold in the state were required to
establish and fund escrow accounts and
verify in writing to the State that
they had done so."

PRESIDENT NARIMAN: Yeah, but
this is: "To whom it may concern."

MS. GUYMON: Yes, it was a mail
merge, and we attached in our
exhibit -- if you look at tab 14, you
will see the list of the recipients;
and Star Tobacco is on that list.

PRESIDENT NARIMAN: Addressees.

MS. GUYMON: Of addressees,
yes.

PRESIDENT NARIMAN: There is no
affidavit of anybody here --

MS. GUYMON: No.

PRESIDENT NARIMAN: John
Grand River Arbitration
Quinlan.

MS. GUYMON: No, no.

PRESIDENT NARIMAN: This letter
of John Quinlan, I remember his name.

It's mentioned in one of the -- one of
the items of notices sent in petition
or claim or something.

MS. GUYMON: In Iowa, yes.

PRESIDENT NARIMAN: No, but I
just wanted to know:

Did you respond to that? Was
there a response because that response
is not on record?

MS. GUYMON: Yes, there is a
response.

PRESIDENT NARIMAN: There is an
allegation that these are the three
items which are sent. One of them is
Quinlan's letter.

MR. VIOLI: Yes. In the
Missouri -- apparently, Missouri sued
Grand River and a number of companies
in 2000. In the petition, the
Missouri attorney general said that

Grand River Arbitration
you can find that that these
companies, Grand River, Native Tobacco
Direct, willfully and knowingly
violated the escrow statutes because,
among other things, back in March
of -- or back in July of 1999, John
Quinlan had wrote a letter to them
notifying these companies that there
was -- that they were bound by the
escrow statutes.

And that attorney general made
that representation in the lawsuit you
are talking about as a basis for
penalties and banning the product.
I have never seen that letter
before they submitted the materials.
When they submitted the materials, we
see that the letter that the Missouri
attorney general said was sent to
Grand River, in fact, was never sent
to Grand River. The attachment which
has the spreadsheet of all of the
companies that this letter was
allegedly mailed to did not include

Grand River Arbitration
Grand River, did not include Native
Tobacco Direct, or any of the
Claimants.

So the Missouri attorney
general is making a representation to
the Court that John Quinlan sent this
letter to eventually Claimants, and,
therefore, they knew about it and you
should impose penalties on them and
ban their product. The fact is that
that was an outright misrepresentation
to the court made by the attorney
general.

MR. CLODFELTER: This has
nothing to do with the case.

MR. VIOLI: It's in the record.

It's on the rejoinder.

MR. CLODFELTER: Nothing to do
with our argument.

MR. VIOLI: It has to do with
notice. You pointed it out. Anyway,
I am sorry I got animated,
Mr. President.

MS. GUYMON: First of all, the

1 Grand River Arbitration
2 United States has not represented in
3 this arbitration that this July 8,
4 1999 letter was sent to Grand River.

PRESIDENT NARIMAN: My question
was different than yours when you
started to argue. I wanted to know
whether, to that Missouri attorney
general's complaint, did you
Grand River file a response, like you
have a written statement to a
complaint? Did you file a response?

MR. VIOLI: Actually, there
were several.

PRESIDENT NARIMAN: Yes or no.
MR. VIOLI: That particular one
we never received, we did not. We
subsequently received a complaint.

PRESIDENT NARIMAN: They are
not on record.

MR. VIOLI: What is that?

PRESIDENT NARIMAN: The
responses are not on record.

MR. VIOLI: Right, because we
did not receive them. That's

1 Grand River Arbitration
absolutely correct.

MR. CROOK: Have you filed
responsive pleadings in any litigation
in Missouri?

MR. VIOLI: Yes.

PRESIDENT NARIMAN: They are
not on record, unfortunately.

MR. CROOK: Those are not in
the record before this proceeding.

MR. VIOLI: No, because those
proceedings postdated March 2001. I
think the litigation was filed in
2002. We filed --

MR. CROOK: I just wanted to be
clear that we got an accurate answer
to the question.

PRESIDENT NARIMAN: Yes, yes,
there the same sort of allegation was
made. I want to know what you said
about it in your response, not what
you are saying today.

MR. VIOLI: Actually, in the
2002 complaint, the Missouri attorney
general did not say that again. He

Grand River Arbitration
did not say you received notice of
this letter that was sent in July of
1999. He did do it in the earlier
complaints that he we never received
and never responded to. But in the
later complaint that we did respond
to, he never made that allegation.

PRESIDENT NARIMAN: You never
received those earlier complaints.
MR. VIOLI: That's correct. So
we did not respond to them.

PRESIDENT NARIMAN: There was
no judgment on those complaints.
MR. VIOLI: Yes, there was.

PRESIDENT NARIMAN: There was a
default judgment.
MR. VIOLI: There was a default
judgment on the earlier.

PRESIDENT NARIMAN: You were
served. How can they make a default
judgment?
MR. VIOLI: Because in the
United States that's what -- a court
can enter a default judgment even if

Grand River Arbitration
you are not properly served or not --
PRESIDENT NARIMAN: Properly is
different. Were you served?
MR. VIOLI: No, we were not
served.

PRESIDENT NARIMAN: Not --
MR. VIOLI: Right. We were not
served, and if there is no
jurisdiction, they can still impose a default judgment. That's why we opened it --

MR. CLODFELTER: This is not accurate. If there is no jurisdiction, they can't impose -- if there is no jurisdiction, you can't impose anything.

MR. VIOLI: You can get a default judgment.

MR. CLODFELTER: You can't get a default judgment without -- without service being established by a court. Maybe they didn't think it was proper service, but the Missouri government thought it was proper and took a default judgment.

Grand River Arbitration judgment. The Court agreed.

MR. CROOK: Mr. Chairman, it's 4:30. It strikes me we may be sort of wandering off of the path.

MS. GUYMON: Can I close out this loop because there is an explanation for the Missouri attorney general's representation that the --

PRESIDENT NARIMAN: You are still to come to that?

MS. GUYMON: That the July --

PRESIDENT NARIMAN: You are still to come to the Missouri part. That is your third point.

MS. GUYMON: I haven't yet gotten into Missouri. But I would like to respond right now to Mr. Violi's statement about the representations made by the Missouri attorney general.

As you know now, because we have discussed it, the Iowa attorney general's office maintained this database of letters to which it sent notices. And Iowa got its information from another state, which had sent
notices, mainly South Dakota --
this -- I'm sorry -- North Dakota,
this very state that sent the notice
to Star.
Iowa mistakenly thought that
all of the addresses in its database
had been given to it by North Dakota,
when, in fact, Iowa obtained the
addresses for Grand River and Native Tobacco Direct because Ms. Montour had
sent notices to the State of Iowa on
behalf of White River Distributors.
So they had acquired that address from
a separate source, but put it into the
same database, with all of the
addresses they got from North Dakota.
Missouri then learned from Iowa
about these addresses and identities
of these individuals and had that same
mistaken impression, that all of those
addresses came from North Dakota, from
its database.

Grand River Arbitration
So it was sharing among the
states of this information which was
hard to obtain, who the manufacturer
was and who their distributors were --
was hard for them to ascertain. But
they were doing their best to find
that out so they could enforce their
laws and so that they could actually
send notices to these companies and
inform them of their obligation, of
which they should have already known.
That's where the mistake
occurred. That's why the United
States in this arbitration has not
claimed that the July 8, 1999 letter
went to Grand River. And that's why
Missouri's attorney general did not
make that representation again because
the mistake was disclosed, but it was
an honest mistake.

PRESIDENT NARIMAN: You say
that this was sent to Star Tobacco?
MS. GUYMON: We are only using this to show notice to Star Tobacco, Grand River Arbitration, but Star Tobacco significantly was a producer, a manufacturer of Claimants' own brands. They had a significant production sharing arrangement.

PRESIDENT NARIMAN: Then what is their reply to this?

MS. GUYMON: That they were no longer in that arrangement by the time this notice was sent, a fact which they did not disclose previously in their statement of claim.

But Star Tobacco also was very vocal about its unhappiness with the regime. It spoke to the press and in September 2000 stated its intention to bring a lawsuit, challenging the MSA and challenging the escrow requirements, and, in fact, followed through in December of 2000 filed that lawsuit. So this is their former production sharing partner.

PRESIDENT NARIMAN: Where is all of that?

MS. GUYMON: That is in our Grand River Arbitration tobacco 116, the September 2000 article, where Star is threatening to sue.

PRESIDENT NARIMAN: One second. Tab 116. The other one.

MS. GUYMON: The other is tab 67, where we have provided a copy of the complaint that Star filed, December 15, 2000.


MS. GUYMON: So here they're --

PRESIDENT NARIMAN: From Star.

MS. GUYMON: Of Star Tobacco.

PRESIDENT NARIMAN: Against the MSA.
MS. GUYMON: Yes.

PRESIDENT NARIMAN: And --

MS. GUYMON: So here, again, we have another company in which they had a large stake.

PRESIDENT NARIMAN: Sorry, tab 116 is what date?

MS. GUYMON: 116 is a Grand River Arbitration September 1, 2000 article in which Star Tobacco states its intent to bring a lawsuit.

PRESIDENT NARIMAN: This complaint, however, is of -- tab 67 is of Star Tobacco itself.

MS. GUYMON: Yes.

PRESIDENT NARIMAN: Suing Missouri.

MS. GUYMON: No, they are in Virginia.

PRESIDENT NARIMAN: Suing their state.

MS. GUYMON: Yes.

PRESIDENT NARIMAN: Okay.

Right.

MS. GUYMON: So it's again incredible to believe that they wouldn't have heard about the MSA and escrow obligations because their former production sharing partner, shortly after allegedly ending their production sharing agreement, was vocally complaining about it, was receiving notices itself, and actually brought a lawsuit, all within the -- all before the jurisdictional cut-off date.

PRESIDENT NARIMAN: Right.

Okay.

MS. GUYMON: And one final point I would like to make and then it might be a good time to take a break, is that, in other instances later on,
Claimants' own allegation suggest that they did receive notice quickly from their business partners and affiliates. They say, for example, that they learned of Missouri's implementation of its version of complementary legislation through their Missouri distributors very quickly. They also present evidence --

PRESIDENT NARIMAN: Which is that paragraph?

MS. GUYMON: In their response that paragraph?

PRESIDENT NARIMAN: In their response

MS. GUYMON: Grand River Arbitration at page 11.

PRESIDENT NARIMAN: That's February --

MS. GUYMON: That response is from January 16, 2005 in their response.

PRESIDENT NARIMAN: 2006 --

MS. GUYMON: They say that they did learn about notices sent to Missouri's distributors, informing them that products by Grand River were deemed contraband.

PRESIDENT NARIMAN: That's where?

MS. GUYMON: It's not in numbered paragraphs. It's their argument, page 11. So they do have knowledge on post cut-off date occasions that their affiliates sent them word about notices they received. But they want us to believe that pre the jurisdictional cut-off they never heard anything from these affiliates.

PRESIDENT NARIMAN: Okay.

MS. GUYMON: Claimants, also, in what -- the evidence that they would like to submit to you, indicate
that they are monitoring enforcements
against others besides themselves.

Mr. Violi's own statements
about the Omaha Nation Tribe suggest
that it is of interest to the tobacco
industry to monitor what is happening
to these other companies; so even if
they were not business affiliates it
would be another avenue for them to
learn about how the law is being
applied.

It's unreasonable to accept
that Claimants learned about only the
later events from their business
partners, but never heard
contemporaneously through any of their
business partners that the escrow
statutes applied to sales of
Nonparticipating Manufacturer's
cigarettes before March 12, 2001. And

Grand River Arbitration
I can leave the third category of the
month lawsuit for after a break, if
you would like or I can move through
that.

(There was a discussion off the
record.)

MR. VIOLI: The Nebraska -- I
would like to say something about the
Omaha. I received --

MR. CLODFELTER: This is our
presentation. This is gratuitous. He
has plenty of time to rebut our case.
MR. VIOLI: Well, it's really
relevant while it's being presented.
I was approached by the counsel for
Omaha Nation in 2002 and asked to give
some cases or some insight into the --
into the -- you know, the escrow
statutes and the MSA.
And it had nothing to do with
the Claimants. This lawyer in
Minneapolis called me and said:
"We are bringing a lawsuit
against the State of Nebraska and
They didn't monitor or Omaha didn't -- this has to do with counsel calling me in 2002 -- I didn't even know about the Omaha Nation, or their issues before -- I think it was March of 2002. So, you know, about monitoring --

**PRESIDENT NARIMAN:** We will go by what is on the record. (There was a discussion off the record.)

**MS. GUYMON:** So the third category is Claimants also knew that the escrow statutes were being judicially enforced against them prior to March 12, 2001. The first of many such proceedings against Claimants for their failure to place funds into escrow was filed by Missouri. Returning to our timeline as we have shown, Missouri filed its petition against Grand River on June 13th.

**PRESIDENT NARIMAN:** Where is this?

**MS. GUYMON:** It should be -- are you looking at the North Dakota letter, the very next slide -- it's a little difficult to see on the paper version. On the screen it's the items that are in the darker green. You will see the first of those Missouri filed petitions against Grand River Enterprises. That was on June 13, 2000. Missouri filed its lawsuit against Grand River, Native Tobacco Direct, Ross John -- Native Tobacco Direct's president -- and several other entities that Missouri thought were involved.

**PRESIDENT NARIMAN:** That's
And the lawsuit was against several defendants, all of whom Missouri thought to be involved in the sale of Grand River's cigarettes in the State of Missouri.

Claimants clearly knew about this lawsuit shortly after it was filed. As indicated on our time line, there are three indications that they had knowledge about this lawsuit.

First of all, the company president, Mr. Williams, is quoted in the newspaper article about the lawsuit discussing the lawsuit.

Second, there was service on some of these co-defendants of the Claimants, and I'll discuss each of these points -- these evidentiary points in turn demonstrating that Claimants certainly knew about the Missouri lawsuit before the jurisdictional cut-off date.

Among several articles reporting on the Missouri lawsuit, is a July 31, 2000 article by Kate Barlow in the Hamilton Spectator. Now, the United States has shown with several exhibits at tabs 118 through 120 that the Hamilton Spectator is the local newspaper closest to the Six Nations Reservation in Oshweken. And it frequently reports on Six Nations news and on Grand River, specifically.

This July 31, 2000, article, which is tab 112 in our appendices --

PRESIDENT NARIMAN: Not 118.

MS. GUYMON: 118 and 120 are just other articles from the Hamilton Spectator -- that it does report on the Six Nations and is the
closest newspaper.

PRESIDENT NARIMAN: This article is what tab?

MS. GUYMON: Tab 112.

PRESIDENT NARIMAN: Right.

Yes.

MS. GUYMON: That article, the July 31st Kate Barlow article, reported that Grand River was named in the lawsuit filed by the State of Missouri for failure to make escrow payments.

The article also explained that over 30 states had passed laws like Missouri's, requiring NPMs like Grand River, to make payments into escrow accounts. Most significantly, the article quotes Grand River's president, Steve Williams, several times.

Mr. Williams is quoted criticizing the MSA states for requiring payments from small manufacturers in a very similar vein to the arguments that are being made by Claimants in this arbitration. Excerpts from this article are shown on the screen and would be in the next slide in your packet after the time line we were just looking at.

This is quoting Steve Williams: "It doesn't make a lot of sense. It's the big tobacco companies that got into this problem, and now they are making everyone else do it. To me, that is totally ridiculous."

PRESIDENT NARIMAN: Is this tab number?

MS. GUYMON: 112.

PRESIDENT NARIMAN: Yeah.

MS. GUYMON: Also, in the article, Mr. Williams disclaimed any
responsibility for making escrow payments, explaining that the cigarettes manufactured by Grand River had been sold to Ross John. He said from then on --

PRESIDENT NARIMAN: Ross John is the president of --

MS. GUYMON: Of Native Tobacco Direct. Yep. So this is what Mr. Williams said about those sales to Ross John:

"From then on, it's his responsibility," disclaiming responsibility for the manufacturer for making these payments. Steve Williams is contorted --

PRESIDENT NARIMAN: Is that correct, legally?

MS. GUYMON: No, it is not legally correct.

PRESIDENT NARIMAN: Isn't the seller responsible --

MS. GUYMON: The manufacturer is responsible.

PRESIDENT NARIMAN: Also.

MS. GUYMON: It shows -- what this quote shows is the attitude of the Claimants.

PRESIDENT NARIMAN: I know that's your point.

MS. GUYMON: They were trying to ignore --

PRESIDENT NARIMAN: I just want to know -- the statute says the manufacturer or the seller?

MS. GUYMON: The manufacturer.

The manufacturer.

The states called on the distributors, like Native Tobacco Direct, to disclose to them who the manufacturer was; but it was the manufacturer who bore the
responsibility under the plain language of the statute to place the funds into the escrow.

PRESIDENT NARIMAN: I see.

MS. GUYMON: So Steve Williams has given us a contorted post hoc explanation, that he never read the article, and that the reporter never explained the lawsuit to him.

This cannot be accepted. The Hamilton Spectator article proves that Claimants had actual knowledge that the escrow statutes were being judicially enforced as to cigarettes manufactured by Grand River.

PRESIDENT NARIMAN: But does he dispute the statements attributed to him in the article?

MS. GUYMON: He says that he did not know that the lawsuit named Grand River, that he thought there was a lawsuit --

PRESIDENT NARIMAN: No, there are quotes. There is a quote that Grand River Arbitration said so and so. Does he dispute the statements attributed to him?

MS. GUYMON: I don't believe that he argues that those are misquotes, no. I think that the assertion in his affidavit is that he didn't really understand, when the reporter was talking to him, precisely what she was referring to, that it was a lawsuit against Grand River. He claims not to have understood that and not to have read the article when it came out.

PRESIDENT NARIMAN: You said something about Kate Barlow. She's no longer available.

MR. CLODFELTER: She's retired, and she's not available. We have not had luck with her.

PRESIDENT NARIMAN: Right.
MS. GUYMON: But rather than remaining willfully ignorant of this lawsuit and saying, "That is not our responsibility," Claimants should have obtained a copy. They should have read it if they hadn't already received. They should have understood already that the escrow statutes imposed an obligation upon cigarette manufacturers, even if their sales were made indirectly.

Casting off responsibility onto Ross John, who we know now from Arthur Montour's affidavit was the president of Native Tobacco Direct, which is the Claimants' purported investment, at issue in this arbitration, does not remove responsibility or knowledge from Claimants. If Ross John had a responsibility, that is a responsibility of Native Tobacco Direct -- that is a responsibility of Claimants as well.

Even if that were true, even if that was their understanding, they had knowledge that the Claimants were incurring liability.

Claimants' principal excuse for ignoring the Missouri lawsuit is that it was not properly served on them prior to March 2001.

PRESIDENT NARIMAN: No, was not served or not properly served.

MS. GUYMON: Not properly served.

PRESIDENT NARIMAN: That is their case.

MS. GUYMON: Yes.

PRESIDENT NARIMAN: Where is that case?

MS. GUYMON: In the response at page ten.
PRESIDENT NARIMAN: The words are not properly served.
MR. VIOLI: We say they never received a copy.
MR. VIOLI: They never received a copy of the complaint.
PRESIDENT NARIMAN: No, no. I don't know whether you received -- I don't know your laws of service.
MR. VIOLI: No, they never received the complaint -- they never received it.
PRESIDENT NARIMAN: Is that correct?
MS. GUYMON: What the Respondents argue -- or the Claimants -- sorry -- what the Claimants argue on page ten of their response is that --
PRESIDENT NARIMAN: Grand River has no record of ever having received service in respect of that action. No, but that is no record of ever having received it is not enough. What I want to know is, does the court record show that -- that Grand River was served? It doesn't matter whether they have a record.
MS. GUYMON: Yes, the Missouri court entered a default judgment based on findings that Grand River had been served.
PRESIDENT NARIMAN: Just one second, let's go slowly.
MR. CROOK: Not wishing to interrupt, but going slowly, this is after --
PRESIDENT NARIMAN: I know. I know.
MS. GUYMON: The default judgment was after the jurisdictional cut-off date. That is true. But the findings made in some of these later-in-time documents reflect earlier events, and this is one such instance.

PRESIDENT NARIMAN: No, but that's not -- the default judgment -- is this one of the default judgments which says that that "knowingly violated"?

MS. GUYMON: Yes.

PRESIDENT NARIMAN: Because I want to know what is the significance of "knowingly.""

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MS. GUYMON: Under the language of the escrow statutes themselves --

PRESIDENT NARIMAN: That means having knowledge that you are required to make payment, you violated.

MS. GUYMON: Yes.

PRESIDENT NARIMAN: That's what I understand as "knowingly violated" --

MS. GUYMON: Yes.

PRESIDENT NARIMAN: But does that default judgment say "knowingly violated"?

MS. GUYMON: It does. The predicate under the escrow statutes for finding a violation and for imposing penalties, including the ban, the injunction against further sales, is, in the case of a knowing violation, penalties may be imposed; in the case of a second knowing violation, they may be prohibited. So in order for that judgment to be entered, the court had to make a finding first that it was a knowing violation.
PRESIDENT NARIMAN: So this petition is what tab number?
MS. GUYMON: The Missouri petition.
PRESIDENT NARIMAN: Yes.
MS. GUYMON: 48.
PRESIDENT NARIMAN: 48. Yes.
I see.
MS. GUYMON: And the default judgment.
PRESIDENT NARIMAN: And the default judgment.
MR. ANAYA: As a default judgment, the court didn't make a finding of knowing violation. It simply accepted the pleadings of the government, right?
MS. GUYMON: Right, but the Claimants here, who were defendants in that case made no appearance; so it was a default judgment. It was not a judgment.

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PRESIDENT NARIMAN: Where is that recorded that they were served? That's what I want -- default judgment is what date, please?
MR. VIOLI: July 26, 2002.
PRESIDENT NARIMAN: Thanks.
July 26, 2002 -- that is tab number --
MS. GUYMON: That is, I believe, in Claimants' evidence.
MR. VIOLI: It's in the Arthur Montour --
PRESIDENT NARIMAN: No, there is no -- default judgment is not on record.
MR. VIOLI: Yes. It's in the Arthur Montour affidavit, I think.
PRESIDENT NARIMAN: I saw something, default judgment.
MS. GUYMON: Yes, I am sorry, Mr. Chairman. I recall what the evidence was here.
In tab 50 in the United States
appendices, there is a default -- a later default judgment, from July 26, 0427

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2002. That default judgment references the earlier default judgment.

PRESIDENT NARIMAN: Default judgment, I see -- of a later petition.

MS. GUYMON: Yes.

PRESIDENT NARIMAN: Of a later petition.

MS. GUYMON: Precisely.

PRESIDENT NARIMAN: And it recites earlier default judgment.

MS. GUYMON: Yes.

PRESIDENT NARIMAN: That's why the second penalty. I see.

MS. GUYMON: So the order of July 26, 2002, which is tab 50, includes a finding by the Court that: "Respondent Grand River Enterprises was previously held to have knowingly violated the escrow statutes by failing to escrow for cigarette sales in Missouri during 1999, by the Honorable Byron Kinder, 0428

Grand River Arbitration of the Circuit Court of Cole County, Missouri."

PRESIDENT NARIMAN: Yeah, but can't you get these judgments -- earlier default judgment, rather than going in this circuitous way of later reports. There must be an earlier default judgment which presumably says that there was some --

MR. CROOK: Well, I believe we do have on record, Mr. Chairman, in the Claimants' materials, at the attachment to -- I'm sorry -- the gentleman from Missouri -- right -- we have there the docket sheet which sets out when all of these things took
PRESIDENT NARIMAN: Okay.
MS. GUYMON: Can I interject, though, that our argument is actually that service is totally unnecessary.
MR. CROOK: Right.
MS. GUYMON: That knowledge is the trigger here, not service. So

Grand River Arbitration it's not relevant to our argument when precisely Grand River was served.

PRESIDENT NARIMAN: No, but we would like to know.
MS. GUYMON: We would like to satisfy your curiosity nonetheless.

MR. VIOLI: April 10, 2001, Exhibit 14 -- 14, cc to Mr. Williams' affidavit. We retrieved the court file from Missouri, and it shows a return of service on Grand River April 10th -- allegedly April 10, 2001.

PRESIDENT NARIMAN: April 10th.
MR. VIOLI: Yes.
MR. VIOLI: That's when the complaint was allegedly served on Grand River.

PRESIDENT NARIMAN: That is the Missouri complaint.
MR. VIOLI: Correct.
MS. GUYMON: Our assertion, however, is that service as I said is

Grand River Arbitration irrelevant. And the service on Grand River by then they surely already knew about the lawsuit.

PRESIDENT NARIMAN: No -- pardon me -- but if you were served, on April 10th, then you must have filed a reply to this?
MR. VIOLI: No. We were not -- the affidavit in the court file says we were served on April 10th, 2001.
PRESIDENT NARIMAN: You have to take that as service.

MR. VIOLI: No.

PRESIDENT NARIMAN: Which is a more authoritative, the court file or what?

MR. VIOLI: They served someone who said he was an -- he was the owner of Grand River. We don't know who he served. The sheriff didn't get an affidavit -- the identity of the person he served, his status or his capacity.

He apparently gave it to someone, if he did this at all, a sheriff in Ontario, and didn't ask any kind of, you know, questions as to what the company was. It wasn't done at the -- at the business address of the company. It was -- that's all it says. It's a very --

MS. GUYMON: We don't dispute that service on Grand River occurred after the cut-off date. We don't dispute that.

PRESIDENT NARIMAN: He's not saying that. He's saying -- he says there is no service at all -- just hand it over to someone.

MR. CROOK: Mr. Chairman, as I understand it, none of this conversation matter for purposes of establishing knowledge prior to the March the 12th. We are arguing an event that happened after March 12th. Therefore, I don't see relevance of the discussion.

PRESIDENT NARIMAN: No, no, no, the relevance of the discussion is this -- I tell you. I want to -- if they were properly served, then they were --
then had to file a response whenever
they filed it. And I want to know
what they said in that response in
reference to the petition. That is
the relevance.

Please tell us tomorrow. I
hope you are following. You may say
what you like with regard to the court
record, but the court record says that
you were served.

Now, if -- you can dispute it,
but, if we are to proceed on the
footing that you were served, then you
have to file a response, obviously,
within the time stipulated. You did
not file a response, so there was a
default judgment.

MR. VIOLI: Correct.
PRESIDENT NARIMAN: That is the
scenario. Therefore, the allegations
Grand River Arbitration
which are made in the petition, if you
were properly served, were not denied
by you. That is the sequence of
events.

MR. VIOLI: Yes.
PRESIDENT NARIMAN: That's the
relevance, yes. So it is relevant.
So I just want to know from -- I know
it's after the date, et cetera, but I
just want to know what was said there.
And, therefore, you say that there was
no response because you were not
properly served.

MR. VIOLI: That's in this one
lawsuit, right.
PRESIDENT NARIMAN: In this one
lawsuit that we are talking about --
this is also --

MR. VIOLI: We have no record
of this.
PRESIDENT NARIMAN: Okay.
That's all right. Okay.

MS. GUYMON: Despite Claimants'
protestations that they were not
served, we have three evidentiary
points that show they knew. And
knowledge, again, is the trigger, not
service.

PRESIDENT NARIMAN: Yes.
MS. GUYMON: As I mentioned,
the Kate Barlow article that we
already discussed was the first. The
second is service on others of the
defendants. The Missouri lawsuit was
served on Holly John, the wife of
Native Tobacco Direct's president,
Ross John, and on the Seneca Nation,
both prior to March 12, 2001.

PRESIDENT NARIMAN: Ross John
and --
MS. GUYMON: And the Seneca
Nation. I'll discuss each of those
two in turn.

PRESIDENT NARIMAN: On what
date?
MS. GUYMON: The notice -- I'm
sorry -- service on Holly John was
February 20, 2001, and this is stated
in Arthur Montour's affidavit at
paragraph six.

PRESIDENT NARIMAN: Yes. Yes.
And Seneca Nation were the --
MS. GUYMON: The service on the
Seneca Nation was July 12, 2000.

PRESIDENT NARIMAN: What is the
connection between Seneca Nation?
MS. GUYMON: Okay. I will
start with Holly John.

PRESIDENT NARIMAN: Please.
What is her name, Holly?
MS. GUYMON: Holly.
PRESIDENT NARIMAN: H-o-l-l-y?
MS. GUYMON: Yes, and John,
J-o-h-n, the wife of Ross John who at
the time was the president of Native
Tobacco Direct, Claimants' investment,
that this service was not technically
perfect for purposes of Missouri law,
which is Claimants' argument, is
irrelevant.
The affidavit of Mr. Schock,
which Mr. Crook referenced, would be
entitled to no weight because it's
irrelevant, even if it were entitled
to less weight, because Mr. Schock did
not disclose in that affidavit that he
currently serves as counsel for
Grand River in ongoing Missouri
proceedings.
PRESIDENT NARIMAN: I didn't
follow this.
MS. GUYMON: Mr. Schock,
S-c-h-o-c-k, provided an affidavit
attached to Claimants' rejoinder in
which he chronicled his arguments for
why service process was improper.
All of that we assert is
irrelevant, is entitled to no weight,
because the technical service
requirements do not matter for
purposes of the time bar in article
1116 and article 1117.
It doesn't require service. It
only requires knowledge, constructive
or actual. Service of a lawsuit in
accordance with the state's technical
requirements is not required.
PRESIDENT NARIMAN: Yes, okay.
MS. GUYMON: The further point
we were making about Mr. Schock's
affidavit is that he does not
disclose, in making that statement on
behalf of Claimants, that he is their
counsel. He is currently serving as
their counsel in ongoing Missouri
proceedings in which Claimants are
participating now.
PRESIDENT NARIMAN: So let
MS. GUYMON: So that affidavit is entitled to no weight, is our point, that the service on Holly John, which is admitted in the Arthur Montour affidavit, shows knowledge by Claimants' investment, Native Tobacco Direct. Surely, Holly John would have informed Ross John, her husband, of service of the lawsuit against him and his company.

PRESIDENT NARIMAN: What makes Grand River Arbitration you say that this service document is on record?

MS. GUYMON: Mr. Montour, Claimant in the case, admits --

PRESIDENT NARIMAN: He says that.

MS. GUYMON: Yes, he admits that Holly John was served with a lawsuit on February 20, 2001.

MR. VIOLI: That's not right.

It's the court record.

MS. GUYMON: Excuse me.

MR. VIOLI: Mr. President --

MR. CLODFELTER: We are putting on our case here. He is going to have a chance to rebut it.

MR. VIOLI: No, you're not. We are trying to establish a clear record.

MR. CLODFELTER: That is the point of rebuttal. We don't go point by point. Come on.

MR. VIOLI: We cannot stand for the record getting cluttered with, you know, inaccurate information.

MR. CLODFELTER: Well, it's our time to present our case.

MR. VIOLI: It's after 5 p.m.

MS. GUYMON: And that's because you keep interrupting.
MR. VIOLI: No, it's because you can't get the facts straight.

MR. CLODFELTER: He's being disrespectful to Ms. Guymon. She's trying to give her presentation. He's going to have plenty of time to respond tomorrow.

MR. VIOLI: No, I won't, if we are going to go through each one of these.

MR. CLODFELTER: You have got all day tomorrow, Lynn.

MR. VIOLI: We will see.

PRESIDENT NARIMAN: Okay.

MS. GUYMON: Paragraph six of the Arthur Montour affidavit -- I'll let the Tribunal read it for themselves -- but it does say that the

Grand River Arbitration summons and complaint were served on Native Tobacco Direct by serving Holly John and refers to the affidavit of service that is attached. And the date on that affidavit of service is February 20, 2001. The location for that service was, again, this 14411 Four Mile Level Road, Gowanda, New York, that we discussed previously.

PRESIDENT NARIMAN: We come back to that.

MS. GUYMON: We come back to that.

PRESIDENT NARIMAN: Okay. So one point is service on wife of Ross John.

MS. GUYMON: Right.

So their dispute with the service on Holly John is that she wasn't an officer of the company. She was just a wife of the officer of the company, and so, therefore, it didn't satisfy technical requirements of
service process.

Our point is those technical requirements don't matter. Surely, she would have told her husband. They don't allege that she didn't tell her husband. They simply attempt to hide behind these technical requirements. That issue has no bearing on the knowledge requirement in 1116 and 1117.

Now, I will discuss the Seneca Nation. The Seneca Nation was also served with the Missouri party on July 12, 2000, even before Holly John was served. And at tab 136 of the United States's evidence, we provide that proof of service.

Native Tobacco Direct's then president, Ross John, is a member of the Seneca Nation. Claimant Arthur Montour, Junior, resides on the territory of the Seneca Nation. Each of the purported investments --

PRESIDENT NARIMAN: What is the status of Seneca Nation? Is it an entity or what is it?

MS. GUYMON: It's a recognized -- federally recognized tribe.

PRESIDENT NARIMAN: It's a tribe.

MS. GUYMON: Yes, it's a tribe.

PRESIDENT NARIMAN: I see.

MS. GUYMON: And to answer Mr. Crook's question, this is probably a fitting time to do it. The Seneca Nation did bring a notion to dismiss the Missouri lawsuit, and they were represented by Williams & Connolly. And I think that is tab E.

PRESIDENT NARIMAN: By who.

MS. GUYMON: Williams & Connolly, which is like Arnold & Porter, a prominent Washington, DC law
firm.

PRESIDENT NARIMAN: What relevance does that have?

MS. GUYMON: Mr. Crook asked

Grand River Arbitration the question earlier.

MR. CROOK: I simply was curious.

PRESIDENT NARIMAN: I thought you were making a point.

MS. GUYMON: No, I thought it was a fitting time to answer your question, that the Seneca Nation was represented by Williams & Connolly.

Tab E to the Williams affidavit is their motion to dismiss that they brought on behalf of the Seneca Nation.

PRESIDENT NARIMAN: What happened to that motion?

MS. GUYMON: They were dismissed from the case voluntarily, because, as Ms. Menaker explained, that Missouri petition was brought against everyone. Missouri was unsure at that point who was really responsible for these cigarettes.

And because they are called Senecas and because Native Tobacco

Grand River Arbitration Direct is on Seneca territory and Ross John is a member of the Seneca Nation, they thought the Seneca Nation had something to do with.

PRESIDENT NARIMAN: Which are the Six Nations then?

MS. GUYMON: The Six Nations of the Grand River -- this is like a test. I don't remember. I am sure Claimants can tell us.

PRESIDENT NARIMAN: No, is Seneca Nation one of them?

MS. GUYMON: It is -- Seneca Cayuga, Mohawk, Iroquois.
MR. ANAYA: No, Iroquois is the whole thing.
MS. GUYMON: Iroquois is the whole thing.
PRESIDENT NARIMAN: But Seneca is --
MS. GUYMON: Seneca is.
MR. CROOK: Just to be clear then, the Seneca Nation did not contest service. They entered in the Grand River Arbitration litigation, contested on the merits, and were dismissed.
MS. GUYMON: Correct.
MR. ANAYA: What is the significance of that?
MS. GUYMON: Here is the significance of that -- because each of these purported investments, Native Tobacco Direct and Native Wholesale Supply, and Claimant Arthur Montour, Junior, and Ross John, president, all reside on the Seneca Nation territory. It's reasonable to expect that the Seneca Nation, having received service of a lawsuit which it didn't feel was probably brought against it, would have mentioned that to the residents on its territory, which it knew to actually be the ones in this business of selling cigarettes.
PRESIDENT NARIMAN: So this --
MR. ANAYA: So if New York gets sued, it's reasonable to assume that all the citizens of New York know that
entity. Is there anything more? Is
it just because they are residents?
MR. CLODFELTER: They are being
sued for this activity. It's a
specific activity which is being
conducted by a known company there,
and they were mistakenly sued.
So if the State of New York got
served for a defective submarine and
there is one submarine manufacturer in
the State of New York, they might
contact that submarine manufacturer.
That's the suggestion.
MR. ANAYA: Okay.
MS. GUYMON: And the Holly John
service is enough by itself as well.

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Holly John was the wife of the
president was company.
The point here is that other
people who were involved knew, and
it's unreasonable to believe that
Grand River did not therefore know,
especially given the combination, the
accumulation of this evidence, the
Kate Barlow article quoting
Grand River's president, the service
on the Seneca Nation, the service on
Holly John.
That overwhelming evidence
accumulated flatly contradicts
Claimants' asserted ignorance or
misapprehension. They knew about this
lawsuit. Before they were served. It
doesn't matter, it doesn't matter.
They knew. They had the knowledge
that is required for article 1116 and
1117.
This overwhelming evidence
flatly contradicts Claimants' asserted
ignorance or misapprehension of the
MSA regime. Claimants received
multiple notices directly from the
states that they were required to make payments into escrow. Claimants' business partners and affiliates received similar notices, and Claimants were sued and were aware they had been sued for failure to make payments into escrow.

PRESIDENT NARIMAN: Excuse me for interrupting you, but this earlier default judgment during 1999, which is recited in the default judgment of tab 50 -- you told us earlier of 2002 -- that earlier default judgment is in connection with another petition. Presumably, it can't be of 13/6/2000.

MS. GUYMON: I'm not sure if I misunderstood you, but there wasn't a default judgment in 1999. Let me just correct that.

PRESIDENT NARIMAN: Oh, but I thought that you said that the default of 26 July 2002, which is at tab 50, Grand River Arbitration is a default judgment of a later petition, which, again, recites the earlier default judgment. Now, which is that earlier default judgment?

MS. GUYMON: That earlier default judgment was in -- was for sales made by Missouri in 1999, but the default judgment wasn't in 1999. The petition involving sales made by Missouri in 1999 is the petition we have provided that was filed in 2000; and so a default judgment was entered on that petition.

PRESIDENT NARIMAN: I don't understand sales -- what sales?

MS. GUYMON: The sales in Missouri in 1999.

PRESIDENT NARIMAN: Sales in Missouri, sales by Grand River?

MS. GUYMON: Well, sales directly or indirectly by Grand River.

PRESIDENT NARIMAN: By that
group, by all of that group of defendants?

MS. GUYMON: Yes.

PRESIDENT NARIMAN: I see. No, we don't have that earlier default judgment?

MS. GUYMON: We do not have it in the record.

PRESIDENT NARIMAN: Do we have the date of that judgment?

MS. GUYMON: I don't believe we do in the record.

MR. VIOLI: It's referenced in the --

MR. CROOK: Is that the judgment of March 25, 2002? Is that the earlier one?

MR. VIOLI: The July 26th default judgment references the earlier one.

MR. CROOK: Okay. I am looking at page eight of the court's docket sheet at the bottom, and that appears to be the reference to the first default judgment. You are correct, the interlocutory order of default.

MR. VIOLI: Yes, if you pull the July 26, 2002 default judgment, I think it reference the judgment -- earlier default judgment by Judge Kentay [phonetic].

PRESIDENT NARIMAN: That earlier default judgment must have been of an earlier petition?

MR. VIOLI: The earlier default judgment was in a petition filed that they're referencing -- that is July of 2000 -- June of 2000.

PRESIDENT NARIMAN: That's June of --

MR. VIOLI: June of 2000.

There was a default judgment, I think,
entered in that case in June of 2002 or somewhere thereabouts.

MS. MENAKER: Mr. President, we can make inquiry this evening and hopefully get you an answer tomorrow.

PRESIDENT NARIMAN: Right. Please proceed.

MS. GUYMON: Okay. Just to summarize then, all of these occurrences were before the jurisdictional cut-off date, March 12, 2001. Claimants should have known about all applicable laws governing their participation in the US before entering into the US cigarette market.

That is their constructive knowledge. They should have known, and they had the ease and ability to know about these laws. States are entitled to expect compliance with their laws. Contrary to Claimants' suggestion, compliance is not optional.

Accordingly, they can be presumed to have known that the escrow statutes applied to them causing them to incur losses as soon as their cigarettes were sold in any MSA state with an escrow statute.

That showing of constructive knowledge is sufficient, but we have shown -- and, again, I would just refer to our final time line, the last slide in your packet -- we have shown by overwhelming evidence that Claimants did first know that they had incurred a loss as a result of the escrow statutes well before March 12, 2001. And, therefore, they had first acquired knowledge that they had incurred a loss as a result of their alleged breaches.
The final time line summarizes each -- all of this evidence, before March 12, 2001. Accordingly, more than three years elapsed between the time of Claimants' first knowledge and submission of their claim to arbitration. Mr. Williams himself was complaining vocally to the press about the very same things in 2000 that they are claiming now in their lawsuit. They knew. They knew that they had a grievance and a loss; and they waited past the limitations period in order to bring this.

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In conclusion, the Tribunal lacks jurisdiction over all of these claims. As Ms. Menaker demonstrated, the alleged breaches and the losses resulting from those breaches -- the first loss resulting from those breaches of which Claimants complain first occurred more than three years prior to the submission of their claim to arbitration.

And as I have just summarized, Claimants first acquired knowledge or should have first acquired knowledge of those breaches and that they had incurred a loss before March 12, 2001. Claimants' attempt to side-track the Tribunal from the jurisdictional bar by identifying later developments that repeated or increased their loss should be rejected. Furthermore, Claimants' excuses in the face of the evidence that they actually knew that the MSA regime was causing them to incur losses do not withstand scrutiny for the reasons that I have demonstrated. Their claims are time barred, and must be dismissed in their
entirety. And that is the conclusion of my presentation, unless there is anything further -- any questions.

That is all for today.

PRESIDENT NARIMAN: Thank you very much. All right. We start tomorrow --

MR. VIOLI: Yes, can I just raise one thing, Mr. President. We also have a presentation, slide presentation with exhibits. And one of the -- some of the items in there and some of them that we will bring up tomorrow are the matters that were addressed in the correspondence.

The events that post-dated our rejoinder in this case, the seizure that took place in Missouri two weeks ago, and the -- our receipt of documents in a case that a specific Grand River Arbitration judgment was just entered into in Kansas about -- I guess -- about three weeks ago, or a month ago -- those documents were served last week and provided to the secretary and forwarded by E-Mail as soon as we had them available to us and learned of them.

And so we will be referring to those tomorrow if we can. And I think we need to address that issue, hopefully, this evening. It won't take time out of the presentation tomorrow.

We have these very important documents which sort of give more facts of the case in some of these notice issues and some of the issues that Respondent has raised today. And we did learn of them only in the past three weeks.

PRESIDENT NARIMAN: How is that relevant on the limitation?

MR. VIOLI: Well, there are a
number of documents which speak to who was a tobacco product manufacturer under the statute. In fact, in most cases, it's not the manufacturer -- could be -- it would be an importer or someone who first sells in the United States.

And they show that it's really not as clear as we have heard for about two or three hours today -- "Absolutely Grand River -- no question about it, it's the manufacturer" -- they will show that the first lawsuit, apparently, that was brought -- this Missouri lawsuit in 2000 -- sued the importer, Native Tobacco Direct. That was voluntarily dismissed, and we have that in the record. That case was voluntarily dismissed against the importer.

The last lawsuit to be brought against any of these Claimants which was three months ago in December 2005, was brought against the importer, not even against Grand River. There is absolutely no clarity with respect --

PRESIDENT NARIMAN: But you have to remember all of that may be so -- but you have to address the principal point that is raised by them, that the MSA together with the escrow statutes established liability against you.

That is your principal point. It doesn't matter whether the state impleaded XYZ, the importer, et cetera. Did it or did it not -- that is the principal point -- establish liability against Grand River in every single state where Grand River was selling cigarettes? No, that's the point you have to meet. That is all
I'm saying.

MR. VIOLI: I have these exhibits which prove that point, is what I am telling you, that I have come into possession with -- the seizure -- first, the seizure that

Grand River Arbitration happened under the contraband law that happened two weeks ago.

PRESIDENT NARIMAN: It's not what they did under the statute. It's by virtue of the statute, were you or were you not liable for -- in respect of the escrow statutes for all the sales of cigarettes you made.

That is all. There is -- they may have sequestered your property. They may have done anything. One state may have done it. Another state may not have done it under some apprehension or whatever.

The argument against you that is made -- the principal argument, apart from all of these documents, is that the statute, the very passing of the statute makes you liable and you are fixed with knowledge of that statute. That is the point you have to meet. That is all I am trying to tell you.

MR. VIOLI: Okay. Should we deal with the exhibits on a one-by-one basis?

PRESIDENT NARIMAN: Whatever you have -- however you are prepared to deal with it.

MR. CLODFELTER: Mr. President, I think we have to have something to say about that. As you know we objected to each of those documents. You know, it wasn't done properly. The documents shouldn't have been before you before they had permission
to put them before you.

But they sent them, obviously, to try to color your thinking before they even had a chance to debate whether they should be introduced or not.

We oppose their introduction because they are late, and there is no justification shown in the record for why they couldn't have been submitted earlier.

On the other hand, our position is that the Tribunal should be informed as possible. And we have indicated that we have a document -- documents as well that we would like to put in, in rebuttal to their case. And so that has to be taken into consideration.

We have also asked whether or not they would be willing to allow us to put in yet another document.

Do you want to discuss that, Andrea?

MS. MENAKER: Sure. There is a document that we have in our possession that was generated by Claimants, specifically by Mr. Arthur Montour. Yes, we can't talk specifically about what the application is or what the document is, because there are protections for taxpayer information, so we asked for --

MR. VIOLI: That's fine. If what you -- they wrote a letter saying

Grand River Arbitration that they would like to submit these documents to the Tribunal. I have copies of those. This is -- now, we are talking about the letters that you wrote -- the documents that were in your letter dealing with the ATF
permit, right?

MS. MENAKER: That's correct.

MR. VIOLI: Okay. The reason

why I didn't address it before now is

because it was said that we were going
to address it before the Tribunal.

We have no problems with those
documents coming in. However, the
only question I have is that they do
contain confidential tax information.
That's what Respondent is speaking to.

PRESIDENT NARIMAN: Just give
me a minute.

(There was a discussion off the
record.)

PRESIDENT NARIMAN: It might
cut short tomorrow's program, that --
if anybody -- my personal view is --

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and this is -- I don't know -- my
colleagues will tell you what their
view is -- my personal view is I don't
wish to shut out anybody from putting
in any document.

The relevance, et cetera, we
all decide when arguments are made.
We don't know what this document
means. We have not read them either.

Now, if they object, naturally,
and they have a right to object and
say that you were supposed to put in
much earlier; you put it in later --
if we overrule that objection and say
very well, we put this in. You answer
whatever you want to say, say you
again answer. It may involve another
hearing.

But I don't like to shut out
anybody from putting in any particular
document in support of this question
of jurisdiction. Am I making that
very plain?

MR. CROOK: Mr. Chairman, if I
can say, I would like to be clear. I haven't read these documents on either side, none. I don't know what is in them.

PRESIDENT NARIMAN: But if counsel says that, "I wish to rely," which he says today or yesterday or the day before, that, "I wish to rely on documents one through seven in support of the case, and I will explain them all to you a little later when I expound on them," I don't like to shut it out.

I can't say, no, no, you first tell me why these documents are relevant and then all the others permitted.

MR. CROOK: Mr. Chairman, if I could, my second point is I don't like submissions coming in close to a hearing. We -- I understand Mr. Violi may have just been able to get these documents. I don't know what the circumstances are.

PRESIDENT NARIMAN: Nor am I happy either.

MR. CROOK: -- or at a hearing, and whatever -- if we were to make an exceptional ruling here to allow these materials in, I hope neither party would take it as a precedent for further proceedings, because I think we have to have a disciplined process for both partied on notice, and where at the conclusion of the proceedings, the Tribunal can deliberate and doesn't have to sit around waiting for post-hearing submissions.

PRESIDENT NARIMAN: Okay. It can be done by consent as well. That all depends on how you look at it. Do
you want to put in some documents?
That is why I am mentioning all of
this. They want to put in some
documents. You want to put in some

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documents.

He says he don't object to
yours. If you wish to respond to
their material which they submitted,
we rather think -- what do we
propose -- what do you propose to do?
You decide. As he rightly says, we
don't want a further hearing and
someone or two to object that we
admitted these document at the end to
our prejudice.

MR. ANAYA: We have a decision
here that we are going to admit all
the documents here or that are
submitted -- allow the Claimants to
submit as they give their
presentation, the documents that
tomorrow they deem particularly
relevant. And then we can make an
assessment at that point.

MR. CLODFELTER: Yes,
Mr. President. As I say, we are
inclined also to allow the Tribunal to
have all the information that is

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available. We also have concerns
about orderly process as well. That's
why we objected.
As long as both sides are
treated fairly in the matter, we would
want to have the right to submit some
rebuttal documents if we need to.

We also need to reserve our
right on post-hearing submissions
until we hear the case, obviously, and
rebuttal is done tomorrow, to see
whether anything more is necessary.

We also take the permission to
use this one document. We also
understand it's a tax document. It has to be protected, which means it can't be part of the public record at all. I think we have to get written permission. We need the letter signed. But on that basis, except, you know, reserving the right with regard to particular documents, I think we can proceed this way.

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PRESIDENT NARIMAN: And what do you propose to do to their documents, I mean.
MR. CLODFELTER: That's what I mean.
PRESIDENT NARIMAN: They are out of time. In the sense --
MR. CLODFELTER: To allow Mr. -- to allow them to proceed with the documents, is what I am suggesting.
PRESIDENT NARIMAN: That's what I thought. Yes -- allow them to proceed with the documents.
MR. CLODFELTER: We will reserve with any particular documents, because we don't know what they have proffered them for. We will make the argument at the time.
PRESIDENT NARIMAN: Okay. So you have agreement in that sense.
MR. CLODFELTER: Yes, as long as both sides are treated the same way.

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PRESIDENT NARIMAN: Yes, that's right. I don't propose to shut out either party. I agree that there is a point of time at which we can cut off things. We can't go on like this. But if somebody feels that it's very important on the jurisdiction issue, that some documents which they had
omitted to furnish before, that they
could not furnish before -- it's all
in the realm of speculation -- is that
it is important, and I think we
would -- I would prefer to hear
whatever you want -- the parties want
to say on these documents.

Either you say, "I don't admit
this document," which is a separate
topic. But if they are admitting
documents or they are not relevant,
but we -- I mean, to say that, "No,
you are not entitled to refer to these
documents at all," is something which
I don't take personally at this point
of time -- I mean, once the hearing is

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proceeding on the issue of
jurisdiction.

If the hearing had concluded
and you were -- said that, "No, we now
want to admit additional evidence," I
would be against it, totally against
it. And I join with Mr. Crook there.

But since we are still at the
stage of not having concluded the
hearing, somebody has some genuine
grievance, that "I have some document
in my possession which is extremely
important on this issue," I will not
shut it out. I may rule that it's an
irrelevant document, but I won't shut
it out.

MR. VIOLI: Do we need -- you
sent -- you have it. Okay.
PRESIDENT NARIMAN: So tomorrow
decide on this, if you like, at the
beginning.

MR. CLODFELTER: With the
understanding that we have to reserve
for the possibility of post-hearing

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submissions, because we haven't heard
the case yet. That's all.
PRESIDENT NARIMAN: Absolutely, absolutely. That's your entitlement.

MR. CROOK: A simple, mechanical question, how are we going to get these documents and when? You have them physically available?

MR. ONWUAMAEGBU: Yes, they have also been submitted by E-Mail.

MR. VIOLI: There should be three, one for each panel member.

PRESIDENT NARIMAN: All right. We will address it tomorrow.

MR. CROOK: Would there be any objection if the Tribunal perused these documents tonight?

MR. CLODFELTER: Well, we can clear up --

MS. MENAKER: We may ask Mr. Violi -- do you intend to rely on each and everyone of the documents you submitted?

MR. VIOLI: It depends on the Grand River Arbitration questioning, so I don't know what -- I have a Powerpoint much like yourself, and I have culled it only to documents which I think are critical. For example, the forfeiture petition in Missouri that followed the seizure or seizures, I am not going to refer to that.

MS. MENAKER: I am just saying, though, would it make sense to identify the documents which you are planning to use.

PRESIDENT NARIMAN: May I suggest that you two sit here just now, and you sort out and you tick off whatever you think is absolutely necessary to support your case. And let's hear them tomorrow and find out whether they accept that.

MR. CROOK: Do it quickly so the commission knows which to read tonight.
PRESIDENT NARIMAN: It doesn't matter what we are reading. We will read it with you if you want, read it with you.

(There was a discussion off the record.)

PRESIDENT NARIMAN: I would ask that both you sit down and decide which of those documents you think is absolutely necessary for the case. You decide what is absolutely necessary. We won't waste your time whether it's necessary or not. Only go to whether it's relevant on this issue or not, but you decide.

(The arbitration adjourned for the day.)

CERTIFICATE

I, TAB PREWETT, A Registered Professional Reporter, Notary Public and Certified Shorthand Reporter of the State of New Jersey, License No. XI01828, do hereby certify that the foregoing is a true and accurate transcript of the arbitration proceedings as taken stenographically by and before me at the time, place and on the date hereinbefore set forth.

I DO FURTHER CERTIFY that I am neither a relative nor employee nor attorney nor counsel of any of the parties to this action, and that I am neither a relative nor employee of such attorney or
18 counsel, and that I am not financially
19 interested in the action.
20
21 __________________________________________
22 Notary Public of the State of New Jersey
23 My Commission expires August 30th, 2007
24 Dated: April 7, 2006
25