HEARING ON THE MERITS

Wednesday, February 3, 2010

The World Bank
1818 H Street, N.W.
MC Building
Conference Room 4-800
Washington, D.C.

The Hearing in the above-entitled matter came on, pursuant to notice, at 9:00 a.m. before:

MR. FALI S. NARIMAN, President

PROF. JAMES ANAYA, Arbitrator

MR. JOHN R. COOK, Arbitrator
APPEARANCES: (Continued)

On behalf of the Respondent/Party:

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Legal Adviser

MR. JEFFREY D. KOVAR
Assistant Legal Adviser

MR. MARK E. FELDMAN
Chief, NAFTA/CAFTA-DR Arbitration
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APPEARANCES: (Continued)

On behalf of the Claimants/Investors:

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Inch Hammond Professional Corporation
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On behalf of the Wahta Mohawks:

PROF. MATTHEW FLETCHER

ALSO PRESENT:

On behalf of the United Mexican States:

SR. JOSE LUIS PAZ,
Head of Trade and NAFTA Office

SR. SALVADOR BEHAR,
Legal Counsel for International Trade

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On behalf of Canada:

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MR. SEAN CLARK
Embassy of Canada
MR. VIOLI: Actually, they're not. I was on NAAG's website this morning. NAAG is not a state government and it's not a Respondent in this case. We've requested the updated, complete version of the MSA. I asked for that at the jurisdictional hearing. I asked for that prior to the hearing. And I would like a copy from the Respondent, a complete version of this measure.

PRESIDENT NARIMAN: Even if it's available on the website?

MR. VIOLI: It's not.

MR. FELDMAN: We will print one out from the website.

MR. VIOLI: With all of the amendments, please, Mr. Feldman.

MR. FELDMAN: We will print the amendments out from the website.

MR. VIOLI: Okay -- the amendments from the website are incomplete. There was an amendment -- let's address this right now. There's an amendment that amended or purported to amend the Model T Statute to remove the Allocable Share Amendment. And this is very relevant to what Mr. Crook brought up yesterday regarding changes in the law and changes at what point in time they occurred, and when did the measures come into effect, and what was offered or what was on the table for the Claimants in this case at any given point in time.

What I'm asking for, not printing from the website. We would like the MSA in its complete form. That includes amendments, addendum, agreements, forbearance agreements, these are all part of the MSA, and amend the MSA. We want a complete and accurate version of the MSA.

PRESIDENT NARIMAN: You want an alternative version, which is --

MR. VIOLI: Indeed. Thank you.

MR. FELDMAN: We can discuss this off the record.

(Discussion off the record.)

MR. VIOLI: Back on the record. A
member of NAAG and the Respondent have spoken with
Claimants regarding the MSA and we were advised
that some documents which may be considered
amendments to the MSA were not executed by all but
were executed by some parties to the MSA but
they're amendments to the MSA, and some might not
be regarded as amendments to the MSA.
Respondent has offered to give what
they regard as a complete version with amendments
to the MSA. I specifically know of one document
which -- or I've been told there is a document
that is an amendment whereby the parties, the
manufacturers to the MSA acknowledged that if they
change, if the parties or if the Model T Statute
is changed to do away with the allocable share,
that the Model Statute will still constitute a
qualifying statute under the MSA.
So that material change in the MSA was
reflected in an amendment. I haven't seen it in
completely executed form, and I'm not sure I have
the most current version, but there was a point in
time when the MSA was amended and parties agreed
to an amendment of the MSA in that respect.
We'll see what they provide and we'll
go from there. So we've reserved our right to ask
for other and additional documents. The other
thing Respondent has identified or informed us is
that when a party joins the MSA, there are
sometimes agreements, forbearance agreements or
other agreements in connection with that entry
into the MSA. And it was left open, I believe,
that the idea was left open that it -- that these
agreements may not be amendments to the MSA.
We respectfully disagree because if a
law says joined an agreement or follow this
schedule of payments, right, the agreement has to
be complete. It has to have fixed terms,
definitions, obligations, liabilities and
responsibilities. We want to know what those are.
If people are joining, exercising this
right under the statute or this obligation with a
certain set of parameters that remains beyond the
public view and beyond our view is not offered to
us, then we believe it's relevant to the

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sold to a certain set of retailers within the state of New Mexico. That was his declaration.

I would also add that Mr. Thomson and his office have active prosecutions going on, including as you're aware, of prosecution against Native Wholesale Supply and any internal deliberations, work product consistent with those prosecutions, Mr. Thomson will obviously have to respond, if there's any sort of questioning along those lines.

But I would just impress upon the Tribunal that his declaration in this matter was exceptionally narrow and I am comforted to hear from the Claimants that they do not plan to take any extended period of time cross-examining Mr. Thomson.

PRESIDENT NARIMAN: Okay. We've noted that.

MR. LUDDY: Did you have preliminary questions, Mark?

MR. FELDMAN: Just to clarify, any questions implicating work product of Mr. Thomson's office, he, in fact, would not be in a position to respond to those questions.

PRESIDENT NARIMAN: You object to it?

MR. FELDMAN: Thank you.

DAVID K. THOMSON, RESPONDENT'S WITNESS, CALLED DIRECT EXAMINATION

Q. Good morning, Mr. Thomson.

A. Good morning.

Q. Thank you for appearing today. Would you please state your full name for the record?

A. David K. Thomson, T-H-O-M-S-O-N.

Q. What is your current position?

A. I am Deputy Attorney General with the State of New Mexico. I oversee all the civil law divisions. Our office is divided into criminal and civil law. I oversee all the civil law divisions.

Q. Have you submitted a declaration in this matter?

A. Yes.

Q. Thank you.

PRESIDENT NARIMAN: Okay. We've noted that.

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MR. FELDMAN: Just to clarify, any questions implicating work product of Mr. Thomson's office, he, in fact, would not be in a position to respond to those questions.

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A. Yes.

Q. Thank you.

MR. LUDDY: Good morning, sir. Rob Luddy on behalf of the defendants.

Q. Good morning. I don't think we have --

A. No.

Q. We have. Nice to meet you. I don't think it was intentional or maybe I misunderstood it, Mr. Feldman suggested in his opening remarks that you have ongoing prosecutions against--

Q. NWS. I take the word "prosecution" to suggest criminal actions. You don't have any criminal actions against NWS, correct?

A. That's correct. It's a civil matter filed in civil court.

Q. Okay. How long have you been with the New Mexico AG's office?

A. I think my ten-year anniversary was in September, so a little over ten years, I suppose.

Q. Ten years?

A. Yes, sir.

Q. So after the MSA was signed?
Q. Who was the contact in the previous administration?
A. I think his name was Glen Smith.
Q. Good. Can you open to core Document 38?
A. 38, yes.
Q. Can you identify that document, please?
A. Yes, that is a letter to the Foreign Trade Zone.
Q. And this was dated August 1st, is it?
A. Yes.
Q. August 1, 2008. How did this letter come about, just generally, tell me the background to it?
A. I think we had information that certain tobacco products was entering into the state of New Mexico through the Foreign Trade Zone.
Q. And when did you first obtain that information?
A. I don't recall.
Q. From whom did you obtain that information?
A. I don't. I'd have to go back and look. It may have been through NAAG contact. I'm not sure.
Q. Who -- with whom did you discuss the matter of NWS cigarettes coming out of the FTZ before you wrote this letter?
A. I think I may have discussed it with other states and NAAG contacts and, of course, internally in our office.
Q. Who's the NAAG contacts?
A. Is it -- Bill --
Q. Michael Hering, Bill Lieblich?
A. I think it was probably Bill Lieblich and probably Michael. I don't know.
Q. And what other states?
A. As best I can recall, California, Oklahoma, maybe Idaho, Nevada maybe because it was located near Nevada.
Q. Did somebody from NAAG contact you to advise you that NWS or that there was shipments of Seneca brand from the FTZ to New Mexico?
A. I think they may have. Now that I'm thinking about it, also, we may have and I can't tell you for sure whether we found out from products showing up in New Mexico, I'm not sure if this was prior or subsequent to the location of product found in Albuquerque, but to answer your question, I think I did also find out through NAAG.
Q. And did you have conversations with these other Attorney Generals from California, Idaho, Oklahoma, et cetera?
A. Generally, we -- a group get together, we often share information if there's working groups and things like that. Yeah, I would assume.
Q. And out of those discussions, with respect to the issue of product coming out of the FTZ, was there an agreed course of action that developed from those discussions?
A. Actually, not really. I sort of took this, evaluated our statute and I had concerns. So I believe I was the first state to write the FTZ. So, we may have discussed what we know about the product entering the different states, but I'm not sure we had conversations about -- well, we may have conversations, different remedies, different states may pursue.
Q. Right, I'm sorry?
A. I'm sorry.
Q. Were you finished?
A. Yeah.
Q. And you say you reviewed the statute. What statute did you review?
A. Our, what I call our tobacco statutes.
Q. Is that the complementary legislation?
A. I suppose people, yeah, people -- compliment versus escrow. I deal in, I call them tobacco statutes, Title 7, Title 6.
Q. Okay. But your letter doesn't implicate the Escrow Statute, per se, it focuses more on the complementary statute, correct?
A. I think that's right. I have to review it.
Q. Go ahead. You can review it. I have to ask you some questions about it anyway.
A. Okay. (Reviewing document.)
B. Okay. I would be mostly involved in what I call a directory issue.
Q. I'm sorry?
A. A directory issue.
Q. And that's under the complimentary statute?
A. I suppose that's true, yes.
Q. This is not a trick question. We have developed common terminology, I just want to make sure --
A. Yeah, I'm trying to fit into that mode, but okay.
Q. And the purpose of the complimentary statute in the eyes of New Mexico is to help enforce its Escrow Statute, correct?
A. I don't know -- I think that's one of the purposes. You know, another purpose, it's really what I would describe as -- to aid the state in -- it's also sort of like a help policy statute. It aids the state in trying to understand what product is entering the state and where it's going.
Q. Okay. And the product that was the subject of this letter coming through the FTZ, you determined that that was going to the Indian reservations in New Mexico?
A. Some of it was. I can't tell you factually because I don't have any personal knowledge where exactly it went. The invoices seem to indicate they were going to Boskit Farms and Amos.
Q. Both of those are located on Indian reservations, correct?
A. Yes, but I'm not sure. You know, I can't represent that all of them went there.
Q. But you don’t have any evidence of shipments, other than to an Indian reservation?
A. No, I don't have any evidence of shipments, other than Indian reservations. I do have some evidence of products showing up off of the reservation.
Q. Okay.
A. I shouldn't say -- I don't know the kind of term of art we're using. In New Mexico, we have Pueblos, they're not -- we have reservations but I use the term "reservation". Actually in New Mexico it's fee land. As long as we understand, I don't want to misuse a term.
Q. I appreciate that clarification.
Look at the first paragraph of your 8/1 letter. This is directed to the FTZ, it's the second line. "We are, however, concerned about the large quantities of non compliant contraband cigarettes being released from FTZ 89 to carriers bound from New Mexico."
The term "contraband" there, when those cigarettes were sitting in the possession of FTZ in Nevada, they were not contraband cigarettes, were they?
A. I don't know. You'd have to ask Nevada. That, I don't know.
Q. Okay. Well, you called them contraband, I didn't. You called them contraband cigarettes. Why were they contraband cigarettes when they were in the possession of FTZ?
allowing it to enter, then you're aiding and abetting.

Q. Okay. Forgive me for parsing your letters closely, sir, but you are writing a letter to a third-party telling them that they are holding contraband cigarettes of my client and I think I'm entitled to ask exactly what you meant by that.

A. And that's fine. And I'll explain to you the best I know but I'm not going to allow you to tell me what I meant.

PRESIDENT MARXMAN: Please explain.

THE WITNESS: The purpose of the letter was to advise the FTZ that we have information you're releasing into the state of New Mexico, that a carrier from New Mexico is coming in and you're releasing, and there's an address that says, it's located in New Mexico and you're releasing it to them, please be advised that you're on notice that you know that product is entering into the state of New Mexico. That's the purpose of the letter.

Q. Did you have -- let's look at the second page for a minute. You referred to the NMSA statute which I guess is the contraband statute or the complimentary statute?

PRESIDENT MARXMAN: NMSA.

MR. LUDDY: New Mexico SA.

PRESIDENT MARXMAN: Is that New Mexico escrow fund?

MR. LUDDY: Complementary legislation, I believe.

Q. Correct?

A. I believe that's right.

Q. And you cite the statute here then you say FTZ may be in violation of that section, correct?

A. Yes.

Q. Did you do any analysis as to whether you, your office had jurisdiction over FTZ to prosecute them for violation of that statute?

A. We believe we would. If it came to that, we would have jurisdiction if we wanted to pursue a civil action.

Q. Has a civil action ever been brought by New Mexico under that provision against any type of common carrier?

A. Against a common carrier? Not that I know of.

Q. Okay. And FTZ in the capacity in which they serve is essentially a common carrier in this capacity, correct?

A. To be honest with you, sir, I'm not exactly sure what FTZ is.

Q. Okay. Do you think it might have been useful to look into that before you threatened to bring an action against them for violation of your complimentary legislation?

A. By not -- we did try to understand what the Foreign Trade Zone was. We were comfortable with what we knew about the Foreign Trade Zone that we would have had jurisdiction to bring a civil action.

Q. Okay. I thought you just said you didn't know what the FTZ was. What is the FTZ?

A. I'm not entirely clear. It appears to be a large warehouse where product comes in, and then it's released.

Q. And the function it serves in the stream of commerce is essentially distinguishable from that of a common carrier, is it not?

A. That could be your argument. I don't know.

Q. What is your argument, sir? I'm not really arguing. I just want to know what your argument is. I want to know what you determined the FTZ to be, and how when you determined it to be to give you authority to take action against it under your complimentary legislation? That's what I would like to know.

A. I determined FTZ to be an entity that was holding, that took cigarettes in, was holding cigarettes, releasing cigarettes into the state of New Mexico.

Q. It was the FTZ that was releasing them into the state of New Mexico?

A. They were releasing them to either a common carrier or some form of distributor.
Q. And did you determine then on the basis of those facts that your office in the state of New Mexico had personal jurisdiction over them under the U.S. Constitution?

A. I did not sue them, so I didn't make that determination. This isn't a lawsuit. This is a notice letter. FTZ --

Q. You didn't --

A. Can I finish? Let me finish. FTZ very well to this letter could have responded and said here's what we are, here's what we do.

Q. Okay. That's fine. Not a lawsuit. What you were really trying to do is just threaten them so that they would stop being involved with NWS cigarettes; isn't that correct?

A. That is completely false. An attempt to block them from that particular product is not true. To characterize it as to block them from that product is not true.

Q. I'm sorry then. What was the intent of your letter?

A. The intent of the letter is the same as -- in all practices with regard to non compliant product, if we find someone dealing in non compliant product, we always make a good faith effort to write them and say, whether it's a distributor or it's a common carrier or it's a retailer and we say, "Look, under our statute we believe you are selling, importing one version of this, of this product. Please review the statute, review the directory. We are concerned that you're" -- and they can agree or disagree. To characterize it as to block them from that particular product is not true.

I'm not threatening them, I'm advising them.

PRESIDENT NARIMAN: May I just interrupt here? Did you receive any response from Nevada International Trade Corporation to this letter?

THE WITNESS: I think we did. I don't know if that's part of the record.

PRESIDENT NARIMAN: Is that --

MR. LUDDY: I don't believe it is. I don't know of a response which does not mean --

THE WITNESS: I don't know if it was part of this particular letter or something else.

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MR. FELDMAN: Object to the characterization.

Q. The last sentence of that paragraph?
A. Last sentence?
Q. Sentence that reads, "There may be federal violations, as well"?
A. Yeah, we thought there may be some, I guess that was with regard to, I don't know if it's Jenkins or CCTA violations.
Q. I take it you don't have authority as the New Mexico AG to pursue federal violations, correct?
A. No, I don't.
Q. But that didn't stop you from threatening them with federal violations--
MR. FELDMAN: Objection.
A. I was not threatening them with federal violations.

PRESIDENT NARIMAN: Mr. Luddy, I'm sorry, this line of cross-examination is not very fair to the witness, unless you produce the response of Nevada. Otherwise, there's no point in all this.
MR. LUDDY: I'll move on.

PRESIDENT NARIMAN: If it's on record, you produce it. If it's not on record, still you are entitled to produce it, but without that, you are asking him all these questions. The recipient of the letter would probably have said what he wanted -- what the true position was.
MR. LUDDY: Fair enough.
Q. If you could look at the complaint that you filed against NWS which is 37 in your documents there, sir?
A. Okay.
Q. Now, this complaint does not seek the collection of any taxes due in New Mexico, does it?
A. No.

PRESIDENT NARIMAN: What document?
MR. LUDDY: It's 37.
That's all the questions I have of Mr. Thomson. Mr. Violi has a few follow-up questions on a related matter.

CROSS-EXAMINATION

BY MR. VIOLI:
Q. Good morning, Mr. Thomson.
A. Good morning, Mr. Violi.
Q. Can I -- for my own information, I'm not sure who's representing, just so I know the context.
A. We're both representing the Claimants.
Q. Mr. Thomson, you testified a few minutes ago that one of the purposes of the complementary legislation was to aid in the enforcement of the escrow statutes, right?
A. Yes, because it requires some -- I suppose their length, in a sense.
Q. And Mr. Luddy just asked you about the collection of taxes in New Mexico for cigarettes. New Mexico collects state excise taxes; is that right?
A. New Mexico collects state excise taxes.
Q. And the mechanism in New Mexico for the collection of state excised cigarettes taxes is affixing New Mexico tax stamps to the packages, correct?
A. Yes. As I understand it, and I'm not a revenue attorney, the stamp is attached, a state excise stamp and I think there's a tax exempt stamp that is also attached. So it's not one and not the other. I think there's a non SET stamp.
Q. Under the Escrow Statute, an MPM must pay escrow for New Mexico based on the escrow statute based on the units sold in New Mexico, right, the term units sold?
A. I'm pretty sure that's right but say the question again and I'll --
Q. In New Mexico an MPM must pay under the Escrow Statute based upon what's called units sold in New Mexico?
A. That's correct.
Q. And unit sold is defined as cigarettes to which or for which the New Mexico state cigarette excise taxes have been paid, correct?
A. Yes.
Q. As evidenced by the affixing of the tax stamp to those cigarettes, correct?
A. Yes.
Q. Now, with respect to the sales, to the Jemez Pueblo and the Isleta Pueblo that were mentioned earlier, has the state of New Mexico ever asked that, to your knowledge, has the state of New Mexico asked that either to NWS or to the entities in Jemez or in Isleta that they pay the state excise taxes for those cigarettes?
A. To my knowledge, no, but I don't -- the Department of Revenue is a separate entity from the Attorney General's office, to my knowledge no.
Q. The cigarettes that are at issue in this letter that went to Jemez and Isleta, the Seneca cigarettes that you mentioned from the Foreign Trade Zone, and that came from NWS, has the State of New Mexico, I guess the Department of Revenue, has it asked for the payment of state excise taxes, cigarette excise taxes for those cigarettes, to your knowledge?
A. To my knowledge they haven't. To my knowledge it would be difficult because the tobacco product at issue here was not on the directory. So I'm not sure it could have obtained any kind of stamp.
Q. Did it ask, the Department of Revenue ask that the state tax stamp be affixed to those cigarettes in the Isleta or Jemez Pueblos, to your knowledge?
A. To my knowledge, they didn't -- I'm not sure they could have asked a state stamp be put on a non directory product, so I don't think they would.
Q. Is it fair to say that those cigarettes would then not constitute units sold under the Escrow Statute?
A. For the cigarettes at issue in this case, I don't suppose they would count as units sold because, again, they're not on the directory. They couldn't obtain a stamp because they couldn't obtain the stamp by -- I don't believe they would be counted as units sold.
Q. By the way, you're familiar with the MPM adjustment proceedings?
A. Honestly, I'm not. I tried to -- the MPM adjustment proceedings were prior to me starting the -- I never really handled the MPM adjustment proceedings, but I'll do my best.
Q. Fair enough. Have any participating manufacturer under the MSA taken the position that New Mexico failed to diligently enforce its Escrow Statute because New Mexico policy or otherwise, New Mexico law does not require that the cigarettes that we're talking about be considered units sold under the Escrow Statute or that they do require, I'm sorry, not required?
PRESIDENT NARIMAN: I'm sorry I didn't follow the question.
MR. VIOLI: I withdraw it. I'll rephrase it.
Q. Has any tobacco manufacturer in the MSA taken the position that the cigarettes that we're talking about in the last few questions, constituted units sold?
PRESIDENT NARIMAN: He said no.
MR. VIOLI: No, no, he was about to say --
PRESIDENT NARIMAN: The answer was --
MR. VIOLI: No, earlier on he said they're not units sold. I'm asking him if the tobacco companies -- you see, let me explain something.
Under the MSA, the tobacco companies that are there get to reduce their payments to the state if they say the state is not diligently enforcing the law. So some of the tobacco companies, not some of them, the major ones are saying, 'New York, you're not diligently enforcing this law because you're not collecting the money from the Indians,' right. So that's lack of diligent enforcement.
Therefore, we want to take three percent reduction in our payments to you for every one percent market share we lose, so when you allow Indians to sell cigarettes, right, we're going to take three times that amount and deduct...
it from your payments. And this is called lack of diligent enforcement.

And the states, we know New York's view that that's not lack of diligent enforcement.

These laws don't apply on Indian -- with respect to Indian commerce on U.S. land. So I wanted to find out from the witness, did -- are you aware whether or not the tobacco companies have taken that position vis-a-vis New Mexico's enforcement of the Escrow Statutes?

A. I understand the question.

Q. Sorry if it was confusing. They are challenging New Mexico's diligent enforcement. We haven't started the arbitration in that, I'm sorry, if you can't hear me. We haven't started the arbitration, so I don't know what their legal theory is. I assume they will make that argument, but I don't know, I don't have their statement of claim, but we would, I suppose, fight the concept that we are responsible for collecting escrow on product that was imported in this state that was not on our directory, that didn't have the stamp on it.

Q. That you're not responsible for that?

A. Right.

Q. You should not get a deduction for that?

A. Right, as far as the diligent enforcement element to this, but it raises an important point which is the directory statute has an element to it that goes beyond that because it's also, again, it's also, it's a health-related document. Not only for purposes of escrow but it's also for purposes when there's a stamp on it and it's a distributor to this license, we know where this product is going. So if it shows up somewhere, we know where it's been and where it's going and we know if that product, you know, when it goes through its certification that it's met all the requirements of the certification.

So my only point there is it's not just about the escrow fight or the diligent enforcement fight with the PMs.

Q. The certification process, let's talk about that. One of the things that a manufacturer must do to certify under the directory is certify that it is in compliance with the Escrow Statute, right?

A. Yes.

Q. That's a principal provision of the certification statute?

A. Yes.

Q. And New Mexico just recently passed its certification statute, or its most recent version, correct?

A. Uh-huh.

Q. It hasn't been in effect for many years, correct?

A. Yeah, I don't know how long it's been.

Q. And one of the second things the certification statute requires is that a manufacturer waive its personal jurisdiction in the state of New Mexico, doesn't it?

A. Yes.

Q. So if you're a company in the Philippines, India or China as we've seen or even Canada, the certification statute would require, and assuming that these companies don't have any nexus or contacts with this foreign jurisdiction, that is the United States or even the Jemez or Isleta Pueblo, notwithstanding those lack of jurisdictional contacts, the certification statute requires if your cigarettes are going to be sold in the state of New Mexico, you have to fill out this certification that you're in compliance with the Escrow Act, that you're a manufacturer under the Escrow Act, and that you are waiving personal jurisdiction under this complementary legislation for purposes of enforcement of the Escrow Act, right?

A. That's one of the many requirements.

Q. And you have to certify that way before your products can come into the state of New Mexico, correct?

A. Yes.

Q. Otherwise, the State of New Mexico says it's contraband, it can't cross our borders,
right?
A. Yes.
Q. All right. Are you familiar -- we're talking a lot about the Escrow Statute. Are you familiar with the term qualifying statute?
A. No.
Q. I'm going to read for you Section 9(d)(2)(e) of the MSA. I'll read it into the record. A, quote, qualifying statute, end quote, means a settling state's statute, regulation law and/or rule applicable everywhere, the settling state has authority to legislate.
That effectively and fully neutralizes the cost disadvantages that participating manufacturers experience vis-a-vis non participating manufacturers within each settling state as a result of each of the provisions of this agreement. Have you ever heard that agreement before?
A. Yes.
Q. And that's language in the MSA, correct?
A. That's my understanding, yes.
Q. And it provides a definition of or purpose for a qualifying statute, correct?
A. That's my understanding.
Q. And the purpose is here, quote, effectively and fully neutralizes the cost disadvantages that participating manufacturers experience versus non participating manufacturers?
A. That's a purpose as stated in the MSA, correct.
Q. Then the MSA states again in that provision, quote, each participating manufacturer in each settling state agree the model statute in the form set forth in Exhibit T, is enacted without modification or addition, except for particularized state procedural or technical requirements, and not in conjunction with any other legislative or regulatory proposal shall constitute a qualifying statute, right?
A. I suppose you can all read the MSA.
Q. Now, did New Mexico pass what is attached to the MSA as Exhibit T?
A. I believe, I wasn't there. I think they passed what would be called a model statute or qualifying statute.
Q. Or qualifying statute?
A. Right.
Q. Why is it important to pass what is called a qualifying statute or the Model T Statute?
A. I suppose, again, I wasn't there when the statute passed. Again, I'm enforcing statutes on the books now. I suppose that they agreed in the MSA to pass what would be deemed a model statute, so that the enforcement statutes were somewhat uniform.
Q. And the reason is because if a state doesn't pass the model statute, the qualifying, what's called the qualifying statute, then the state can't qualify for an exemption from those draconian consequences we talked about before and that is the --
MR. FELDMAN: Object to the characterization.
Q. Right?
A. Well --
MR. VIOLI: I'll withdraw.
Q. If you don't pass a qualifying statute?
PRESIDENT NARIMAN: Mr. Violi, are you testing his knowledge on the subject?
MR. VIOLI: I would like him to confirm that there's, the state will face a reduction in MSA payments if it doesn't pass the Escrow Statute.
A. That is true and, again it also involves the public health provisions of the MSA. It allows us -- look, we understand that tobacco is, I think it's undisputed tobacco is a nefarious product, it's a product like liquor that's regulated. So it sets up a system of uniform regulation. That's what it also does.
Q. But this particular qualifying statute if passed, and assuming diligent enforcement, would prevent the state from facing an adjustment or reduction under the MSA, correct?
A. Yes, I think that's right.

Q. Now, I would like to read into the record now 9(d)(2)(g) of the MSA, quote, in the event a settling state proposes and/or enacts a statute, regulation, law and/or rule applicable everywhere the settling state has authority to legislate, that is not the model statute and asserts that such statute, regulation, law and/or rule is a qualifying statute, the firm shall be jointly retained by the settling states and the original participating manufacturers for the purpose of determining whether or not such statute, regulation, law and/or rule constitutes a qualifying statute.

Are you familiar with that provision of the MSA?

A. I've read that provision, yes.

Q. And that provision, let's try to summarize, provides that when a state is going to pass a law, rule or regulation, that is not exactly like the Model T that's attached, that's called the model legislation, that's called the allocable share release provision, correct?

A. I suppose that's true. I'm not an expert on that provision. You know the MSA is huge.

Q. Fair enough?

A. That provision says what it says. Thank you, that's fine. I'm not here to test your knowledge. It says what it says.

MR. FELDMAN: Mr. President, I would reiterate again that Mr. Thomson has put in a one-page declaration in this arbitration.

MR. VIOLI: I agree. I only have a couple more questions and it has to deal with enforcement, what he said enforcement --

PRESIDENT NARIMAN: This is a provision in, ask him. So far if he can he can.
Attorney General against Native Wholesale Supply Company? Can you tell us what happened to this complaint? Is it dismissed, allowed or what happened?

THE WITNESS: Can I get those guys on the stand and ask them.

PRESIDENT NARIMAN: No, do you know?

THE WITNESS: Right now I think we are -- they are challenging the jurisdiction of the State of New Mexico. We've responded, and I think we are considering and they can correct me if I'm wrong, are considering a stay in the matter pending collateral issues.

PRESIDENT NARIMAN: So it's pending, nothing has happened to it?

THE WITNESS: That's correct.

PRESIDENT NARIMAN: Okay. That's all I wanted. Yes, there's a question here.

ARBITRATOR ANAYA: Good morning. If you can just explain how New Mexico regards on-reservation sales of cigarettes for taxation purposes, does it seek to tax all of those, some of them and how it goes about doing it, if it does?

THE WITNESS: My understanding, Mr. Anaya, and again, I'm not the stamping authority, but I'll give you my best understanding is that a licensed distributor, the product comes in, it's transferred to a licensed distributor, that distributor has what's called stamping authority. Then they go to taxation and revenue and they either acquire a state excise stamp or non SET stamp.

In your analysis, it would be the tribal stamp and there's no restriction on the number you could get. So if they go to taxation revenue, and say, "I need X amount of tax exempt stamps," then they're given them. They're placed on the product --

ARBITRATOR ANAYA: How do you get a tax exempt stamp, for what purposes?

THE WITNESS: Well, legitimately the purpose would be for sales on-Reservation -- on tribal land for tribal members. I don't know the exact language. It's supposed to be to a properly chartered tribal entity. So they literally, the distributor goes to taxation revenue and says, "I want X amount of tax exempt stamps," and they're given them.

ARBITRATOR ANAYA: The distributor in this example being smoke shop on the reservation or distributor to a smoke shop on the reservation.

THE WITNESS: Distributor to a smoke shop, yes, sir.

ARBITRATOR ANAYA: And the case that we're talking about that would be the Isleta Wholesale?

THE WITNESS: Yes, sir.

ARBITRATOR ANAYA: And that's a distributor on Isleta Pueblo?

THE WITNESS: I'm not sure what Isleta Wholesale is. I think they've represented that they're a distributor. They're not a licensed distributor in the state of New Mexico. They may be one on Isleta, but they're not a licensed -- they don't have a license through the state to obtain those stamps we were just talking about.

ARBITRATOR ANAYA: Right.

THE WITNESS: Am I being clear? It's a little confusing. If you're licensed with the state, then you get the two stamps and you put the stamps on the product.

ARBITRATOR ANAYA: Who would that be in New Mexico concretely with regard to sales on Indian Country lands, whether it be Pueblo fee lands.

THE WITNESS: We have a whole number of -- we have a list of distributors, licensed distributors on our website.

ARBITRATOR ANAYA: Would those typically be off-Reservation distributors?

THE WITNESS: Often they are.

ARBITRATOR ANAYA: Non Indian distributors?

THE WITNESS: Generally yes, but it doesn't prohibit a tribal entity from being a licensed distributor.

ARBITRATOR ANAYA: They're the ones
that get the tax stamp?

THE WITNESS: Yes, sir.

ARBITRATOR ANAYA: If they're going to distribute to a smoke shop on Indian country land, then they can get a tax exempt stamp?

THE WITNESS: Right.

ARBITRATOR ANAYA: That would be for sale to tribal members only or for sales to non members, as well?

THE WITNESS: As I understand it, tribal members only.

ARBITRATOR ANAYA: Okay. So if there's a smoke shop on Isleta Pueblo or Navaho reservation or one of the apache reservations in New Mexico and they're selling to non Indians, they have to have the regular tax stamp on those cigarettes for those sales to non Indians.

THE WITNESS: They probably should. Generally, they have tax exempt stamps on them.

ARBITRATOR ANAYA: Even for the sales to non Indians?

THE WITNESS: Generally, that's what has happened but --

ARBITRATOR ANAYA: What position does the State of New Mexico take as to those?

THE WITNESS: I don't know what position Taxation and Revenue has taken in that circumstance. I can tell you we're very leery, very leery of going on-Reservation to enforce that type of issue. That's why in this case it's actually a step back. We're dealing with purely directory.

ARBITRATOR ANAYA: So as a practical matter, the smoke shops that are on I-25 between Albuquerque and Santa Fe, right off the highway, as a practical matter those smoke shops sell tax exempt cigarettes?

THE WITNESS: Yes.

ARBITRATOR ANAYA: Including to non Indians?

THE WITNESS: I believe so.

ARBITRATOR ANAYA: In practice, I'm saying?

THE WITNESS: In practice, yes, sir.

that's my belief but important to note they have a stamp on them. How do they have a stamp on them, they're on our directory. That's an important, significant point.

ARBITRATOR ANAYA: Okay. And the cigarettes that are coming through wholesale, Native Wholesale Suppliers do not have a stamp?

THE WITNESS: Those are our allegations in the complaint.

ARBITRATOR ANAYA: Thank you.

MR. VIOLI: May I ask one more question.

Q. The state licensing requirement, does that require a bond, a monetary bond to be posed by the state license distributor?

A. I don't know the -- that's a taxation revenue handles the licensing. It may, I'm not sure.

Q. Okay. Now with respect to on-Reservation distribution, does an on-Reservation distributor, is it required to get a license from the State before it can distribute on its own land?

A. If it's distributing on its own land, I suppose it doesn't.

Q. You haven't -- your office hasn't prosecuted reservation distributors who are not licensed and are distributing on their own land, has it?

A. I don't think we have.

Q. And when I meant prosecutor, I meant civil?

A. Right.

MR. VIOLI: No further questions.

ARBITRATOR ANAYA: Just so I'm clear, maybe I'm muddled, I'm a little unclear on the facts, perhaps, but how does that line of questioning, I'm not saying it doesn't, how does that line of questioning have to do with the facts here?

MR. VIOLI: Because when you're an on-Reservation --

ARBITRATOR ANAYA: No, not in the abstract, specifically?
MR. VIOLI: Because the Jemez distributors --

THE WITNESS: No, that's New Mexico case, your case.

MR. VIOLI: Mr. Weiler's going to present it but we believe that violates international law, there's an encroachment on both treaty rights and customary international law when a sovereign exercises jurisdiction when it doesn't have jurisdiction to excise.

ARBITRATOR ANAYA: You were talking about distributor on-Reservation, I understood.

MR. VIOLI: Right.

ARBITRATOR ANAYA: Where is the distributor on-Reservation here in this case?

MR. VIOLI: The Jemez and Pueblo, yeah, the Isleta Wholesale Supply and the distributor in the Jemez Pueblo, are native operating on their own reservation. We sell, NWS when I say we. We sale interstate commerce directly to, those licensed distributors, licensed by their own people, by their own sovereign nations.

And the State of New Mexico is now saying in so many respects is saying we know you're licensed by your own people and you can be for tax purposes, but all of a sudden when it comes to the MSA, we're going to say the complementary legislation goes where not even the taxes go. We're going to stop you, we're going to stop nation-to-nation commerce.

ARBITRATOR ANAYA: Okay. I understand.

PRESIDENT NARIMAN: Okay. Do you have any questions?

MR. FELDMAN: Yes. Two questions.

Thank you, Mr. President.

REDIRECT EXAMINATION

BY MR. FELDMAN:

Q. Mr. Thomson, what is the Native Wholesale activity that is being regulated under New Mexico's directory statute?

A. Under our complaint?

Q. Yes.

A. It would be the importing or causing to be imported of non directory product into and through the state of New Mexico, and with regard to the directory, the products not on the directory.

Q. And with respect to NPMs have New Mexico brought enforcement actions against NPMs?

A. Yes. I was trying to come up with -- yes, NPMs both foreign and domestic.

Q. And on cross-examination you were --

A. And let me add also distributors. And let me add it's not all about suits, so it's not a number of lawsuits we brought part of my job is working with NPMs and distributors to make sure, that's why if you look at our website, we try to be up front about here's all the brands, so they can look at that and educate themselves about the brands on our directory, sorry.

Q. Have you worked with NPMs to get them on the directory?

A. Yes.

Q. On cross-examination you were asked questions about the August 1, 2008, letter to the Nevada FTZ and I'm just going to read two short paragraphs from that letter. The first says, "To assist you in determining whether cigarettes are contraband in New Mexico, I refer you to the website where our directory of compliant products is listed. It can be found at WWW dot NMAG dot gov. And then select tobacco manufacturer's info section. To assist in resolution of issues arising from past shipments from FTZ number 89, I would like to begin discussions to form a binding memoranda of understanding or other agreement that will ensure that non compliant products are not released by FTZ number 89 when the shipping destination on the shipping documents is any location in New Mexico.

Mr. Thomson, when your office sent the letter to the FTZ, were you threatening the FTZ?

A. No. That's why I apologized, I got a little excited about that. That's not my mode of operation. That's not unusual with other -- it's not unusual with other distributors, NPMs or retailers. I take the job of the State very seriously. We're not hammering people.
It was a way to resolve it and that was my approach, so . . .

MR. FELDMAN: Thank you, Mr. Thomson.

PRESIDENT NARIMAN: Just one question

Mr. Thomson. The letter says, "Please contact me at your convenience, please contact me at your convenience to discuss this matter."

Did anybody contact you in connection with this letter of yours on compliance or non-compliance? Did anybody from Nevada speak to you?

THE WITNESS: I may have talked to Nevada general counsel. I will go back through my records to see if we have a written response from them.

PRESIDENT NARIMAN: You have no recollection.

THE WITNESS: I don't but I speak to so many -- I'm not sure whether we -- I spoke to the general counsel or someone at the FTZ or what also may have happened because as we're talking about before, we were working with Nevada and other states where another state AG spoke --

PRESIDENT NARIMAN: My question is what happened after this letter with regards to its content August 1, 2008, do you know anything about it or you don't know anything about it?

THE WITNESS: I don't know.

PRESIDENT NARIMAN: Because you spoke to counsel you said about this.

THE WITNESS: Right. And I don't -- we never entered into a formal memoranda, as I suggested.

PRESIDENT NARIMAN: Okay. Thanks.

Thank you.

THE WITNESS: Thank you, sir.

PRESIDENT NARIMAN: Okay. What next?

MR. LUDDI: Mr. Weiler has it setup.

PRESIDENT NARIMAN: No. Let him set it up. We'll take the coffee break when it comes.

(Q. Is it there?)

PRESIDENT NARIMAN: Mr. Weiler, it's all yours.

MR. FELDMAN: Mr. President, before --

Mr. President, before Mr. Weiler -- sorry -- before Mr. Weiler begins, we've been notified by the Claimants that they do not intend to call Brent Kaczmarek, our valuation expert, for cross-examination.

We just wanted to notify the Tribunal that Mr. Kaczmarek is available at this time, in the event the Tribunal had any questions for him.

PRESIDENT NARIMAN: That's gone on record, I take it. What you have said has gone on record.

MR. WEILER: Good afternoon -- is it afternoon yet? Good morning. So what I tried to do over the evening was take a look at the transcript over the past two days and see the occasions when the Tribunal had questions. And, well, of course, we still understand we have a closing to do, we thought that we could take some of your time now to go through some of the materials and see if we can answer some of your questions.

So it seemed to me that these were four of the key areas that we could focus on. The first one, I heard a couple of times and it seems like a fairly important issue, why is this a NAFTA claim. So I thought that we can start with why this is a NAFTA claim.

And, again, so there isn't any confusion, I use that fancy literary word "redux." We're not abandoning any part of the case. We're trying to make it as brief and as tight as we can.

So there are two standards here, minimum standard and the, what we could call the cumulative less favorable standard. I'll start briefly with the no less favorable standard since we did talk about that a little bit yesterday, and I have a few notes I just wanted to go over with you.

So with respect to the comparison, the point of the obligation is to ensure that there's an equality of effective opportunity for the parties, and it's an individualized test because there's only one Claimant. They don't represent their country. They represent themselves.
And as the Pope & Talbot Tribunal and the Feldman Tribunal found the comparison should be with the best treatment being received by some other foreign national. If it's most favored nation treatment or national, if it's national treatment.

The best treatment here, we think, would be the opportunity to join the MSA with grandfathering. So as a result of the Allocable Share Amendment, we are placed in a position where the status quo ante has changed, and the ideal circumstance for the Claimant would have been to have been able to join the MSA, much like the SPMs had joined the ones that had exemptions, to join on similar terms. I'm trying to read my own writing. That's a dangerous thing.

The other choice would have been to pay higher escrow. Those were essentially the choices presented. It was either seek to join the MSA, hope to get the same treatment the exempt SPMs received or pay the escrow and take your chances and see how long you last.

And we know that in three states they didn't last and they're hanging on in two states and the numbers show that. So . . . to be clear though the opportunity was not passed up. The Claimant's did try to join the MSA.

PRESIDENT NARIMAN: Excuse me for interrupting. What period of time are you talking about? What period and so on, what year?

MR. WEILER: Post Allocable Share Amendment, so with the Allocable Share Amendment about to come into place, if I recall the time frame correctly, the Claimants saw this, knew what was coming because the Allocable Share Amendment was coming in in five different states with five different legislature so it didn't happen the same day. But it was clear what was happening and they did make their efforts, which is in the record to try to join the MSA.

And that's one point I wanted to make because there's one thing that concerned me because the president said yesterday, he was asking about the comparison between an exempt SPM and MPM such as Grand River, slash, NWS and you asked about whether or not it was fair given that the exempt SPM had, quote, unquote, all of these health considerations. And I just wanted to make it clear that the types of health considerations that, the things that one would have to give up were really the kind of things that a company like Grand River wasn't doing. It would not be hard to give up.

They weren't advertising on NASCAR. They weren't advertising on television. So the kinds of things that they would have had to give up to join the MSA, they were obviously quite willing to, and how do we know that? Because they tried to join the MSA. If they had any problem with it, well, they would have said say we'll joint subject to this or that exemption.

The only thing they wanted was the same kind of deal that the exempt SPMs received. And in that regard, it's important to note while the status quo ante is better than it is now, it still wasn't fair to be able to compete against the exempt SPMs, Grand River had to stay in five markets.

What they wanted to do and what Jerry Montour's affidavit states he wanted to do was to compete in all of the markets in the U.S. off-reserve if he was going to join the MSA. He was more than willing to compete if given the opportunity to compete on a fair basis.

So there should be no confusion about the level of treatment. Grand River was more than willing to take on the negligible extra commitments in terms of healthcare. I mean, no one even asked the Claimant ever, do you -- we heard yesterday about the fire retardant cigarette paper. My clients use that. Nobody bothers to ask that. It's just assumed that they don't. The best thing we have is a Buffalo newspaper, that's not a reliable source. So if someone would just ask the Claimants rather than assuming that they're, quote, unquote, scofflaws, they might have been able to probably, I would have assumed, maybe come to some sort of arrangement but instead...
it didn't happen.

PRESIDENT NARIMAN: For my edification, Mr. Weiler, at some point of time not just now will you just enumerate the documents, just give us a list of the documents on each side showing that you attempted to join the MSA genuinely, bona fide and that they rejected your efforts. I would just like to have that in picture form, just give us.

MR. WEILER: The tabs.

PRESIDENT NARIMAN: Yes, just the tabs.

MR. WEILER: Will do.

PRESIDENT NARIMAN: Stay there.

MR. WEILER: Yes, I'm not going to run off now. And let's see, the other point I wanted to make was I wanted to turn back to something that Professor Anaya said. I don't think this changes anything, but I just thought that I would make sure I was on the right page, so to speak.

So we were talking about intent and the question was assuming that we have a prima facie breach in the sense that we have less favorable treatment according to the Claimant, as compared to someone else and that the comparison sticks because they're relatively in competition.

Yes, it is relevant why they did that, but we agree with the statement you made and it is indeed the statement that many WT panels and tribunals have made that had more the natural treatment cases, it's impossible to discern intent, whose intent we are talking about.

In S.D. Myers, we were quite lucky because it was clear that there were some angry bureaucrats who gave up the Claimants an access information request that you could only dream about. We had smoking guns that said someone's got to tell the minister we can't do this under NAFTA. But we're not -- you're generally not going to get that, that's not going to happen very often. And besides, whose intent, which legislature do we want to pick.

So, it's funny because Mr. Eckhart yesterday actually pronounced the test, but with respect to local law, municipal law, he said it's manifest on the facts. And, indeed, that's the way the WTO Tribunals have gone. Manifest on the facts, whether or not it appears that there was or was not a good reason. And it is a balancing test.

Just last night I was reading -- I didn't bring it because it's too late, but it's a 2009 law article by two very well known young men who are in this field, and it's a whole article about proportionality analysis. And so while they didn't talk about national treatment, they talked about minimum standard and they talked about expropriation.

Nonetheless, it was certainly clear to me that we're at least on the same page. We're talking about this notion of how well the measure appears to meet that goal, and I think it's fair to say that protecting healthcare is a legitimate goal. And so the question is going to be manifest on the facts to what extent does it appear to be meeting that goal, balanced against what harm it's doing to the Claimants.

And that is something that the Tribunal will have to weigh based on all the evidence they have. So the one thing that's pretty -- that is clear though from the case law, to the extent that you feel they want to be guided by it, is that intent to discriminate on the basis of nationality is not in the text and it's not in the case law.

It's probably because it's not in the text. Though my friends, and my friends from the other NAFTA parties in the cases that I've been involved in, will continue to say that it is discrimination on the basis of nationality. Thus far, it appears that the vast majority of Tribunals don't agree with them. And I would submit you shouldn't agree with them either because it's not on the face of the text. The text doesn't require it.

Nationality is only a concern to the extent that you need to be the right kind of national to even be in the door to make this claim. So with that, I'll turn to the Article 1105. Of course, we can certainly come...
back to this if you want, but with respect to the Article 1105 case, again, I tried to figure out how I can hopefully describe to you why this is a NAFTA claim.

The important point I want to make on this slide though is the word "collectively." I'll get you the reference because I think I wrote it down on another piece of paper.

ARBITRATOR ANAYA: Mr. Weiler, excuse me. This is useful but what will be particularly useful and I imagine if you're going to do this in your closing, would be if you link some of what we've heard, the cross-examination, you know, the points that were being made to what you're saying.

MR. WEILER: I'm doing a little bit of it here and we'll certainly be doing more in our close.

ARBITRATOR CROOK: In a similar vein, I would be very interested if we could focus on what specifically are the measures that are being contested here.

MR. WEILER: The answer to that question is with respect to off-reserve Allocable Share Amendment with respect to on-reserve, it is the enforcement of the escrow statutes regardless of whether it was or was not before or after the amendment as per the Tribunal's decision, and it is most definitely the Contraband Laws, which I will discuss briefly at a certain point during my presentation and we will certainly also be addressing further on, but it is the enforcement of those two pieces of legislation in these various states that we've been talking about. Those are the measures.

ARBITRATOR ANAYA: And you're distinguishing between on-reserve and off-reserve?

MR. WEILER: Yes, because the expectation of the Claimants with respect to their on-reserve sales, their sales that were from nation to nation, from Indian wholesaler to Indian distributor, or I think to a certain extent sometimes retailer, that the expectation was that they would not be, that the regulation that they would be subject to in conducting those sales would be the regulation of the sovereign entities within whose jurisdiction they were operating.

So I've heard many times my friends say they thought they could be free and clear, but that's not true. They just expected to be regulated by the sovereign jurisdictions in which they were trading.

ARBITRATOR ANAYA: And thereby not -- and thus, not subject to regulation by the states.

MR. WEILER: Yes, that's correct.

ARBITRATOR ANAYA: At all.

MR. WEILER: And, of course, subject to the federal --

ARBITRATOR ANAYA: Not subject to regulation by the states, including as to sales to non Indians?

MR. WEILER: Well, the Claimants never sold to -- they're wholesalers.

ARBITRATOR ANAYA: No, no, I mean -- you know what I'm saying. I mean, including as to those cigarettes ending up being sold to non Indian consumers.

MR. VIOLI: With respect to that, Professor Anaya, the measures are any application of the MSA regulatory regime, so as the jurisdictional award --

ARBITRATOR ANAYA: I understand. It's
just that when we talk about expectations, these are in my mind relevant considerations.

MR. VIOLI: Yes. So I'm trying to blueprint the measures. The measures are the MSA, the original Escrow Statute, everything they were talking about on-reserve because the view is the expectation is that they never had the right to enforce any of them, and the jurisdictional award said that, but with respect to off-reserve, I believe the jurisdictional award said --

ARBITRATOR CROOK: Is that what we said?

MR. VIOLI: -- on-reserve doesn't have a time --

MR. FELDMAN: Counsel, did you just say the MSA is a challenged measure in this arbitration?

MR. VIOLI: With respect to the on-reserve, the MSA regulatory regime, includes the Allocable Share and includes the original Escrow Statute.

MR. FELDMAN: And does not include the 1998 agreement, correct --

MR. VIOLI: The 1998 agreement is part of the statute but we're talking about on-reserve. There's a distinction between on-reserve and off-reserve. And the -- any measure, any MSA related regulatory measure on-reserve did not have a time bar, is my understanding. It was the --

MR. FELDMAN: This isn't a time bar issue. The Claimants have affirmatively stated that the MSA is not a challenged measure in this arbitration.

MR. VIOLI: If you read the second -- you know, I appreciate your parsing it out but if you read the cases that have talked about this in the domestic courts and what we've presented all along is that trying to divorce the MSA from the Escrow Statutes is inappropriate.

It's inappropriate because as I said yesterday, you have one statute that says do one of two things, enter into an agreement or abide by the schedules in the NPM payments in the schedules in the Escrow Statute. That proceeds after 1998.

1998 agreement, correct --

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It's inappropriate because as I said yesterday, you have one statute that says do one of two things, enter into an agreement or abide by the schedules in the NPM payments in the schedules in the Escrow Statute. That proceeds after 1998.
PRESIDENT NARIMAN: What's the difference?

ARBITRATOR ANAYA: And you mentioned jurisdiction award.

MR. WEILER: My point, Professor Anaya, was that the jurisdictional award, it didn't matter how you decided, it was still a measure, the MSA was an private agreement between parties and if we misspoke, mea culpa, if we misspoke, it is not a measure. It informs the measures that it implemented, but the MSA is -- it's the definition of a measure doesn't include agreements between parties, private parties.

ARBITRATOR ANAYA: We did make a distinguish -- between on-Reservation sales, true members of federally recognized tribes and the jurisdiction award.

MR. WEILER: Yes.

ARBITRATOR ANAYA: And how do you see that as informing this analysis, what is the measure and also what is a reasonable expectation or any of the points that you're making?

MR. WEILER: With respect to sales between -- well, perhaps as a matter of getting into the law and certainly I'm at a disadvantage compared to many people in the room.

ARBITRATOR ANAYA: Who can put this all together? I keep hearing, no one is an expert on this, and the other. Someone's got to be able to put this all together.

MR. WEILER: The test, as far as I understand it, is that with respect to regulatory measures -- well, first with respect to taxation measures, with the taxation measure, if the tax, if non Indians have come on to reserve and bought cigarettes, and when they go back out, they don't pay the taxes they're supposed to pay, the case law shows it is perfectly appropriate for the state to require the seller of that product, excuse me, the seller of that product to collect information and if I'm not mistaken even collect the tax on behalf of the state. It's just the information they can collect.

With respect to -- so that's the simple test and, obviously, it matters the incidence of the particular measure that's involved. This isn't a tax we're talking about here. We're talking about something that doesn't have to do with the consumer coming on, taking it off and they're supposed to be paying for it.

ARBITRATOR ANAYA: I'm sorry, I didn't really want to go down, you know, the path of trying to parse the U.S. case law which is very confused. I'm not saying it's just confusing to the reader, it's confused area of case law, so there's no surprise that we have divergent views of what it says, and even here we have divergent views, but what I want to know is how these distinctions on-Reservation, off-Reservation that you are making, the distinction sales to Indians sales to non Indians that we make in the jurisdictional award, how those relate to your claim. You're making these --

MR. WEILER: If you mean the NAFTA claim?

ARBITRATOR ANAYA: Yes, I mean the NAFTA claim.

MR. WEILER: I'm there, but if it's the evidentiary --

ARBITRATOR ANAYA: No, I'm trying to relate all these things, okay, good. I'm sorry if I derailed things inappropriately.

PRESIDENT NARIMAN: Can we stop here?

ARBITRATOR CROOK: We can certainly stop. I have a question.

PRESIDENT NARIMAN: We'll resume at 11. (Whereupon, at 10:45 a.m., the hearing was adjourned until 11:00 a.m., the same day.)

PRESIDENT NARIMAN: Can we start?

MR. KOVAR: You can start.

PRESIDENT NARIMAN: Do you have an announcement?

SECRETARY YANNACA-SMALL: Yes. The announcement with regards to the time each party has available. The Claimants have eight hours and 17 minutes and the Respondent 13 hours and 37 minutes. Eight hours and 17 minutes for the
Claimants and 13 hours and 37 minutes for the
Respondent.

PRESIDENT NARIMAN: That's the
remaining time?

SECRETARY YANNACA-SMALL: Yes.

MR. VIOLI: The redirect of Mr. Eckhart
last night, by Respondent, was that put towards
Claimant's time?

SECRETARY YANNACA-SMALL: No.

MR. VIOLI: Okay. So --

SECRETARY YANNACA-SMALL: Everything
it -- and the questions from the Tribunal are
excluded.

MR. VIOLI: For both sides.

SECRETARY YANNACA-SMALL: For both
sides.

MR. VIOLI: All right. So the
Respondent has used one hour and 23 minutes in all
of their questioning and their questioning of the
economics -- the evaluator yesterday, it's only
come out to one hour --

SECRETARY YANNACA-SMALL: Yes. That's
the time recorded.

MR. VIOLI: Okay.

PRESIDENT NARIMAN: Okay. We will
begin.

Mr. Crook has a question.

ARBITRATOR CROOK: We were having a bit
of a side-bar discussion about the definition of
the measures. And as we proceed, I think it would
be useful to the panel if you could direct your
attention to Paragraph 72 of the jurisdictional
award in which we said, among other things, where
we addressed the question of on-Reservation sales.
I will just draw your attention to one
sentence but I think it's really the entire
paragraph that would be important for you to
consider.

On-Reservation sales of tobacco
products, at least such sales to members of
federally recognized Indian tribes, are generally
exempt from regulation by the states within the
United States as a matter of federal law. And
then in Paragraph 103 of our dispositivewe noted
that certain claims were dismissed but claims with
respect to retail sales on-Reservation would be
considered at the stage of the merits.

And as you present your claim I think
it would be helpful to the Tribunal if you could
perhaps relate it to the specific findings that we
made there.

MR. WEILER: Thank you, Mr. Crook.

I also would just like to confirm when
Professor Anaya was asking me about the connection
between the NAFTA and the measures, I had wrongly
assumed that you were actually asking my opinion
of the state of Indian law, which I now understand
you weren't.

And I did want to make sure on the
record that I did not take a position either on
behalf of the Claimants or, for that matter, on
behalf of any indigenous sovereign concerning the
application of state taxes. I just wanted to make
sure that was quite clear that I didn't do that
and that's certainly not the Claimant's
position and probably not any sovereign's

position. I just wanted to confirm that.

If that's fine, I'll just continue on.

ARBITRATOR ANAYA: It would be useful
perhaps if you would address Mr. Crook's point.

MR. WEILER: Yes, I'm sorry, I had the
idea, Mr. Crook, that was as you go on as opposed
to --

ARBITRATOR CROOK: I always hate to put
counsel in a difficult position. If you feel
you're in a position to address the point now,
please do so.

MR. WEILER: I do not feel that I am so
I will meditate on it and work with it and build
it in as much as I can at the moment but then we
will also return to it.

MR. VIOLI: Mr. Crook, may I ask what
the second paragraph -- well, the first one was 72
103. What was the second one?

ARBITRATOR CROOK: 103.

MR. VIOLI: I thought that was it.

ARBITRATOR ANAYA: I would just like to
point out we were very deliberate in our
jurisdictional award as to that distinction. You know, that there were certain -- the MSA claim was barred as to the off-Reservation sales but not as to the on-Reservation sales.

MR. VIOLI: Right. That was my understanding. It says March 12, 2001, for off-Reservation -- retail off-Reservation.

And one thing I would like to engage, because it's an issue when it comes up with the incidence of the regulation.

With respect to on-Reservation sales, right, Claimants here, and I know you're having trouble with this, I think it's something we should, I think, clarify at this point.

Claimants -- and I understand you know it, and when we talk about on-Reservation sales to non-members of the community, that's fine, but there's a distinction as Professor Goldberg and Professor Fletcher I believe have pointed out. The Claimants here only deal in a non-consumer sale transaction. All right. It's only a supply situation.

The incidence of this regulation, however, is not on the consumer. It is on, as Professor Gold- -- Professor Clinton, excuse me, has mentioned, the incidence is on not the consumer, but the upstream supplier and manufacturer. In a transaction that takes place with a member or company owned by members of one Tribe or Nation and sometimes another Nation or sometimes a member or a company owned by a member of another Nation.

Now, those transactions may result in an ultimate sale to a non-member of that remote sovereign coming onto the territory in purchasing the product. But the incidence of this regulation is not on that remote consumer. The incidence is on the supply chain and the manufacturing part of this distribution chain.

So we think that is important because the standards, at least in a domestic Indian law, and I'm not so sure I agree with even the imposition, and as Professor Anaya said, reasonable scholars, judges and lawyers have differed as to whether or not whether a state can come in and tell a licensed entity of the Nation, a Tribe, you know, you have to charge tax to your consumer, you have to ask this person, are they white, are they African-American, are they Native American, are they Asian. And if they're any one of those you have to charge different price and impose a tax.

I personally think the development of the law is going to be that that perpetuates civil rights violation. And it's putting a Native American retailer in an unfortunate position. And I think there's commentary on that.

So that is my position I would argue all the way to the Supreme Court if I had to. But now we're dealing with what does the -- what is our Claimant's position? And our Claimant's position is we only deal in the upstream supply and wholesale and that the incidence of this regulation, both the complementary legislation, because the complementary legislation doesn't just say, you know, residents of Arizona, residents of New Mexico, you're not native and when you go on the Native American land you have to --

ARBITRATOR ANAYA: Mr. Violi, you know, I don't want to really interrupt you but I think we understand your position.

The question is how does that relate to the claim.

MR. VIOLI: Indeed.

ARBITRATOR ANAYA: And in light of our jurisdictional award.

MR. VIOLI: Right. And so my point here is that, Professor Anaya, the award says it does not mention -- when you talk about on-reserve, it does not say on-reserve to non-reserve members.

And I viewed that rightfully interpreting the law in the application of these laws because the incidence of these laws apply not to the retailer, not to the consumer transaction. It applies -- the incidence of these laws applies to the upstream wholesale transaction. So we view
the on-reserve transactions to be those
transactions.

PRESIDENT NARIMAN: Which? You viewed
on-reserve to be what transaction?

MR. VIOLI: The transactions between
the Claimants, NWS in this case or Arthur Montour
and NWS and the Native American tribes that it
deals, with because it deals with tribes. It
deals with companies owned by with tribal members
on their land and it deals with tribal members who
are sole proprietorships on their land, that
upstream transaction. Not the consumer.

The taxes under U.S. Indian law, they
deal with the -- predominantly with the incidence
of the regulation falling on the non-Native
American consumer and they create -- a fictional
albeit, they create a fiction the incidence of
this regulation doesn't really fall on the
retailer, the Native American. It falls on the
non-Native consumer who comes on and buys. But if
that's the case, then deal with it -- our view is
deal with it with the consumer, not go upstream

and put the imposition of the tax.

PRESIDENT NARIMAN: But do I understand
you to say that that sentence in Paragraph 103
doesn't enter into your claim at all because it
speaks of retail sales? That last sentence. I
just want to know your position.

MR. VIOLI: Sure. Okay. I would read
it because it's very important.

Any related enforcement measures
adopted or implemented by U.S. states prior to
March 12, 2001, with respect to cigarettes
manufactured or distributed by any of the
Claimants and sold at retail, off-Reservation,
that one? That's off-Reservation.

PRESIDENT NARIMAN: No, no, no.

ARBITRATOR ANAYA: No, but it
implies --

PRESIDENT NARIMAN: This is reserved
for the merits, that portion which Mr. Crook read.

MR. VIOLI: Yeah, well, that talks
about what is dismissed.

What is dismissed is anything before
March 12, 2001, any measure before March 12, 2001,
with respect to cigarettes sold at retail
off-Reservation.

We are here dealing with the questions
that were presented were on-Reservation.

PRESIDENT NARIMAN: The last sentence
of that paragraph.

MR. VIOLI: Oh, sorry. Any such claims
with respect to retail sales on-Reservation will
be considered at the stage of the merits. And
with respect to retail sales --

PRESIDENT NARIMAN: What's your case on
this?

MR. VIOLI: Our case on that is, we
supply the distributors on-Reservation or when a
Tribe is a retailer, the Tribes on-Reservation.

We supply them. There are -- the Coeur d' Alene
Tribe, for example, in Idaho owns a smoke shop
retailer. So --

Go ahead.

ARBITRATOR ANAYA: So this doesn't
apply. What we're trying to say here is that you
 everything is off the table because the Contraband Laws are...

ARBITRATOR ANAYA: Okay. What we did was we said that any measures before March whatever --

MR. VIOLI: March 12, 2001, right.

ARBITRATOR ANAYA: -- 2001 are time barred.

MR. VIOLI: Off-Reservation.

ARBITRATOR ANAYA: Yes. For retail sales. And we made that distinction.

And then as to those cigarettes that make their way --

MR. VIOLI: Right.

ARBITRATOR ANAYA: -- in the stream of commerce --

MR. VIOLI: Right.

ARBITRATOR ANAYA: -- ultimately in retail to -- off-Reservation --

MR. VIOLI: Right.

ARBITRATOR ANAYA: -- those are time barred.

MR. VIOLI: Indeed.

ARBITRATOR ANAYA: As to those transactions that make their way through the stream of commerce to --

MR. VIOLI: Retail.

ARBITRATOR ANAYA: -- sales retail on-Reservation, you're free to still make a claim.

MR. VIOLI: Okay.

ARBITRATOR ANAYA: And so we're saying how does that apply. And it seems like you're saying the whole thing doesn't apply, that we shouldn't think of it that way.

MR. VIOLI: No. Okay. I would clarify, because that's an important point.

With respect to NWS's business on-Reservation, all of NWS's business is on-Reservation, right. What I mean by that is, it sells -- as the record shows, it sells to distributors in Tribes or distributors who are owned by members of the Tribes or the Tribes themselves on-Reservation, meaning the product goes from either New York or free foreign trade zone, it's manufactured and it goes to the Tribe, tribal land. It is then sold at retail on tribal land. We're not talking about -- because --

ARBITRATOR ANAYA: No, we understand that. This goes to the question of what then are the measures that you are --

MR. VIOLI: There are two measures.

There's the Escrow Statute, right, because there's no time bar on the Escrow Statute --

ARBITRATOR ANAYA: Right.

MR. VIOLI: -- in that situation and the complementary legislation. Because the Escrow Statute should have never been applied at any point in time.

ARBITRATOR ANAYA: All right.

MR. VIOLI: To charge us $5 per carton for sales sold on-Reservation at any point in time is a violation of the NAFTA and that's what we've pointed out.

With respect to off-reserve, we say the allocable share is what causes the damage to us.

But on-reserve there never should have been this MSA regulatory regime which only applies by way of the original Escrow Statute --

ARBITRATOR ANAYA: If I'm correct, we're actually saying that you can assert the MSA as a measure prior to 2001. And I don't --

MR. WEILER: Technically, as Mark is about to say, not the MSA but the implementation of the MSA.

MR. VIOLI: The Escrow Statute.

MR. FELDMAN: The Escrow Statute with respect to on-Reservation sales, the Escrow Statute, either in its original or amended form, is the challenge measure.

The MSA, as Mr. Weiler has confirmed, is a private agreement. It is not a challenge measure. It cannot breach the NAFTA.

ARBITRATOR ANAYA: All right. I misspoke. I misspoke.

MR. VIOLI: And the states never came to us and said the MSA applies on-Reservation.

What they said was the Escrow Statute and the complementary. I'm sorry. Did we clear -- I mean...
ARBITRATOR ANAYA: I think so.
MR. WEILER: Article 1105. Right up there. And hopefully on your screens as well. So that's the little dandy that we're having fun with. I mean that in the colloquial manner, just to be clear.
Each party shall accord to investments of investors of another party treatment in accordance with international law. And then they list two possible standards that are included in that minimum standard.
And then we see right below a clarification which is binding upon Tribunals under Article 1131 sub two which states that -- well, as we can see, that it prescribes the customary international law minimum standard. So clearly one of the things that that's saying is that when it says treatment in accordance with international law, they don't mean that you can try to bring a NAFTA claim because somebody violated the WTO trips agreement. Because the WTO trips agreement breach has to be heard in the WTO.

standard. And the most recent case, Glamis Gold versus USA, sets it out fairly well. I mean it's -- I disagree with some aspects of the case, but -- and their reasoning but it sets it up pretty well. It says there that, you know, although the circumstances of the case are, of course, relevant, the standard is not meant to vary. It's not a subjective standard that simply means whatever you think is fair is fair. It's an absolute standard. And it draws a distinction for us, which is why I highlighted this, between the minimum standard and Article 1102, the national treatment standard, which is a comparative standard.

It would help me at least to start if you could set out what is least to the start if you could set out what is that treatment that you complain of in this case that is sufficiently egregious and shocking as the case says.

MR. WEILER: Luckily, Mr. Chairman, that's exactly what I'm doing.

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

Sufficiently egregious and shocking in the current case. What are those elements. If you could first spell them out and then proceed, at least I would be more educated.
ARBITRATOR ANAYA: And also as you do that, if you could relate it to what we've heard so far, the kinds of things that have come in.

MR. WEILER: It's right here. We're about to talk about it so we're -- it's right here and we're gonna -- it's the next slide so we're right on track.

So again this second slide here, it's just another example of clarifying that unjust idiosyncratic -- we won't go into any detail there.

The other point I want to make with Siemens before I turn the page is that it's clear that the current standard does include the frustration of expectations. Very down at the bottom there, Professor Anaya. The current standard does include legitimate expectations.

Another example of that premise is this case called BG Group, the duties of the host state must be examined in light of the legal business framework as represented by the investor at the time it decides to invest. Some people believe that that can only mean some sort of investment agreement.

Other Tribunals, and I would submit that -- we've made our arguments in writing with respect to which Tribunals say which, our position is that the minimum standard includes a minimum level of transparency and certainty which admittedly is hard to breach but does exist and so that's what we mean when we say when we got here the status quo ante was the measures as we found them and then they were dynamically changed.

Yes, Mr. Crook?

ARBITRATOR CROOK: As you know, the Glamis award took a pretty traditional view of what it takes to establish a rule of customary international law.

Now, you're asserting that custom has involved to include these notions of transparency and so forth. And what do you cite as the evidence for that?

Let me finish, please.

Are decisions under bilateral investment treaties that are not subject to the NAFTA FTZ statement relevant? Do you think those are indications of consistent practice informed by a sense of legal obligation? Where do we go to find the customary law here?

MR. WEILER: The Glamis Gold quote is the operative quote. It's -- I've parsed out the blue.

Arbitral awards can serve as illustrations of customary international law if they involve an examination of customary international law. BG Group PLC very clearly states around that very same area, it's talking about custom. It refers to the NAFTA standard and it says, we like this NAFTA standard. It's good because we don't want -- the Tribunal ultimately doesn't do an additive analysis because it's deciding on custom.

ARBITRATOR CROOK: So these are equivalent to the writings of the leading publicists or --

MR. WEILER: These are the equivalent to the writings of leading publicists.

ARBITRATOR CROOK: So you're not asserting these are state practice?

MR. WEILER: No. They're evidence of a finding that state practice exists. As actually the Glamis Gold Tribunal says itself, it does not expect very often that you are going to find any Claimant capable of demonstrating the positivist doctrinal position of proving custom. That takes decades. And that's why the Glamis Gold Tribunal, as you said, being a very conservative Tribunal's approach, nonetheless says, we want to look at other cases as long as they're also pronouncing customary international law in that other Tribunal's position.

Ultimately, of course, as a Tribunal you have to decide for yourself whether you're comfortable with what these other Tribunals are saying about customary international law but the Glamis Tribunal itself did that.

ARBITRATOR CROOK: In Claimant's view, what is customary international law?
MR. WEILER: Customary international law is one of the three -- taking the doctrinal position in Article 38 of the statute of the Court of International Justice, customary international law is -- one could almost call it the common law of states. States effectively through practice and through an observation of their intent to -- strike that. They're -- it's tough to word it. Ultimately I would just go back to the standard you quoted. Essentially it shows the state believes itself to be bound and acts like it's bound. And that's why the Gamis Tribunal did actually make a finding in that case that they're -- without going to a proof of the positivist doctrinal test, they nonetheless found, based on the case law, that there was a customary norm there. And we have many customary norms in the next pages coming up.

For example --

ARBITRATOR ANAYA: So I'm clear, relating to the earlier slide and the earlier quote from Glamis, we have to find that a breach of the norms is shocking and outrageous?

MR. WEILER: Shocking and outrageous is actually the near standard. And most writers and scholars would suggest that it might just -- it might be shocking. It might be shocking and outrageous but the other way that they go is that they say, well, what's shocking and outrageous to someone in 1927 --

ARBITRATOR ANAYA: I understand. I just want to make sure that these things are together.

We're not talking about finding out -- discovering a rule of customary international law then finding that, you know, on the balance of things it was breached. We need to find that it was sufficiently egregious and shocking and gross denial of justice; is that right?

MR. WEILER: Yes. And so that's why I mentioned it in the first slide. Good thing you just jogged my memory.

One of the things I was going to say with the first slide when I said collective is as the Gamis Tribunal suggested, and I think that they were correct in suggesting it, so I'll get to the cite soon. The Gamis Tribunal was correct, we submit, in suggesting that it's a cumulative test. You don't just parse it out and say, well, did you make it on legitimate expectations? Did you make it on denial of justice. It's all of them together. It's the whole -- you don't parse it out into little compartments.

ARBITRATOR ANAYA: I understand. But we are to find that all of them together are shocking.

MR. WEILER: Are shocking to the reasonable jurist today.

ARBITRATOR ANAYA: Yes, of course, today.

MR. WEILER: As opposed to 1927.

ARBITRATOR ANAYA: Yes, or as opposed to 1540 or something.

MR. WEILER: Or, yeah, or even an earlier, yeah.

The concept of civilized nations is sort of offensive nowadays.

So legitimate expectation.

I think I've pretty much already covered this. There's a legitimate expectation of transparency, certainty, due process.

PRESIDENT NARIMAN: I'm sorry.

Speaking for myself again, see, all this is good in theory. I just want you at some point of time as soon as you can to enumerate in some detail why you say the treatment in this particular case, what is that treatment and why it is so shocking to our conscience that we should say that it is -- it falls on the relevant article.

You see, until I get that, I don't go back onto all the case law, et cetera. I want to first know what according to the Claimant is that conduct or that treatment which they have either done or failed to do, omitted to do, deliberately virtually, because it has to be shocking, it has to be deliberate. It has to be deliberate against you.

What is it -- I mean why don't you
please crystalize that? I don't get -- I went
through this. If you could just crystalize that,
at least I will find it very, very useful.

MR. VIOLI: Mr. Chairman, we'll do that
in the closing, but I would just present just a
short story here of states -- beginning of the
negotiation process where they say these measures
will apply to Indians on their land. And I'll
just take the on-Reservation sales.

These measures are going to apply to
Indians on their land. That's the federal
proposal. We're going to give them payments in
return for the payments under the $5 per carton
and we're going to confer with their Tribes in the
negotiation of how it's going to get paid and
everything like that. We start with that premise.

We then proceed with the MSA after the
federal government rejects that. The states
decide they're going to take it in their own
hands. Forget the federal government. Forget the
people, my friends across the table. They don't
want it so, we'll do it ourselves, the states say.

They enter into an agreement that
specifically says, this excludes Native Americans
or Indian Tribes. We proceed with -- a few months
after that agreement is reached. What do we do in
the case where we have non-taxable sales on Indian
reservations? Not a unit sold that doesn't apply.
These measures don't apply. We proceed for five,
six, seven years. Five, six, seven years. No
enforcement on-Reservation. We go on. We invest.
Build a market. Cultivate the market. These are
the first people in this hemisphere to grow,
cultivate and trade in tobacco. Long before the
English settlers came. Right? They had tobacco
trading commerce long before the companies entered
into this deal.

So we have a five-, six-year history
after the measures are adopted. They don't apply
on-Reservation. No one comes knocking on the door
and says, we now want this to apply on your Indian
land, your trading commerce.

All of a sudden the big tobacco
companies start to complain and say, we want to

take money back under this MSA payment scheme
because you're not diligently enforcing it
on-Reservation. And the states, like in New York,
say, it was never meant to apply on-Reservation.
We have memos that show it's not -- they opine it
doesn't apply on-Reservation. All of a sudden
because big tobacco says, we want it to apply
on-Reservation or we're going to take money away
from you, the states start knocking on the door,
tapping at first lightly and then they start to
encroach. And then they start to seize product.
Then they start to tell people that we're dealing
with contraband, something that we've been
dealing -- not me personally. I'm a visitor, I'm
a first-generation American. So I'm a visitor as
well. But I know what it means to be a visitor in
someone else's land.

They come knocking on the door to these
people and say -- or other people, don't deal with
them. They're contraband. Yeah, the product is
only going on their land and they're dealing in
Indian-member-to-Indian-member trading or
Nation-to-Nation trading or

Indian-member-to-Indian-member trading, things
that have been done for probably a thousand years
in this hemisphere. But now we have a problem
with it under this rubric that we developed seven
years ago, because tobacco companies are
complaining about it and we're going to get less
money.

How egregious can that be? They've
admitted that it doesn't apply on-Reservation.
They never enforced it for six, seven years. And
then all of a sudden because competitors, because
Phillip Morris, because these big companies that
have 90-something percent of the market see a
Native American company that employs two, three
hundred people, provides more jobs on these
Reservations both in Canada and across the
artificial border in the U.S. on their
territories, three hundred jobs, brought more
industry and economy and commerce to these nations
than they ever seen since the settlement of the
English colonization and subsequent revolution and
independence. Right. They're growing.
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<td>Healthcare. Donations to charities. 12 million dollars -- they're doing the best they can to develop this business and to put it back into their people.</td>
<td>it. NPMs, you get this treatment here with refunds. Right? You get refunds.</td>
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<td>And now we have the states who admitted that it doesn't apply on their land saying it now applies. Stop it. And you, you're shipping this product to there? Contraband.</td>
<td>What happens after that's passed?</td>
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<td>Do I know that that is a violation of law? No. Did you do diligence to research whether you had authority to tell a foreign trade zone regulated only by the United States Government that they have to stop shipments to a Native American land? Did you do due diligence? No. I thought I said you may or you'd think about it.</td>
<td>Again, the tobacco companies say, you know what, these NPMs gained about four, five, six percent of the market, maybe eight percent which is beyond the two percent limit that we allowed, so we want you to go after them.</td>
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<td>Well, a couple of those letters from the foreign trade didn't say that. They said, cease and desist without due diligence. So now they're shutting these people out of their Native American markets. To this day they're getting letters, and we'll see one, letters back -- as recent as December 31st of this past year. Stop the business on the Reservation. That's egregious, disrespectful. It's in plain violation of what they agreed and how what they said and how it was supposed to be a supplied. And they brought a lawsuit against the tobacco companies, the big guys, to say this does not apply on-Reservation, the State of New York did. Does not apply on-Reservation. They admitted it and now they want to change the terms. Now they want to come after something -- us under something, an agreement that they've admitted all along never applied, has no basis of applying under international law, domestic Indian law or plain fairness and justice. That's on-Reservation. Off-Reservation, they have an Allocable Share Amendment that's changed the whole deal, terms of the deal. They agreed to that, that legislation. That was what the tobacco companies in the states agreed to, the original law. The original said grandfathered exempt SPMs, they get course, saying, we're losing market share. That precipitated this. We'll see e-mails where these tobacco companies, where we have the Attorney General of Oklahoma saying, Phillip Morris attorney, please tell me you approve of this language in the Allocable Share Amendment, because they were drafting it, because I need your blessing before I can go to the legislature of Oklahoma and tell them that it's safe to run with this legislation. My God, you have these people in bed with each other. You have the infiltration of the core of American democracy by a private interest that is being protected, shielding and furthered in an alliance what is called by some company an unholy alliance. Imagine the Attorney General of Oklahoma telling a Phillip Morris attorney, I need your blessing to go to the legislature. It doesn't have a comma here or I used the word that instead of which. Is it okay, Mr. Attorney for Phillip Morris. Right?</td>
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This is what we see when we get a snippet of what is really behind the door. The documents that exist out there. And that's why I've asked the documents and they have yet to produce them, because they will show to the Tribunal how egregious and how gross the misconduct is, how shocking it is and outrageous. We've seen it.

So now, in addition to these memos, right, we have them caucusing. We have the State of California passing a law. It's never given allocable share release. The State of New Mexico, the gentleman today, I don't know if I've ever given that. Why change the law if you've never given a release? Why change it? Did you do an economic study? We have the agreement. It says, if you're going to change the law or cast this thing it's going to affect the qualifying statute, get an economics firm to determine whether there's really a cost disadvantage. Whether these SPMs are really -- really have some kind of advantage. Did they do that? Did they get an economist? Did they go to the economist? No. Did one state do an economics analysis of this change in the law? Such a big change in the law now. We have investments. We have building up of market share, tremendous dedication, trademarks. We're building it, we're putting all the money in the market, we're developing it, cultivating the brand. Did they come to us? Did they confer with us? No. Did they go to an economics firm and say, we need to stop the Seneca brand because there's a disadvantage? No. The agreement says, go to an economics firm. Did they do an independent study? Did they do an independent study? One economic study to be produced in this record of why they need it. No, it's all ex post facto. It's all after the fact by expert who said in federal court when the federal government brought its case, this MSA doesn't work. He comes in and he says, well, you know, I think this economics -- nothing done anything done at the time the allocable share was passed by the state. They did no due diligence to determine whether they really needed -- whether they really needed this change in the law to remove some disadvantage, some loophole. I mean we're talking about a fundamental change in this economy, this market in this industry. Not one economic study.

Why did you pass it? Well, NAAG told me a memo that's a loophole. Any analysis that there was a market share loss? Because we have a letter from the Attorney General himself saying that NPMs grew because Phillip Morris raised its price fivefold multiples of what it had to pay under the MSA. The MSA $3 a carton, Phillip Morris raises its price $17 a carton. And the Attorney General says that's why SPMs have market share. You have these guys gouging consumers in the American market. Granted, it's pariah product. It's dangerous product. Now they're adding insult to injury. Now they're charging the consumer -- it's ridiculous, $17 a carton, these Phillip Morris companies, big companies, right,
share? Right. Because it's about the money. The tobacco companies came knocking on the door.

And so the states, they heeded the call. They followed what the tobacco companies asked them to do. They went in and changed the law. They changed it grossly to disadvantage us. So we had that sort of dynamic, that egregious and shocking conduct, what has brought us here and we've been fighting all these years to be here.

Because this is something that is unprecedented. As I told my brother across the table, if we were dealing with them, we wouldn't be here today. We're not dealing with them. We're dealing with the states. We have no quarter with the federal government. Our quarter was with the states. They're vicariously responsible.

Did they take these measures? No. Not at all. Did they pass a new law under the FDA? And exceptions in there, Mr. President? No. Not one exemption. Any different treatment, you pay $5, you pay $2? No, no, no, across the board. Across the board. But that's the level.

We have something unprecedented in the U.S. economy. We have infiltration into the poor. These are the highest law enforcement officers of the states, the attorneys general. Right? It's the fox guarding the henhouse. We've allowed infiltration of private interest into that core Democratic process, because the AG's then go to the legislatures and say, we need this change in the law. Behind the curtain we're told what they need to change in the law for. On the front they say health and they say whatever. This is egregious.

I've never seen a case -- I've never seen such infiltration on a -- and some of the words are terrible, what they would call this kind of -- where a private interest has -- the highest law enforcement officer literally has in their hands, tells them that they need our blessing before changing the law.

And that is egregious, I think the Tribunal will find during our closing, and when we get to the more slides, that's where we're going with all this and we do think it reaches that level.

PRESIDENT HARIMAN: Thank you. I'm glad I provoked you.

MR. VIOLI: I apologize.

MR. WEILER: I should mention, Mr. Chairman, we need to get you the tabs. But we actually -- personal aside, actually my spouse has been in tobacco reduction. When I explained this to her, she was shocked. I remember my client thought it was funny when he first found -- he said basically you're trying to help me and she's trying to put me out of business because she does tobacco reduction. She doesn't now. She's gone on to do a Ph.D. but she's -- it convinced her.

You go on this reserve, you see this plant, and actually I'm hoping we will have time to show you that video because the video is meant to show you that video because the video is meant as sort of a consumer -- you know, it shows the retailer what they're doing, but you see those faces and it really does bring it home a lot better than I think that I can possibly do talking about law. But this -- it truly is egregious and the people in the health community, they're not very thrilled about this either, because big tobacco has cut a deal with AG's.

But anyway, I'll get on with the law here.

My clients, they're not putting on a show. They really do believe in their sovereignty and they really do believe that the Jay Treaty and the Treaty of Gent, three or four other treaties, that these treaties really meant something.

They're very clear they were never conquered. Those treaties, as Professor Clinton explained --

ARBITRATOR ANAYA: Mr. Weiler, you say your clients believe in their sovereignty. I understand what you're saying but is the Mohawk Nation or any of the tribal -- or governments of the Indian Nations intervening in any way, or have they taken a formal position?

MR. WEILER: Yes, Chief William Montour has written I believe two letters and --

ARBITRATOR ANAYA: I know about the
letters, but is the Nation itself?

MR. WEILER: Well, I think perhaps Mr. Montour tomorrow, you could probably ask him that question. That might be more appropriate than my trying to answer that.

MR. VIOLI: I can answer it.

With respect to the Muscogee (Creek) Nation in Oklahoma, I know that they've recently brought a lawsuit -- recently brought a lawsuit seeking an injunction against the application of these measures to trading commerce on their land, but they haven't intervened in this action. They have a separate federal lawsuit that's pending.

MR. WEILER: And the AFN chief.

PRESIDENT NARIMAN: Yes, Mr. Violi, it would help me, at least, if you can go through the transcript what you just told us just now and just pinpoint the various documents in this case that would support what you say. And later, when you close your argument or whatever it is, go through this transcript and just give it to us.

MR. VIOLI: Thank you.

ARBITRATOR ANAYA: I mean, you're relying very much on the sovereignty of the indigenous people, a Nation that is involved here.

MR. WEILER: Yes.

ARBITRATOR ANAYA: -- yet your client is in fact not the Nation.

MR. WEILER: No, they're not the Nation, but --

ARBITRATOR ANAYA: I understand that.

But it seems like, given your analysis, it would be relevant to have -- to know, you know, what the position of the Nation is as the Nation. And I understand that the chief has made a statement. And if you're saying that that's the position then I'm --

MR. WEILER: I'm happy to get the answer on the Nation. I mean there's really -- there's the Seneca Nation and there's the -- and in Osewan it's six Nations as opposed to -- and there's two councils. There's politically elected council and then there's a traditional one. I thought we had something in the record from the traditional chiefs already, but I have no problem before the end of this Tribunal hearing getting you that information. And I'm sure that on an expedited basis they can check that out.

MR. FELDMAN: Mr. President, the Claimants clearly are free to rely on what's in the record but supplementing the record is a very different issue.

ARBITRATOR ANAYA: Yeah, and I'm not asking them to supplement the record. I'm just asking them to direct me where we can find that information for their position reflected in the record or whether it is.

MR. WEILER: We definitely can do that. I do recall in Mr. Jerry Montour's statements there was material up to that regard. I know that Mr. Montour -- Chief Montour filed a statement. It wasn't just a letter. He actually filed a statement in the first with the Memorial, so we definitely -- but, anyway, we'll get it. We do have that.

PRESIDENT NARIMAN: Does it make any difference that a sovereign Nation hasn't made a claim in this case but that --

MR. WEILER: No.

PRESIDENT NARIMAN: -- examination of a company which many Indian Tribes has, does it make any difference, according to you?

MR. WEILER: Well, to qualify as an investor, I mean a sovereign Nation can be in theory --

PRESIDENT NARIMAN: No, no, no, no, no. No, I'm not talking of investing. Bu whether a sovereign Nation, not being the Claimant in the present case, does that make any difference to the argument that we are a sovereign Nation that it -- that it is because we are a sovereign Nation that this entire scheme never applied to on-Reservation?

MR. WEILER: The short answer is no. And the reason why is that different nations organize themselves in different ways. In a way -- I mean some say loosely you'd say some of them are more laissez faire in terms of ownership
and rights of participation. Some of them are more social democratic and outright state controlled. So there's a wide variation in Indian Nations as to how they organize their affairs. With respect to this particular, the Mohawk Nation and the Seneca Nation, they are actually big fans of free enterprise. So -- and I -- they support that and that's why the Claimants do believe -- when they're speaking for the -- I mean they speak for the Nation in more than one way, one because they are part of the Nation.

President Nariman: Montour belongs to the Seneca Nation?
Mr. Weiler: That's correct.
President Nariman: I mean his company operates from the Seneca Nation?
Mr. Weiler: Correct.
President Nariman: Within the Seneca Nation?
Mr. Weiler: Yes. And he is and it does.

And Mr. Hill and Mr. Jerry Montour are both Mohawk Nation and they both participate on -- that's where their plant is.

President Nariman: Hill and who?
Mr. Weiler: Mr. Hill and Mr. Jerry Montour.
President Nariman: Yes.
Mr. Weiler: And I think they also speak for the Nation in another way. They are by far the largest employer. I mean this is a small community so it's not like they're off on their own sort of doing their own thing. These people have the largest charity in Canada devoted to benefiting indigenous people and it's across Canada. They're actually federally registered. So anyone from any indigenous Nation across Canada can go get a grant for teach- -- there's all sorts of things.

President Nariman: You are speaking from the record?
Mr. Weiler: Well, it's in the record.

...
it. They actually grant him some extension. The article doesn't say how much longer. And he goes back home and apparently within, I guess, it's either 30 days or 60 days he and his lawyer figure out, no, I'm pretty much a local seller in this particular state, maybe the one next door. I'm better to stay out of this thing because there's a provision for me. If I'm going to stay local, I'm going to stay there.

So when I hear this stuff about loophole, you know, no one thought of it. I mean, well, Mr. Baillie, some -- you know, just some fellow, you know, who's got this small tobacco plant somewhere, he and his lawyer figured it out pretty quickly. So, I mean, gee, what a shocking loophole.

I mean I think what's more likely is Mr. Baillie had every reason to rely on that. And if Mr. Baillie was a Canadian or a Mexican he could be here, but because he's an American he doesn't qualify under the NAFTA to bring a claim so Mr. Baillie is out of luck. But it's just as egregious to Mr. Baillie. All he can do is complain to the Forbes Magazine.

Denial of justice. This is another one where there's no debate that there is a denial of justice standard. And it's pretty clear from the writings that we've submitted to you that this is not just a question of having a good judicial system. This is about administration. This is about executive rule making. Denial of justice is a -- basically a proxy for the notion of due process.

And I don't mean the American style of due process that is also substantive. I mean the procedural type of fundamental justice that's more common in the Canadian-British kind of system.

So there is this degree of fairness that one expects. And in this case, I've got it up there and I think you have it in front of your screen too. They're told, okay, you've never -- there's not one case that we're going to see and we haven't seen and we're not going to see, not one case of a state being able to actually collect for healthcare costs from a tobacco company for apparently the cost that they have to, you know, fund as part of that part of the socialized medicine that they have. It's not one case. And yet -- so there's no legal authority whatsoever and yet they want to take their money for 25 years just in case someone gets sick. And I guess in the 25 years they're hoping the law is going to change too.

Because --

PRESIDENT NARIMAN: I'm sorry. I didn't follow this part of your argument.

MR. WEILER: Well, there is no --

PRESIDENT NARIMAN: What is the relevance of it?

MR. WEILER: There's just no tort law supporting the right of the states to take the money. Not for five years, not for one year, not for ten, not for 25. They don't have a legal claim in tort law to it. And so it is a denial of justice to say to somebody, okay, I have no right --

PRESIDENT NARIMAN: I don't follow --

MR. VIOLI: Let me explain.

Mr. President, the Escrow Statute requires an NPM to put money -- every year has to put certain amount of money in and that money has to be held in the account for the benefit of the state for 25 years. And that's held there in case the state in the future tries to bring a lawsuit against the manufacturer, all right? And -- like a bond. And they have to hold it for 25 years and at the end of 25 years if the state does not bring a lawsuit against the tobacco, and win, right, the money is supposed to go back to the tobacco product manufacturer.

Now, this money that's held for 25 years can only be used in a lawsuit that's defined in the MSA, a certain kind of claim. And those claims are the ones that the states brought between 1996 and 1998. And they were settled under the MSA. They're Medicaid recoupment cost.
states sued the tobacco companies, the big guys, and said, you lied, spiked nicotine and you conspired not to come out with a safer product. We're suing you, big companies, because we want you to pay the money for people who get sick. We have to treat them. So the state says, we have to pay for the hospital bills. We want reimbursement for that. So the states brought the lawsuits for four years and they settled them. Now, those are the types of lawsuits for which we have to put money away for 25 years but none of those lawsuits ever went to the merits. None of the states -- the states said, let's settle with the tobacco companies. Let's enter into an agreement and let's pass this Escrow Statute. We don't want the courts to determine our fate. We don't want the courts to tell us whether we're entitled to the money or not under these types of cases.

So the Escrow Statute says, you, Grand River, must put the money away for 25 years in case the state wants to bring a similar lawsuit against you.

PRESIDENT NARIMAN: What was that case?

MR. VIOLI: Cipollone versus Liggett.

PRESIDENT NARIMAN: And what happened, what was decided?

MR. VIOLI: Whether or not there is such a claim against the tobacco company, whether a government can sue a tobacco company for healthcare costs related -- you know, expenses and
the case against the federal government here, our
brother across the table, the judge said, no such
case exists. You cannot get damages for fraud and
healthcare recoupment. Threw all those claims
out. But the court did say, we will give you
injunctive relief, like a monetary type of thing,
you know, equity. We'll give you an equity kind
of remedy for a RICO violation. That's the only
thing that was sustained.

MR. WEILER: Exactly. Against the
health insurance companies.

MR. VIOLI: Now, the health insurance
companies, Blue Cross/Blue Shield, they sued.
They're numerous. We have them in the record.
The health insurance companies did the
same thing that the states did. They went and
sued the tobacco companies and said, hey, we had
to pay. Our customers have health insurance. We
had to pay for cancer treatment. We're suing you,
Phillip Morris and the tobacco companies. The
court said, no such claim exists.
Pension funds. They did the same

So the point here, because now we're
required to put money away for 25 years for those
types of claims because when they formulated this
statute in 1999, right, the Escrow Statute, they
formulated it to require money to be paid by our
clients to be put away for 25 years for those
types of claims. But now all the cases have held
there is no such claim.

What was it Mr. Hering said yesterday?
We have no claim today. It's 11 years, 10 years
after that statute. Have any evidence of a
violation that would give such claim? No. Do you
have a claim? Well, we might be able to have
one --

PRESIDENT NARIMAN: And this doesn't
depend upon whether you belong to an Indian Tribe
or not.

MR. WEILER: No.

MR. VIOLI: No, this is generally.

So now, forget about the statute of
limitations, Mr. President. Have you ever heard

of suing a company 25 years later after consuming
a product? The statute of limitations -- I mean,
there's fraudulent concealment, right? Which law
extends to the one you knew or should have known
that the product was dangerous, right?

That will carry you maybe a few years,
but product liability is usually three years, six
years max. Twenty-five years.

Could you imagine being tobacco company
25 years from now, you put money away and -- put
money away. 25 years they come knocking, God
bless I hope you're still here. But they come and
they knock on Mr. Jerry Montour's door and say,
24 years ago you sold a product and we want you to
pay for it. So what these cases held that have
determined the merits --

PRESIDENT NARIMAN: But you paid up
this?

MR. VIOLI: Well, you put it in a fund.

PRESIDENT NARIMAN: No, you did. Did
you do it?

MR. VIOLI: Yes, $50 million. To date,
carton into an escrow fund for 25 years when all
the experts agree you could be using that money
for other purposes. You can compete more
effectively against the exempt SPMs. You could
use it as a better capitalization for purposes of
growing your investment or putting it to better
use in the context of your business.

Why put millions of dollars into a fund
when the states can never get that money? There's
no cause of action.

All of the cases that have decided have
said there's no claim. The states can't get that
money. There's no such thing as a released claim.

So that is what we submit, right? That
is what -- is it denial of due process of taking
of a property without just cause or reason? And
we ask for the evidence from the other side, where
did we do something wrong at that would allow you
to take this money that you're requiring us to put
$5 away for the future.

PRESIDENT NARIMAN: Is this the Allocable Share Amendment?

MR. VIOLI: Yes. The Allocable Share
made it go from 50 cents per carton to $5 per
carton, the effect of which was we had to put a
lot of money in this fund. But the effect is also
as they candidly admitted in other papers, that it
has to raise our prices.

That is why, vis-à-vis, the exempt
SPMs, we were shut out of the Oklahoma market, the
Arkansas market. All of these markets, which we
just couldn't hold onto because our price, as the
record shows, we were at about $10 per carton
before the Allocable Share, we had to go up by two
at that time, right? To about $12. But Liggett
targeted that Arkansas and Oklahoma market at $8.50
a carton, almost three, four dollar difference.
And as the affidavit in the record showed, one of
the biggest distributors of discount cigarettes in
the Arkansas market, I'm sorry, I can't buy your
product anymore.

Another one in South Carolina said,
your prices going up by, it's $5 per more carton
now after the Allocable Share. We have to go to

this Premier brand, which is -- what's called
Ultra Buyer Shield which is made by Premier. The
exempt SPM, they have a five dollar advantage over
you. I'm sorry I can't buy your product anymore.
And so we were shut out of the market by that
increase caused by the Allocable Share.

And we've been putting the money in,
we've borrowing the money to try to comply with
these measures until we get some form of relief
because we've been putting the money into the
escrow account, so there's now $50 million but
it's been sitting there at a rate of interest of
like .5 percent. It doesn't even return money on
it. But the states have no right to that money.

So imagine, if you will, Mr. President,
that you have a bonding requirement by a state.
You want to engage in some kind of activity and
the state says, you need to pay -- forget about
that you need to pay $5 for the bond and somebody
else needs to pay $2. You have to pay $5 per unit
or per hour, whatever, for this bonding

PRESIDENT NARIMAN: The federal case,
the two of you, that judgment is reported?
MR. VIOLI: It is indeed. It's in the
record. I think most of it is in the record.
PRESIDENT NARIMAN: Again will you
just -- after you go through this transcript, will
you just write it there at that point and give us
that, put a tab on it.

MR. VIOLI: Yes.
PRESIDENT NARIMAN: Okay. Sorry to
interrupt you.

ARBITRATOR CROOK: I wonder if we could
go to the international law for a minute here.
Professor Weller, as you and I very
well know, all of the classic cases on denial of
justice involved denial in the judicial system.
Now, Claimants's last paper fervently disavowed any intent to bring a denial of justice claim in the classic context of denial of justice in a judicial system. What would you point us to in the way of authority for the proposition that what Mr. Violi has so eloquently described as a perversion of the legislative process constitutes a denial of justice?

MR. WEILER: The two that come to mind right offhand is the Freeman book from the 1920s and the Paulson book from the few years ago.

ARBITRATOR CROOK: I'm quite familiar with the Paulson book. I reviewed it, but you think if we look there we'll find support for your proposition?

MR. WEILER: I think you'll find support for the proposition that denials of justice are in no way limited to judicial systems. And includes perversion of the legislative process?

MR. WEILER: Well, in this case it's not about perversion of the legislative --

ARBITRATOR CROOK: Well, that's what Mr. Violi told us with great energy.

MR. WEILER: Well, with respect, sir, what he said was, he said that it was perversion of justice. He wasn't submitting that that was a denial of justice. A denial of justice is straightforward. They took the money for 25 years and we didn't get to go to court. At least the big companies, they got to go to court and on the eve of that case they settled. But we don't get to go to court.

ARBITRATOR CROOK: Professor Weiler, haven't you been litigating rather energetically --

MR. WEILER: Not on this issue.

ARBITRATOR CROOK: -- on whether the Allocable Share Amendments were proper? You haven't litigated that question anywhere?

MR. WEILER: That's a -- that's -- with respect, sir, there's a different --

ARBITRATOR CROOK: You don't have to
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ARBITRATOR ANAYA: Okay. So, what you mean when you say you can't go to court is that you can't go to court to seek damages.

MR. WEILER: We can't go to court to dispute the issue of whether or not healthcare costs can be recouped because their statute says they're keeping that money for 25 years in case we do something culpable and the definition in the statute says they can recover for healthcare costs if they can -- but we don't get to go to court and have them bring it on and have that fight and see if they can prove that there's healthcare costs and that we should be putting money away. No, instead they're just going to keep it for 25 years; they may decide to sue us on the 25th year they may not. That's -- the big tobacco companies didn't have to do that. They got to go to court right away and they got a really good settlement.

MR. VIOLI: You're right that we cannot sue for damages, though, for the harm here, but can only get injunctive relief which would not remedy the damages caused which is--

ARBITRATOR ANAYA: I understand your argument, Mr. Weiler that you keep going to but at this point I'm really trying to get clarity on it.

MR. VIOLI: Yeah, we cannot, under the 11th Amendment. And so, therefore, all of our litigation -- actually we have one litigated--a couple litigated -- we only seek -- we could sue, we haven't yet. You can get damages from an Attorney General if you sue him in an individual capacity meaning that he abused state law under the authority of state law and took some action that violated your civil rights. We haven't done that yet and quite frankly that's not a fight that we brought on. That's the only way you could -- but that wouldn't be the actions of the state at that point; that would be a rogue Attorney General or attorneys general that did certain egregious conduct which would not even be brought under state law, but the 11th Amendment precludes us getting any kind of monetary relief under the Constitution, the 11th Amendment of the Constitution.
Yes, Mr. Crook?

ARBITRATOR CROOK: I don't remember

Claimants ever arguing abuse of right before today. Is this a new argument you're making?

MR. WEILER: No, it's in there.

ARBITRATOR CROOK: Is it?

MR. WEILER: I'll give you this, but the Bin Chang is in there. I think it was the First Memorial but I'd have to go back.

ARBITRATOR CROOK: First Memorial back 4 or 5 years ago.

MR. WEILER: I don't think it's 4 or 5 years ago but definitely it's in there.

ARBITRATOR CROOK: Okay.

MR. WEILER: Actually -- frankly, it's in all my pleadings because I really like the abuse of right as a theory.

ARBITRATOR CROOK: Okay. Would you refer us to any NAFTA cases that have adopted the theory?

MR. WEILER: Well, as a matter of fact, I was just going to point you to the Pope & Talbot case and it is true they never said the words "abuse of right," but if you fact pattern of Pope & Talbot, which I so happen to know well because I was in it. We've got a very similar case. In Pope & Talbot, we sued the Canadian government. We were Americans and we sued the Canadian government and we sued them because we felt that we were being mistreated, brought a fair equitable claim, brought an expropriation claim, brought a national treatment claim, and guess what happened fairly soon after we sued them. Minister of Foreign Affairs, the man in charge of the system, he decided to do a little audit. He did an audit on us.

And his audit -- he started asking us to do things that we didn't really think he had any authority to do but we didn't have much choice because what he was holding over us was the ability to recommend to the minister for us to lose our quota, and if we lose our quota we can't ship because this plant is located in between mountains in British Columbia and the only way to the market is the rail line south. So, if we lose our quota because this man just basically decides that our, that the review doesn't suit his needs, we're out of luck.

So, he tells us we have to bring -- he wants an audit but he wants us to bring -- it was about 50 boxes -- basically every scrap of paper up to Canada so he can take a look at it. That's not a normal audit but that's what he wanted and he claimed he didn't have authority to come down to the U.S. to do it. That's not true under the Customs Act, actually; there's a reciprocal agreement for that, but he didn't bother checking into that. He just asserted he had the authority to do it. And so, what we had to do is we brought a claim and -- well, not a claim. We brought a motion for interim measure. We actually knew we were going to lose but we wanted to put it before the Tribunal because the interim measures provision in NAFTA says you can't enjoin the measure and we were going to ask them to enjoin the measure, but we got it before the Tribunal and

the Tribunal said, we'll remember this for the merits and we don't think that this audit -- they looked at the audit, they looked at the whole thing and they said, we can't decide on this because we have to put it off on the merits but we don't think this audit is anything that anyone should be proceeding on.

A couple years later we actually had the hearing. Mr. -- it was Doug, I can't remember his last name. Doug is sitting there at the table and Doug is -- I think it might have been Black -- anyway, Doug is asked some questions by the two counsel and then the Tribunal asked a question and he said -- out of his mouth pops, oh, yeah, I wrote a letter to the Minister on that. It wasn't in the record so we got the memo and the memo basically said, we're not sure. We think there might be some criminal activity going on and even though the audit wasn't the best we think maybe you should take away that quota. The Tribunal was apoplectic about this. The Tribunal -- it was actually the very first Tribunal to deal with that
new statement and it didn't like the statement and
it said it didn't think it should follow it but it
said it didn't matter because in this case this
was shocking, egregious, and outrageous. I submit
to you this is worse. We don't just have a little
hint to the Minister about criminal behavior.
He's got to go to court in three months and we
already know from our friend, I think it was
Mr. Eckhart yesterday, who said oh, yeah, I had a
little chat with the federal prosecutor and, yeah
/my California judge did throw that out and said
they didn't believe it, but he could go to jail.

That's more than just a little kind of
hint to the Minister. This is really serious.
And you have a working group of attorneys general
meeting, they won't tell us about it because
apparently -- obviously it's work product
privilege, but I'm sorry what kind of world do we
live in when a group of attorneys general can get
together and plop their strategy and so far their
cases aren't that -- very successful. They seem
to be not doing so well. That doesn't seem to
bother them, though, because they're still writing
the letters and still bringing the cases. The
fact that this --

PRESIDENT NARIKAM: Is this on record
that this is called the Grand River project group?

MR. WEILER: Yes. Yes, we heard it
yesterday, and the day before.

MR. VIOLI: We heard that there is a
group, they do meet, we've asked --

PRESIDENT NARIKAM: Called Grand River
Working Group.

MR. VIOLI: Yes, it's the Grand River
Working Group.

PRESIDENT NARIKAM: Working group.

MR. VIOLI: Yes, we are one of the few,
perhaps the only entity that I'm aware of that has
its own working group and an Attorney General's
office for the enforcement of certain laws.

PRESIDENT NARIKAM: There's no Phillip
Morris working group?

MR. VIOLI: Not that I'm aware of, Mr.
President, but we've asked for documents of this

working group. What do they discuss? What do
they plot? What is the purpose of it? But they
have not produced any documents. We haven't seen
any Grand River Working Group documents.

MR. FELDMAN: I'm sorry, that request
was never made and discovery issues are closed in
this matter.

MR. WEILER: Adverse inferences aren't
closed.

Actually, Mr. Chairman, we've got some
slides later on that address the questions that we
specifically asked. The one final point about
Mr. Eckhart I just wanted to remind the Tribunal
of, as Mr. Violi was questioning him -- and again,
we'll point this out exactly on the record it
turns out that our friend from California admitted
that there was no claim under the California
Escrow Statute for going after Grand River, so
they used their complementary legislation. My
friend's argument is that the complementary
legislation is really not even a measure at all,
this's just complimentary. It just helps the
there, there were three awards, we have to make
sure you have the damages award because they made
two findings on 1105, once before the NAFTA
parties got together and issued their statement
and once after, and I'm talking about the "after"
one.

By the way in the Pope & Talbot case,
we actually lost our arguments. What we won on
was this egregious abuse of authority for the
audit afterwards.

Do you want to take a break,
Mr. President? I see you were looking at the
clock there.

PRESIDENT NARIMAN: No.
ARBITRATOR ANAYA: The abuse of
authority, the abuse of right that you're talking
about, are you using their terms interchangeably?
MR. WEILER: Yes, I use them
interchangeably because in common law, especially
in Canada, it's become a tort called the abuse of
authority tort.

It is kind of a funny story because it
was actually--

ARBITRATOR ANAYA: I know. That's why
I'm asking, because it seems like there are
certain elements we need to find and it seems like
you're putting everything together, all these
different, as you describe them, egregious acts or
omissions. Is it different from just the
generally shocking nature that you assert here or
is it the distinct --

MR. WEILER: Abuse of right is a
principle, and so it's a doctrine and it's a
principle. The WTO calls it a principle; I
usually call it a doctrine.

ARBITRATOR ANAYA: Are you just
conflicting it with all the other stuff here?
MR. WEILER: Well, no, I'm not
conflicting. My submission is that they're
cumulative.

ARBITRATOR ANAYA: Okay. All right.
MR. WEILER: What I have to do to prove
an 1105 breach is show you how customary
international law rules contribute to this norm.

I think I.

ARBITRATOR ANAYA: I understand. You
don't have to go back to that. So, when they are
cumulative they can still be distinct.
MR. WEILER: Yes.

ARBITRATOR ANAYA: Right? Now, are
they distinct or does it just go to a different
characterization of the same facts?
MR. WEILER: No, this abuse -- I mean,
Mr. Crook is certainly right to wonder, well,
where was this abuse of authority before because
it was frankly really being used for the notion of
arbitrariness, to explain how arbitrariness works.

ARBITRATOR ANAYA: Okay. So, you
didn't have a distinct section in your Memorial
about abuse of right.
MR. WEILER: We did. We had an abuse
of right section.

ARBITRATOR ANAYA: I'm looking for it
and I actually typed in "abuse of right" and then
a find function and I --

MR. WEILER: In the Memorial or the
Reply?

ARBITRATOR ANAYA: In the Memorial.
MR. WEILER: It could have been the
reply, but I will certainly.

ARBITRATOR ANAYA: I've been looking
for it and can't find it.
MR. WEILER: I could--if you like, we
can break and--

ARBITRATOR ANAYA: I found one
reference to abuse of right but it's kind of
buried in a general distinction.

PRESIDENT NARIMAN: Look for it in the
afternoon. Yes.

MR. WEILER: Okay.

ARBITRATOR ANAYA: I'm just trying to
understand, get the structure of all of it here.
MR. WEILER: Abuse of right is -- I
mean, it's rooted in the general principle of good
faith.

ARBITRATOR ANAYA: No, I understand the
principle.

MR. WEILER: Yeah, okay.
ARBITRATOR ANAYA: I'm just trying to see how you're presenting it, how you're relating it to the various facts that you're putting on the table, how you're relating it to the different elements--

MR. WEILER: No, I--

ARBITRATOR ANAYA: --out of the NAFTA standard that you're articulating, how it fits in your overall structure of your argument in your Memorial; that's what I'm trying to get to.

MR. WEILER: Until Mr. Eckhart told us that he was doing that without authority and until we found out that he was -- he admitted that he was using the Contraband Statute even though he didn't have an escrow claim, that's why, if you will, the abuse of right was rather dormant. I mean, now it --

PRESIDENT NARIMAN: Could you just explain that, that contraband claim was an abuse of --

MR. WEILER: Mr. Eckhart explained that he used his -- sometimes they call it a listing statute, a contraband law, the complementary legislation -- he admitted to Mr. Violi -- actually, Mr. Violi, if you want to actually say it, it might actually be easier.

PRESIDENT NARIMAN: Go ahead, whoever wants to.

MR. VIOLI: He said that -- first, he said that, as the other A G said, it enforces -- it helps the enforcement and as the NAAG documents show, it was to help the enforcement of the Escrow Statute, because the Escrow Statute you have to wait 15 months to enforce. So, you start January to December, you make sales, and then you have to make a payment on April 15 of the following year -- well that's 16 months. So, what happens is, then, if you don't make that payment on April 15th of the following year the Attorney General gets to bring a lawsuit against you under the Escrow Statute to seek enforcement.

So, as Mr. Hering testified, the complementary legislation was meant to do a couple of things, right? The first of which was to aid enforcement of the Escrow Statute -- primarily, excuse me, enforcement of the Escrow Statute, because what the complementary legislation does is you cannot sell from January 1 to December 31 unless you do certain things under the complementary legislation. Those things are:

Fill out a form, says your name, give pictures of your plant, say who you're owned by, or your address. The other thing you need to do is say you're in compliance with the Escrow Statute and that you will comply with the Escrow Statute. You must adopt as brand as your brand family. So, in this case Grand River will have to say, Seneca is my brand and the Seneca brand family is mine and I will be responsible for it.

One of the other things you have to do under the complementary legislation is waive personal jurisdiction. You have to say that you agree that the Attorney General can sue you for enforcement of the Escrow Statute. You have to waive personal jurisdiction.

Now, what we've said is that is a little bit of a problem because it tried to correct, although they never told us why -- it tried to correct the situation where they don't have personal jurisdiction over a foreign manufacturer, which they admitted in private. So, what they did is, let's get around the due process limitations that we have and just force a company to waive personal jurisdiction under the complementary legislation, and then we solved our foreign manufacturer problem. So, that's what the complementary legislation does and then you have to certify all that in a document. And then, when you give it to the Attorney General, he can approve or deny it and then he will -- if he approves it then he puts your brand on the approved list, the white list, and then it can be sold.

So, what I believe Mr. Eckhart's testimony was is, well, it stands alone, it also stands alone, meaning it's not just to enforce the Escrow Statute so that we make sure you pay your escrow and if you don't pay we can ban you or we
can ban you before unless you agree to pay escrow.

What it also does according Mr. Eckhart is stand alone and allows him to band the product separate and apart from, apparently, in compliance with the Escrow Statute. He's right, it does act independently that way because it acts as band, an embargo -- an interim embargo against your brand even before the time that it's due to make payment for it.

So, he said that it stand alone and it allows him to tell someone not to let the cigarettes in the state, not to sell the cigarettes in the state, or not to sell to someone in the state independently of compliance with the Escrow Statute; that's what Mr. Eckhart testified yesterday.

So, my --

PRESIDENT NARIMAN: So, what's wrong with that?

MR. VIOLI: What's wrong with it is that it imposes a couple of thing.

First thing is the due process limitation. It requires a manufacturer, as they called it -- Philippines, India, or China -- who are not subject to personal jurisdiction in California. It requires them in international commerce they sell to a manufacturer -- they sell to a manufacturer --

PRESIDENT NARIMAN: But this is only a challenge to the statute you are now saying.

MR. VIOLI: Yes, yes.

PRESIDENT NARIMAN: But then, nobody has challenged the statute.

MR. VIOLI: Yes the complementary legislation is challenged; it is one of the measures. The Contraband Law --

PRESIDENT NARIMAN: No, by 'challenge' I mean challenge in a court of law not challenged here.

MR. VIOLI: There was a challenge in the court of law but you can't get damages, again. You're limited to what you can do. You --

PRESIDENT NARIMAN: But you can get a declaration that it is unconstitutional, invalid

-- MR. VIOLI: NWS did, spend a lot of money in defending against California because California brought a lawsuit against NWS for the complementary legislation, and NWS obtained a jurisdictional award -- right -- by the court in California. The California court said you have no jurisdiction over this NWS with respect to this Indian commerce even under the complementary legislation. You cannot ban the sale. What did the Attorney General California say yesterday? I don't care what the court says. I enforce the laws of California and to me you are violating California law and we're not putting you on the list, even though I don't have jurisdiction to prosecute you or regulate you under that law, I'm still not putting you on the list, you're not on the list, and it's over. If you want to come in, he said, at the end of his testimony, come in, pay us all the money we say is due, get certified, waive your personal jurisdiction, do all those things -- to Grand River -- and then we'll let NWS sell.

So, even in the face of a judicial finding. Mr. President, the judge of California has said you can't enforce this law on Reservation with respect to NWS.

PRESIDENT NARIMAN: That's Superior Court judgment?

MR. LUDDY: Yes.

MR. VIOLI: Indeed, indeed. Not withstanding a judge telling the Attorney General -- and it's always been the system of a law i think in the world let alone the United States that the courts are the authority; they're the final authority. Not in this case. The court of law does not exist with respect to these laws; it's amazing. We had the South Dakota Attorney General -- Grand River went all the way up to the Supreme Court of South Dakota because their product went to the Sioux, the Yankton Sioux in South Dakota through various channels. So, it gets up to the Tribe--they sue--South Dakota Attorney General sues Grand River, all the way up
to the Supreme Court of South Dakota. South Dakota court says sorry just like the Wisconsin court, just like the other Superior Court in California. There's no jurisdiction over at Grand River. It is a foreign manufacturer; it deals with the NWS, the Nation trading, and then it goes through interstate channels or international channels and it gets here to a tribe in California, Wisconsin, or South Dakota. We don't have jurisdiction -- South Dakota Supreme Court, it's a six-member panel, whatever it was.

What does the South Dakota Attorney General say? We -- we -- may have lost this battle but I can assure you we did not lose the war. With all due respect, who is the "we"?

PRESIDENT NARIMAN: How many such actions there are in which you have judgments secured in the present case which are on record, roughly?

MR. VIOLI: There are default judgments which Mr. Luddy spoke about yesterday. There are quite a few. I think Mr. Hering said maybe a dozen, few more -- a dozen --

PRESIDENT NARIMAN: Can you give us a list in your closing argument.

MR. VIOLI: We can of what they said. Then, we went back in select states where the states really tried to push South Dakota, Wisconsin, and California where the states tried to push their enforcement of these default judgments. We went back in the state courts and in every case so far that has been decided, we have won.

So, the courts have recognized -- but my point is that the South --

PRESIDENT NARIMAN: Can you give us that.

MR. VIOLI: We will, absolutely. What was particularly egregious is the South Dakota Attorney General is told by his highest court in his state, you cannot enforce this against Grand River. He submits in an article -- he says in an article -- he says, I am working -- we are all working together with other states -- "we," right? And although we lost this battle, I can assure you we did not lose the war.

What is the battle? What is this working group?

PRESIDENT NARIMAN: What is this article you are talking?

MR. VIOLI: Right after Grand River secured the--

PRESIDENT NARIMAN: It's on record?

MR. VIOLI: No, no, in south Dakota, right after--

MR. FELDMAN: Counsel, is this on record?

MR. VIOLI: It's in the record. It's in the materials.

MR. FELDMAN: What do you mean by "the materials"?

MR. VIOLI: It was submitted in the materials in the case -- the South Dakota opinion in the articles is certainly in the case. I don't know if it's in the Memorial.

PRESIDENT NARIMAN: You better check on it.

MR. VIOLI: Yeah. And that's where we saw this claim of, we lost the battle but I can assure you we have not lost the war.

In all due respect, this is the highest court telling the Attorney General you don't have authority to enforce. Why is the South Dakota Attorney General engaged in a war in battles in other jurisdictions? He has no jurisdiction in other states. He has no jurisdiction to meet with NAAG and the California Attorney General or the New Mexico Attorney General or the South -- but that's what's going on: They are waging a war evidenced by that Grand River working group.

Now, I submit we did not know it was called the Grand River working group so I did not ask for all documents of the Grand River -- you can't ask for that which you don't know, but we know there's a working group. Wouldn't the Respondent have seen unto itself if they knew
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<td>MR. WEILER: We actually feel kind of</td>
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<td>aggrieved, too, Mr. Crook, because we only found</td>
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<td>MR. WEILER: So Professor Anaya, with</td>
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<td>MR. VIOLI: But the South Dakota -- the</td>
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and everywhere else -- and it's in the first slide of the presentation they gave yesterday -- if your cigarettes are found in the state, the assumption is you sold it in the state. And on that assumption, which violates every principle of due process that I know of and I've read in international or domestic law -- on the assumption that due process -- that your jurisdiction follows the product. A company in India that sells it to an importer who's in Germany who then has it imported into the United States and then sold eventually in Illinois -- and I know because I represent this Indian company, okay? It ends up in Illinois, the company in India doesn't own the trademark; it doesn't have any control over it after it's sold to the immediate seller, and it ended up in Illinois, Illinois brings one of the most massive cases against this Indian company and the personal jurisdiction and the owner of the Indian company says, this violates international law. This is over eight years ago. How can the State of Illinois reach across the world simply because --

ARBITRATOR ANAYA: Mr. Violi, that's not this case, is it?

MR. VIOLI: It is.

ARBITRATOR ANAYA: It is. Okay.

MR. VIOLI: It is indeed because this is why -- this is why: The states just assume that if your product is in their state they have personal jurisdiction over you. That's an exercise of jurisdiction that has never been placed before anywhere in the record books. It was an abuse. They did no research, Professor Anaya, to determine whether they had jurisdiction over Grand River before and when they launched their lawsuits. We saw it today, no jurisdiction -- it's a pattern. I don't know if I have jurisdiction over the Foreign Trade Zone, Mr. Eckhart said, so did Mr. Thomson, but I'm going to write the letter, anyway.

ARBITRATOR ANAYA: I don't know if he said that, but I --

MR. VIOLI: Certainly they didn't do their diligence when they went and sued Grand River in California, when they sued them in Wisconsin, when they sued them in South Dakota. All of the courts have held no personal jurisdiction.

ARBITRATOR ANAYA: The fact they lost doesn't mean they didn't come to a good faith argument, or at least good faith from the standpoint of their standpoint.

ARBITRATOR ANAYA: Well, do you have to win an argument -- I mean, is that what you're saying, to win --

MR. VIOLI: No, but give the basis for it.

ARBITRATOR ANAYA: Well, he said that they had basis.

MR. VIOLI: Not really. I don't see anything in the record that has basis.

PRESIDENT NARIMAN: He said there were documents and the lady judge overlooked them; that's what he said.

ARBITRATOR ANAYA: Mr. Violi, indeed, between NWS and California.

ARBITRATOR ANAYA: Okay. So, we have to -- so, we need, I mean what I'm trying -- I'm grappling with -- I mean, I may not agree with his position on the law and the substance and the outcome of the California litigation and I may happen to agree -- I'm not saying I do, I'm just saying I may happen to agree with the Superior Court decision, but that's one thing. Quite another thing is for me to say they were committing an abuse of authority even taking that position and they're committing an abuse of authority in appealing. I mean, that's quite --

MR. VIOLI: What you'll find on this issue that I find concretely and was stated in the slide by the Government, which is nowhere -- there's no precedent for it anywhere.

PRESIDENT NARIMAN: No what?

MR. VIOLI: No precedent for it -- is that they assumed jurisdiction.

PRESIDENT NARIMAN: If it's found
MR. VIOLI: If the product they assume in rem jurisdiction over the manufacturer if the product is found in a jurisdiction in a state. That, Professor Anaya, there's no precedent for it anywhere.

Now, if the foreign manufacturer commits a tort, makes it defective tire rim or tube; like in the Asahi case in Japan, or valve that goes into a tube that goes into California and when the tire blows in California -- right -- then you look at foreseeability, as Justice O'Connor said, and you have this plurality opinion, I would agree, but when there's no allegation of the commission of a tort but only the need to put money away based on a future potential liability -- when there is no tort, there is no authority for following the jurisdiction in rem over the person wherever his product goes. That is unprecedented. I've never seen it in international law. Certainty, I haven't seen it in domestic law and I've looked for it high and low. That is where I think they have abused their authority, by trying to extend jurisdiction in a way that has no basis.

PRESIDENT NARIMAN: Well, according to you, Mr. Violi, why are they, as it were, according to you, going for you, all these states?

What for? What's your explanation?

MR. VIOLI: Competition, Mr. President.

PRESIDENT NARIMAN: But states have no competition.

MR. VIOLI: The tobacco companies that they get their money from under the MSA. It is in all of the papers we've seen so far. We have to reduce the NPMs, take all steps necessary. Remember the NPM, the NAAG memo, take all steps necessary to reduce NPMs, because when you reduce NPMs, you raise the MSA -- OPMs, Phillip Morris, and when you raise them up high, you get $3 per carton from them.

PRESIDENT NARIMAN: Do you have that memo, Mr. Luddy.

MR. VIOLI: The NAAG memo.
reducing NPM sales in every state.

MR. WEILER: Should we take our break.

ARBITRATOR ANAYA: Yeah, are you at a good point in your presentation?

MR. WEILER: I'm at a good point in the presentation, but I don't mind. I kind of have to go to the bathroom.

ARBITRATOR ANAYA: I think he needs to take a break.

PRESIDENT NARIMAN: We'll meet at two.

(Whereupon, at 12:50 p.m., the hearing was adjourned until 2:00 p.m., the same day.)

AFTERNOON SESSION

PRESIDENT NARIMAN: Okay, are we ready?

MR. WEILER: So, we begin, again, with our march through the legal justification, the "Why is this a NAFTA claim?", and I've so far gone through denial of justice and reasonable expectation and abuse of right.

And now, I'm going to have a look at international human rights and how it may have some bearing on the fair and equitable treatment for protection and security standards. I remember on the first day I did go over Article 31(3)(c) of the Vienna Convention, and I would submit that it is authority for a Tribunal to look to other sources of law to make a determination as to how to construe a treaty obligation.

I give an example which is actually this interesting exchange between Senator Root and Sir Robinson which I think does encapsulate, even though it's a century old this year, I think from the case from which it's quoted. The effect of rule of international law is rather a rule of construction. So, the whole point is we're not trying to say that a good faith breach in and of itself is cause to find a breach of the minimum standard but rather that it is further evidence, if you will, to help you construe the obligation, should you choose. So, it's the construction as opposed to the right base because the right base has to come from fair and equitable treatment.

I have here some submissions taken from WTO cases in which the Respondent to a certain extent admits or, if you will, stipulates what it considers the purpose of Article 31(3)(c) to be. It acknowledges that the provision is supposed to be used to interpret a particular treaty term, and it does agree that it can apply to agreements.

I would certainly acknowledge, though that in the Banana (ph.) Submission, the point that the U.S. wanted to make was that they thought it should be restricted to custom but nonetheless they did seem to admit that an agreement between two states could have relevance in the WTO treaty, even though the agreement between those states could be completely outside the WTO framework.

And as -- I'm assuming we all know, but just to be sure the WTO with a Lex Bes E Alis and very well accepted lex specialis, very strong dispute settlement rules built into the treaty mechanism; and yet, nonetheless, despite that fact, the appellate body has consistently ruled that it is still nonetheless a creature of Public International law and that, therefore, from time to time when interpreting a provision, other parts or other quadrants of Public International law may be relevant.

So shrimp turtle is another example which I don't have here but there are a number of examples where the appellate body may be interested to know whether or not a convention on environmental protection has been signed by all parties or what have you.

In this context, we would submit that the treaty obligations undertaken by the United States with respect to Haudenosaunee peoples and the obligation it undertook to the British empire.
in Jay Treaty and then further in the Treaty of Ghent for the benefit of Haudenosaunee and other indigenous peoples is relevant to the extent that it helps the Tribunal form an opinion of what fair and equitable treatment means with respect to how it is keeping its obligations.

That does not mean, though, that I'm suggesting that the breach of the Jay Treaty is an instant after breach because that would contradict the third paragraph of the January -- I'm sorry, the July 31st interpretive statement which says that a simple breach of another agreement is not constitutive of a breach of the minimum standard. So, it's clear it's about construing the obligation. It has to be interpretive exercise and no more.

That is, I submit to you, one reason why human rights obligations that --

ARBITRATOR ANAYA: Excuse me, are you going to get into at some point how, what specifically the implications of the Jay Treaty are?

MR. WEILER: Yes. They are under submissions under --

ARBITRATOR ANAYA: This theoretical exposition is -- I think we've heard that. It's always useful to go over things but I think what we're really interested in -- well, speaking for myself -- I should speak for myself, the specifics of how the particular treaty is relevant.

MR. WEILER: In this case, the Claimants are of a strong belief and I think a very reasonable belief that they have a right to unhindered commerce and trade, unhindered by both the Canadian Government which is the successor to the British Empire and also the United States Government. They do not accept the United States Government's argument that simply because they omitted to continue the protections that were supposed to be there -- that because they just omitted them from a customs act that they just magically disappear -- as far as they're concerned they're still there and they make the point, and again, rightfully so, that they never -- they were never conquered they never had to make a treaty of some sort of peace and amnesty. They evolved much like the Two-Row Wampum Belt: They evolved together with our societies.

They don't see this treaty, this Jay Treaty, as somehow just because it's a little old that it doesn't matter anymore. But this is a constitutional democracy that's been around since, oh, I think it is about six, seven hundred years now.

ARBITRATOR ANAYA: Yeah, the bar counters the argument are pretty well understood, I think, but do you have, like, authority, and are you saying that this --

MR. WEILER: The authority is the treaty.

ARBITRATOR ANAYA: Okay any interpretive court decisions or...

MR. WEILER: The expert submission of Professor Fletcher is the primary authority we use to --

ARBITRATOR ANAYA: Fletcher or Clinton?

MR. WEILER: I'm sorry.

ARBITRATOR ANAYA: Clinton, right?

MR. WEILER: Clinton, who is an expert on the Jay Treaty and who provides us with the authority we believe is necessary.

ARBITRATOR ANAYA: Okay. Is he arguing that trade between native peoples across the border are subject to no regulation?

MR. VIOLI: I believe his statement --

ARBITRATOR ANAYA: You said --

"unhindered" was the terminology.

MR. VIOLI: I believe it's across the border in friends wherever situated.

ARBITRATOR ANAYA: Pardon me.

MR. VIOLI: Across the border in friends wherever situated. I am trying to picture --

ARBITRATOR ANAYA: And "friends"?

MR. VIOLI: Friends wherever situated.

We have the three treatise, right, Jay, Ghent, and Canandaigua, and we have a situation where the early 1800s, late 1700s, the location of the
various members, nations of first nations of the six nations -- first nations of the six nations, then five I believe it was -- throughout North America was not delineated by states or geographic boundaries but in some cases a particular region, but maybe crossed over to more than one region. We then have the movement of these nations, right, marched across the country or -- put the Seneca Cayuga down in Oklahoma, with whom we continued to deal or trade with. It's not across the border but also across the United States.

Now, what is -- as Professor Goldberg I believe would not opine on any treaty right. So. We have -- at least, initially in her first report. We have --

ARBITRATOR ANAYA: She did in the reply.

MR. VIOLI: In the rebuttal which I think may have been in the Rejoinder, excuse me.

ARBITRATOR ANAYA: Whatever you call it, I'm sorry.

MR. VIOLI: Yeah, I mean --

ARBITRATOR ANAYA: We know what --

MR. VIOLI: Professor Clinton gives an opinion and she doesn't reply to it and another brief later which I think procedurally was a little off, but the situation is that the Claimants believe -- and there are cases, the Lezore case and a couple of -- the Carnouth case, although contrasting it we, have the State Department still recognizing the Jay Treaty, so we have confusion among the various branches of the Federal Government as to whether the Jay is in full effect or was restored, whether it was restored for purposes of just passage or for also commerce. And the key thing as I see it is -- and one of the big points is, well, is this common among Indians not in bales, right?

PRESIDENT NARIMAN: What?

MR. VIOLI: Not in bales. At that time, when you transported in trade and product, commerce, typically the archeological evidence says they would use bales to carry -- yes

ARBITRATOR ANAYA: It in one of the core documents I can't remember where.

MR. VIOLI: Yeah.

ARBITRATOR CROOK: It is in the U.S. documents, I think.

MR. VIOLI: But I wanted to come back with to it with more specificity I wanted to deal with one specific issue that I saw as the issue and you said, what are really the issues where the parties are --

ARBITRATOR ANAYA: No, I -- he said --

MR. WEILER said the position of the clients is subject to no regulation in their trade across borders.

MR. VIOLI: That's our position.

ARBITRATOR ANAYA: Right, no regulation.

MR. VIOLI: When you're dealing with travel and you're dealing with commerce, it was unfettered commerce. But when we're dealing with -- since there there's no border, right, between the United States and Canada. That was the principal focus and idea of these treatise.

ARBITRATOR ANAYA: Yes, I'm somewhat familiar with the history.

MR. VIOLI: Right.

ARBITRATOR ANAYA: But I'm interested in how -- what the position is now and believe me I'm not being hostile. I'm just trying to understand --

MR. VIOLI: You mean the positions now
in this proceeding or among the Claimants or...
ARBITRATOR ANAYA: In this proceeding, yeah.
MR. VIOLI: That there's a right among these Claimants.
ARBITRATOR ANAYA: Unfettered with no state regulation.
MR. VIOLI: No state regulation.
ARBITRATOR ANAYA: Or federal regulation?
MR. VIOLI: The treaty says free from molestation or without -- shall be able to freely pass and trade. And we're talking about trade among, first, Native Americans in North America.
ARBITRATOR ANAYA: No, I understand.
MR. VIOLI: So, really the only regulation at issue is tax -- in this case we're talking about contrabanding or whatever.
ARBITRATOR ANAYA: Right, but if we take this interpretation in order to sustain this position it seems like that interpretation would have broader implications.

MR. VIOLI: Not necessarily.
ARBITRATOR ANAYA: No? Okay.
MR. VIOLI: Because we're talking about the commerce, right? We're talking about whether a duty imposed or excise, and back then that's the way you burdened commerce among sovereigns or persons doing business: Duty, excise, or imposed.
That, I think a logical extension is, no state excise tax. The logical extension is no escrow in this circumstance. It's in the form of duty, excise, or imposed. It's a burden on the commerce.

What I wanted to speak to you, Professor, and perhaps I'm jumping -- because that's the thing that screams out to me is the idea that -- I mean, it's the notion that this should be limited to peltries and to perhaps bales of corn or tobacco as opposed to the commerce now?
No treaty --
ARBITRATOR ANAYA: But that's not what we're talking about.
MR. VIOLI: Okay. You're talking about something and I was going to get into the other.
ARBITRATOR ANAYA: No, we're talking about -- let's say we don't want to limit it to that --
MR. VIOLI: It's just -- okay, so we went into tobacco--
ARBITRATOR ANAYA: --but we extend it to this. Yeah.
MR. VIOLI: Okay. Let's say we applied that product --
ARBITRATOR ANAYA: To commercial sales of tobacco in significant quantities usually --
MR. VIOLI: Not uncommon to Indians and --
ARBITRATOR ANAYA: No, but we're using various -- yeah, I'm not contesting that it's not uncommon, always, but I mean, you are talking about commercial sales of tobacco across the border using various means of transportation and so forth.

MR. VIOLI: Indian to Indian, right.
ARBITRATOR ANAYA: Yeah, it involves that, but it involves -- as you know, we need to paint an accurate picture of it and I'm not predetermining the outcome of it I'm just saying that, with this characteristics -- trade with these characteristics you're saying is exempt from any kind of regulation.
MR. VIOLI: I don't know if I have to go that far with this proceeding --
ARBITRATOR ANAYA: Yeah, that's what I'm trying ---
MR. VIOLI: --I don't have to go that far --
ARBITRATOR ANAYA: That's what I understood it -- okay.
MR. VIOLI: Yeah, we don't have to go that far.

It's exempt from state regulation --
ARBITRATOR ANAYA: Okay.
MR. VIOLI: -- state regulation that's at issue here.
MR. WEILER: And that's clear to the point. We don't have to go that far but we're stating the Claimant's --

ARBITRATOR ANAYA: I'm trying to get the basis for interpreting the treaty to get precisely to that point. Go ahead, sorry.

MR. WEILER: No, no, that's fine. The Claimant's position is that unfettered means unfettered and it should be unfettered. They do pay federal excise taxes as in the record; we know that. So, we know that we're not talking about federal regulation in this case. We're talking about state regulation.

ARBITRATOR ANAYA: But you have to concede we need to come to a principle basis for getting to that precise interpretation, and that's what I'm sort of grappling with.

MR. WEILER: Yes, and the principle should be unfettered.

ARBITRATOR ANAYA: But if we go unfettered, that would seem to be unfettered vis-à-vis the federal government as well.

MR. WEILER: Well, and that is the Claimant's position.

ARBITRATOR ANAYA: It is the position.

MR. WEILER: The Claimant's position is that it is unfettered.

ARBITRATOR ANAYA: Okay.

MR. WEILER: It's not necessary in this chase to go that far but that is definitely their position. They do not recognize the border between Canada and the United States. It's imposed and their territory is their territory and that treaty is pretty much one of the only vestiges left of the comity that was supposed to be shown between the United States and the Haudenosauaee.

MR. VIOLI: I think in that respect, if you go back in time to the early 1800s when the Jay Treaty was restored or the rights under the Jay Treaty were restored, and as throughout the 18th and 19th century, and you look for a history of the federal government taxing or putting a duty on any trade or commerce of the six Nations, and the same thing with the Yakuma in Washington under their border to border, ocean to ocean treaty, you see no imposition of a duty, an excise, an import or any kind of tax.

That imposition or that -- I think that's the way you have to interpret a treaty when it's written and give it room for expansion but what the parties, and particularly the people that didn't draft it, which are the Native Americans, what was their interpretation and understanding? And they perceived throughout a long history, trading in tobacco, trading in a number of product and there is no state tax or even federal imposed duty or excise imposed on that trade. So, as a point of reference I, think that's where the Tribunal should begin and I think Professor Clinton -- I mean, obviously, I cannot speak as professor Clinton would, but his report, I think, makes it clear we would stand by the way he's presented the argument in the report, and certainly maintain those arguments here.

ARBITRATOR ANAYA: Thanks.

MR. VIOLI: And one of the things that is -- again, not being an expert, but Professor Clinton talked about the Jay Treaty -- and many treaties acknowledged that which is inherent. I mean, a treaty sometimes doesn't give you a right or confer a right upon you as much as it acknowledges the right, a right since time immemorial, I think, what is written, but what is it that's acknowledged, and I think if we look back in time we would see that an unfettered trade, commerce, all across the North American continent certainly for 100 or 150 years, and nothing that would detract from it in a way that would suggest that the states could impose this particular regulatory burden is something the states haven't done before in this context as we submit Professor Clinton has stated it well that would be a protected trade under these various
MR. WEILER: We would have preferred to have Professor Clinton here but the Respondent as it's right, chose not to call him and we didn't call Professor Goldberg, so it does leave us a little wanting to answer your questions because I think we're going to, in a certain extent, referring you to our experts.

ARBITRATOR ANAYA: Yeah, that's fine.

MR. WEILER: To go on, this one is actually more tender than the last one. It's very difficult to talk about the obligation to consult without unfortunately bumming into Professor Anaya's opinion. So, I do apologize for citing. It's not the kind of form I like to show, but honestly it's very difficult to do that, the root article seems to come from that one book.

That being said, though, I think that there's very strong basis for it as you see in our memorials. I think that our memorials do a good job of explaining why we think consultation obligation has formed as a matter of customary International law. It's important to note again, though, that what I'm asking you to do for the Claimants is not to say that, because there is a breach of a customary international norm, which my friend will contest is a customary international norm does not mean that you get a breach of the NAFTA but rather we have a number of different avenues which cumulatively, certainty, lead to the results that we want. The outrageous conduct when cumulatively added breaches a number of customary international law doctrines and rules and we would submit that this is one of them.

And in this case, I can't stress enough the frustration of the Claimants about not being consulted at the various stages of these many years of measures. As the Chairman asked, why didn't they ask the NPMs, and specifically, why didn't they ask by far the largest and clearly a very important NPM, the largest Native American NPM, why didn't they consult them and why isn't there any consultation -- there's no consultation demonstrated on the record with respect to other attorneys general from the various nations that might have been interested. One of the witnesses, I believe it was the first day, didn't apparently know that attorneys general actually existed on First Nations' territory which was a little surprising to say the least but it may explain to a certain extent the level of disconnect that seems to exist between the state regulators and our Claimants.

It seems like the state regulators really dropped the ball when it came to just being diligent about consulting the people they should have consulted before they started doing what they did.

ARBITRATOR ANAYA: Excuse me, Mr. Weiler, what authority do you have that the duty to consult, even if it is part of customary international law, extends to consultations with indigenous individuals as opposed to indigenous Nation or people itself through its representative institutions?

MR. WEILER: I'd refer you to our Memorial. I would like to actually take a peek at it, though, because one of the human rights treaties actually --

ARBITRATOR ANAYA: Just to make clear, you are not attributing that to me, anything I've written.

MR. WEILER: No, no. I just -- no, it's -- let's just see if I can find the particular treaty.

MR. VIOLI: In the meantime, leaving aside the indigenous aspect of it, the record is replete with consultations between the states proposing the measures and the big tobacco companies --

ARBITRATOR ANAYA: That's not the issue Mr. --

MR. VIOLI: (Off microphone.)

MR. ARBITRATOR ANAYA: Yeah, I know, but that's not the issue.

MR. VIOLI: If there was an obligation to consult I'm just saying it hasn't fallen upon
the states --

ARBITRATOR ANAYA: You are asserting an obligation in customary international law to consult with indigenous peoples and extending it to indigenous individuals, that's what I'm interested in, and I'm not making a determination it exists or that it doesn't exist right now I'm trying to find out what the authority is.

MR. WEILER: I understand. I'm trying to get the authority. I understand, Professor, and I--I chose the wrong computer. The other one I actually had in the note the actual paragraphs. I could have just grabbed right to -- I apologize for the delay. I think I'll get back to it.

We'll get back to it but there is a treaty, a human rights treaty obligation, which we submit articulates a standard that does involve individuals as well as sovereigns and again I would --

ARBITRATOR ANAYA: I'm just curious, I mean, how do you then see these authorities that you're putting up? You don't have to comment on the reference to me, but how do you see the reference up here which is the duty to consult with indigenous people's which is about indigenous peoples and their own representative institutions?

How do you see that? I mean, you put it up here for us and by doing that you're representing that it extends here, so, at least, if could you articulate what that is.

MR. WEILER: Yes, yes. The way we articulate it is that, again, we return to the nature of the socioeconomic structure and a governmental -- or the state structure of the sovereigns, and in respect of the Mohawk and the Seneca, they have a more diversified socioeconomic structure such that the rights are not all held in the state. The state being the tribal council.

ARBITRATOR ANAYA: Do you have any evidence in the record of this so we could understand that the duty to consult with indigenous people is in the context. The Mohawk people really is a right that applies through representative institutions like the Grand River Enterprises, that within Mohawk social political structures that that would be the way --

MR. WEILER: I would like to get back to you on that question, if I may, Professor Anaya.

ARBITRATOR ANAYA: I'm telling you, if you're going to invoke the duty to consult, from my point of view, this is critical because it's --

MR. WEILER: Yes, I understand.

ARBITRATOR ANAYA: And just to put this up there and then have us make that leap is asking a good bit of us.

MR. VIOLI: I would note that I don't have it in the record, but there is a letter from the Mohawk Attorney General -- Seneca Attorney General, Jim Gildersleeve who wrote a letter -- I can get it if the Tribunal so wishes commenting about how the Seneca were never consulted in the context of this MSA, were never asked to participate, or its members to participate and/or negotiate or, and he raised issue with -- and actually I believe the letter --
ARBITRATOR ANAYA: I would appreciate it if you could focus on it and not sort of -- bringing in -- conflating these things. I understand the other points you want to make association with it, but this is a particular point that has to do with your argument that's in my view, a key part of your argument in this regard.

MR. VIOLI: I understand.

ARBITRATOR ANAYA: I want to give your argument a full consideration, that's the gist of my questioning, it's not to be dismissive about it's to be clear about it, to the extent you have represented that what I have written has something to do with this duty that you're talking about when in fact it's an extension of that or a difference on that.

MR. WEILER: We're exactly copacetic on the same page, and you'll have your answer.

ARBITRATOR ANAYA: I need you to be sensitive about that, as well --

MR. WEILER: I am very sensitive about it --

ARBITRATOR ANAYA: You put my name up there representing I said something and then extended it to something else and I'm having to bring out the distinction, okay?

MR. WEILER: Yes.

MR. MONTOUR: May I say something I have something to reserve that I testified that he's not --

MR. FELDMAN: Mr. President, we haven't yet called Mr. Montour.

MR. VIOLI: He just wanted to make a point he would like to speak on his own behalf with respect to these matters, that's all he said, and not necessarily through Mr. Weiler, and as a Claimant, I think he has that right on this particular matter -- when you call him obviously.

MR. WEILER: With respect to the interpretation of the minimum standard, we look to the language of the United States model bilateral investment treaty, which I have up there. Fair and equitable treatment includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceeding in accordance with the principles of due process and by no principle legal systems of the world.

It does, we assert, demonstrate even a partial acceptance on the part of the Respondent that procedural fairness extends beyond the judicial phase. I understand that the word "adjudicatory" is in there. We don't need to get into administrative law minutia with respect to what's adjudicatory and what's decision making but it's clear it does involve administration and executive -- the exercise of executive powers.

Now, we think it also confirms the interpretation we're suggesting you adopt with respect to Article 31(3)(c) of the Vienna Convention because it's talking about principle legal systems of the world and it's talking about the notion of due process being embodied in them. So, it seems to me that's a definite reference to principle, that's 381 sub -- it's either two or B, I can't remember which -- but that's principles that's not customary. It doesn't sound like a customary international rule I'm seeing there. I'm seeing it referenced to principles. So, I would submit that the only way that would make sense is if we are looking at principles through the prism of Article 31(3)(c).

And it seems that U.S. investment treaty practice, therefore, explicitly supports due process as this fundamental concept that demonstrates that we can also look to principles with respect to the remainder of this case on 1105, and I'm sorry if I am going on about this, but I think it's very important to set the theoretical groundwork to be able to show you why this is a NAFTA claim, because there's been a lot said about the minimum standard and how one reaches it. And I think it's important to see that there is still a place for Article 31(3)(c).

We covered some of this already, so I think I can probably slip past the slide but I want to see -- it makes the point that I was making earlier. The Claimants really were
surprised that they didn't -- that there wasn't more of a cooperative regulatory format, and I would point to the Pope & Talbot damages decision where actually that was the kind of language that the Tribunal used, that one day what seemed to be cooperative, normal regulation became adversarial and that change was attributed to the state. And we would submit that if there ever was a period where this was a normal regulatory environment and I'm not sure it was, but I would submit that we have seen the animus from the deputy attorneys general with respect to the client -- sorry, the Claimant and it's adversarial -- it's clearly adversarial. This is not cooperative regulation. Even if we don't need to go as far as saying that it is a duty to consult as a customary international rule, this is just a simple good faith, which again informs how we look at fair and equitable treatment.

MR. VIOLI: I wanted to mention the complementary legislation at this point, if I may. What we said before, with the complementary -- you would point to the Pope & Talbot damages decision where actually that was the kind of language that the Tribunal used, that one day what seemed to be cooperative, normal regulation became adversarial and that change was attributed to the state. And we would submit that if there ever was a period where this was a normal regulatory environment and I'm not sure it was, but I would submit that we have seen the animus from the deputy attorneys general with respect to the client -- sorry, the Claimant and it's adversarial -- it's clearly adversarial. This is not cooperative regulation. Even if we don't need to go as far as saying that it is a duty to consult as a customary international rule, this is just a simple good faith, which again informs how we look at fair and equitable treatment.

MR. WEILER: That completes our analysis of the minimum standard of treatment and its roots and its root in customary international law and principles in international law, and the ways in which we believe these other doctrines and principles can and should be used to interpret that provision.

I now move to the definition of investment enterprise which was another question the Chairman had in the first day.

In this regard. I think it's one thing...
the United States market exclusively.

The reason that that’s there is because we have two claims; two types of claim. We have an Article 1116 claim, which is a claim by the investor on its own behalf and we have an Article 1117 claim, which is a claim by the investor on behalf of an investment enterprise. To be clear, the $27 million claim is a claim by the investor, Grand River enterprises. The impairment claims that we’re making are Article 1117 claims made by the other Claimants on behalf of the enterprise which they operate on Seneca territory for the promotion of the brand.

Now, I’m going to attempt to demonstrate to you why we are confident that we have an investment enterprise which is an association on Seneca land. First, the definition as to why we get there. We’re talking about an enterprise because the definition of investment includes an enterprise. We refer to Article 201 the general definition provision to figure out what enterprise means and this is a very inclusive choice.

Investment enterprise means any entity -- any entity -- constituted or organized, and key there, "organized," under applicable law, whether or not for profit, whether or not privately or governmentally owned and it includes these various species, corporation, trust, partnership, proprietorship, joint venture, and other association. We submit that, if you recall, the object and purposes of this treaty which is to protect investment and to promote investment, that you should construe this provision broadly and purposefully. That doesn't mean I'm suggesting that you're in any way departing from the text. The text is very clear it says "association" but I would submit that if it was a toss up, this one goes to the - - the tie goes to the runner. In this case you would want to, if you have two choices of interpretation, both seem equally solid, you would want to choose the one that more befits the object and purpose of the treaty. So, what is the investment enterprise?

Canada -- they would bring a Chapter 11 case if plain paper packaging came in. That makes perfect sense to us, because that's the nature of the business. Cigarettes are essentially a tube with a filter and a blend, a proprietary blend, of tobacco.

You know, it's not that hard for someone to go use a machine and start making them; that's not where the investment is, that's not where the money is. That's in building a brand and it takes time it takes a lot of time, and we submit that these three investors have done that. They have created an investment in the brand and they have done it via their association together. Now, Professor Goldberg, in her criticism of this approach, tries to draw some strict interpretation of the language of the applicable law and we think it's necessary to go over some of that.

Very clear, that once again it's evidenced on the record that the Seneca Nation licenses NWS, that NWS is 100 percent owned by
Arthur Montour and that he is 100 percent member of the Seneca Nation. And as necessary, because Article 2.201(a) of the Business Code for the Seneca Nation says that has to be the case and so it is; that's for a wholesaler. Article 1.109 very clearly vests jurisdiction with the Peacemakers Court, and we highlighted the word association to demonstrate that it's that same word: It's an association. It is recognized in this legal system that one can have an association as differentiated from a firm, partnership, corporation, business entity. It goes onto point out exactly how -- it does personal jurisdiction, does subject matter jurisdiction, does territorial jurisdiction. You see it's broad and it's even more important to note that the parties themselves and their cross-licensing arrangements contemporaneously at that time cited Seneca law. They fully intended -- they certainly didn't fully intend to fight each other, but if there ever was something it was going to go to the Seneca Peacemakers Court and it was going to be decided under Seneca Nation law. We show you the definition of business. We show you the simple common dictionary definition of what an association is. We submit that this is -- it is baby steps but it seems important in light of professor Goldberg's criticism that we demonstrate that all of those steps are followed. So what do we have here? We clearly have three men who are in control of their corporations, their two separate corporations. They clearly have a shared and collective interest in these trademarks succeeding, in the brands that the trademark supports. Succeeding. Significant commitments on the record, capital, so much capital committed by these interim -- I'm sorry, loans which were originally going to be of five-year duration and ended up seven or eight years ended up being. But it's very clear that NWS would not have been able to do that alone, they needed the loan from GRE.

That's the contribution. That, by the way loan -- that's defined. I find it frustrating personally as a small business person to see the Respondent -- counsel for the Respondent questioning -- well they say that, you know, there's no specific maturity date. Where's your specific loan agreement? A loan is pretty straightforward. A loan is when somebody gives to another person something of value either expecting it back or expecting it back with interest. The NAFTA provision doesn't specify any more than that. It leaves it at loan and says it has to have a maturity date more than three years. It doesn't specify it has to be in writing or any other such thing.

So, I would submit that not only is this loan evidence of the joint commitment of these Claimants to this association that they have which is governed by Seneca law, it is also in and of itself clearly meeting the threshold of investment here, that loan in and of itself.

So, the next point to make is that my friend mentioned -- they say, hey, wait a second this association doesn't have a license and everybody has to have a license. Well, no, actually, not true. NWS is the exclusive wholesaler of these products and when we look at the Seneca business -- I'm sorry, the Second Nation Business Code or their fuel and Tobacco and Fuel Ordinance it's very clear you don't actually -- if you're an association with someone who has that license and your association is not selling cigarettes in and of itself, which it isn't here, it's promoting a brand -- that's the venture -- it doesn't need a license to do that. The Seneca code specifically says in the case of a partnership, association, or joint venture no business license shall be required of any partner whose not selling cigarettes.

And there is no evidence on the record that Mr. Montour, Jerry Montour, or Kenneth Hill is selling cigarettes in the United States, much less the Seneca Nation. There is no evidence of that individually.
What there is a lot of evidence I would submit is that these three partners -- I'm sorry, strike that -- these three investors are in association together for a purpose. And I note what I see in the preamble and then again in the early text of this business statute. The Nation couldn't be more clear about what it's saying. It's explaining it has sovereign inherent authority, and I think Mr. Violi made the point that's probably worth repeating that the Claimants don't so much look to these older treaties as a source of rights but rather a confirmation of what's already their's. Much like the original Two-Row Wampum Belt between the Dutch and the Haudenosaunee when they were the Five Nations it symbolizes inherent sovereignty they already hold and the relationship they hold with the other sovereign. We, in common law terms, so often I think treat treaties as if they're statutes and think that's actually where the power comes from but it's more complicated than that, and I think it was necessary for me to just clarify that on behalf of the Claimants.

So Canandaigua Treaty, and forgive me for mangling that, is also cited by the Seneca Nation, so it's very clear they know exactly what they're doing when they pass this business regulation. They cite the treaty of 1794 that cites that famous phrase, the United States will never claim, same, nor disturb them or either the six Nations nor their Indian friends residing thereupon, and united with them in the free use and enjoyment of their land. That's why the Claimants say no, federal -- no federal regulation either. Again, we don't need to go that for that case but they're very serious about that. Now, this one I felt a little -- I was surprised at with respect to Professor Goldberg because she point to these other statutes, these other First Nation statutes and other parts of North America and she demonstrates how they have these very elaborate systems for quantifying and validating what is and isn't an enterprise. With respect, that's not very respectful. It's pretty clear right there in Article 1-103(a)(ii) that the purpose of this code is to permit the orderly initiation of new businesses. I'm sorry to Professor Goldberg that the Seneca Nation didn't decide to have a real fancy incorporation statute, but that's their right. They don't have to have a big fancy incorporation statute to be able to validly designate what is and isn't a business on their territory. And we would submit to you that this language here is very clear. And with that, actually, I'm going to go back to another issue of investment, but I have to go back this far. There we go.

So, I've covered the loan. I had a point to tell me to make sure I covered that. One of the things I want to stress is we really think that if you look -- if the Tribunal looks at the evidence on the record, that the real life facts speak for themselves. The whole point, the thrust of a tobacco enterprise is to establish and support and build equity in the tobacco brand. That's why it is so deadly for a brand to be taken off the shelf even for two weeks.

Yes, Professor Weiler.

ARBITRATOR ANAYA: Clearly --

MR. WEILER: I'm sorry, no, I'm Professor Weiler, you're Professor Anaya.

ARBITRATOR ANAYA: Yes, I think that's still the case.

MR. WEILER: Could we trade? Actually, I would like to trade.

ARBITRATOR ANAYA: I've been on that side plenty of times. But back to the point on business association, I understand you say it's an investment because it's a business association under Seneca law; is that right?

MR. WEILER: Yes, it's a business enterprise, their association together.

ARBITRATOR ANAYA: Do we get --

MR. WEILER: They are working in
concert together to promote the brand is an association.

ARBITRATOR ANAYA: And hence it's an investment under NAFTA.

MR. WEILER: Hence, it is an investment enterprise under NAFTA.

ARBITRATOR ANAYA: Do we have to find that Seneca -- that it is a business enterprise or association under Seneca law in order to find that it's an investment under NAFTA or is that just one of --

MR. WEILER: It's one of the ways.

ARBITRATOR ANAYA: One of the ways.

MR. WEILER: We thought it was worth going through the details of that because, you know, we've had a lot of kicks at the can in this case in terms of -- and by the way, I'm thinking probably it is a particular statement of claim where we might find the good faith. Remember that was a long time ago.

ARBITRATOR ANAYA: That's one of the ways. Are there any other independent ways if we didn't find --

MR. WEILER: The loan is another independent way. The brand is another independent way. There's more, I just have to turn my mind to them because I'm fixated on those ones. Do either of you two want to name one of the other ones?

MR. VIOLI: I think under any law, certainty U.S. law, the trademark licensing agreement, Professor Anaya, with the attendant exclusivity to use the trademark for purposes having the exclusive right to manufacture cigarettes for the U.S. market, the contract manufacturing relationship among them, I think evidence is their association as a matter of even domestic law.

ARBITRATOR ANAYA: You seem to put a lot of emphasis on the assertion that it's a business association under Seneca law. Is that because you think it's the best argument for finding this as investment under NAFTA.

MR. WEILER: No it's because Professor Goldberg, in the final rejoinder, took issue with it and so we felt it behooved us to address it.

ARBITRATOR ANAYA: I understand the Respondent is taking issue with all these other arguments, as well.

MR. WEILER: None of which required the opinion of an expert, but we're more than happy -- I mean we have 15 hours and we're --

ARBITRATOR ANAYA: Okay. No, no. Okay. Well, all right.

MR. WEILER: --more than happy to spend time on any of the investment issues you'd like to discuss.

ARBITRATOR ANAYA: So do you have -- are there any -- sorry.

MR. VIOLI: The other reason we wanted to demonstrate that it was an association, a business association, an investment enterprise, among Native Americans and governed by Native American law, in this case Seneca law, is because -- and I remember dealing with this issue -- should any one or more of these individuals or the companies try to attain an Indian trader statute.

And when I researched the law, Indian trader statute really applied -- particularly to non-native enterprises doing business on Indian land. And so, what I think this did and the agreement I mentioned before says it governed by Seneca Nation law, what it does is it reinstilled in them in their mind for their own understanding, that they were really dealing in -- maybe it's misplaced and I use it wrong and forgive me -- what I call Nation-to-Nation commerce. I view Nation-to-Nation commerce, perhaps incorrectly, but I think it's still nonetheless protected.

When a member of the Seneca Nation deals with the Coeur d'Alene or the Isleta Pueblo, either directly with those tribes or nations or with their tribal-owned distributors or with their tribal-licensed entities. Including entities that are owned by tribal members. That's what we've used generally to mean Nation-to-Nation. Maybe it doesn't mean that in the real Indian law sense but certainly when we have association among First Nations members and their businesses constituted
and certainly their relationship governed by Nation law and they trade with their friends or other nations, I think it, what we understood and what they understood and what I understood them to understand is that it really -- it was really a focus it was an intent to deal in Nation-to-Nation commerce, to have their relationships and this business constitute or come within Nation-to-Nation commerce the way they understood it and I understood it. So, that's why we mention it here, but it's not precluded as being association under domestic law, individuals setting up a --

ARBITRATOR ANAYA: Okay. Yeah, that was one point.

Okay, but as to this argument that it's a business association under Seneca law, do you have any -- is anything in the record -- I don't recall seeing it -- any kind of expert opinion and I don't mean it has to be a legal expert, or expert trained in U.S. law but an elder or some authority in Seneca law that has opined about this matter? I mean, you're advancing interpretation of Seneca law.

MR. VIOLI: Yes.

ARBITRATOR ANAYA: So I'm wondering if, you know, often, in many justice systems or indigenous justice systems, you have people who are authorized or authorities in the law of that, and so we look to the people or the elders or other kinds of indigenous authorities to give expert opinions. Sometimes it's touchy because those matters are somewhat private or sensitive otherwise, but in any case I'm asking, do you have any kind of -- such evidence in the record of Seneca -- or is it just the argument you're presenting to us on the basis of your own interpretations of the code and the sociology or political make-up or authority of the Nation?

MR. VIOLI: It's consistent with the plain terms of the Seneca code.

ARBITRATOR ANAYA: Okay. So you don't have it.

MR. VIOLI: We don't.

MR. VIOLI: That's what I want to do, I want to tell you why.

ARBITRATOR ANAYA: -- I understand you --

MR. VIOLI: I'm sorry.

ARBITRATOR ANAYA: I'm sorry. I'm sorry. Please.

Look, please don't prejudge what I'm trying to say, I'm trying to say this in a sensitive way. I understand how sometimes this can not be an easy thing to do for a number of reasons. I'm just asking if you have any such --

MR. WEILER: We do not have --

ARBITRATOR ANAYA: -- or if I just have to rely -- we just have to rely on your own interpretations as lawyers.

MR. WEILER: You have to rely.

ARBITRATOR ANAYA: On you as lawyers.

MR. WEILER: Yes, you have --

ARBITRATOR ANAYA: -- then it's a different kind of analysis put into place.

MR. WEILER: Yes, that is what we have.
We do not have an elder's opinion --

-- and there were very few

-- and there were no court cases for this --

My next question is, is there any reason for that, and hence you can -- now you can --

It's never been a dispute before there was no dispute and there's never been a dispute that we've been able to find in a Peacemakers Court or otherwise, but we endeavor to ask a Peacemaker for a declaration. They don't have a declaratory judgment or declaratory rights statute that would have allowed us to get without some kind of controversy -- if this controversy was there, we were told, we would be able to get a declaration. Ironically, that's what the status of the U.S. law was in the original court system of the Justice Act. Unless there was a case or controversy pending in that Tribunal you couldn't get --

We hired a Seneca lawyer who practiced in the Peacemaker, and that's what we found. I apologize trying to chomp at the bit to get that out to you, but we did in earnest try to get a declaration or finding and they said, we'd love to, but we're bound by our jurisdictional limitations which don't allow us to give a declaratory judgment in that respect unless there was a case in --

Just to be for the record, the fellow -- I think his name was Jeffrey that was helping -- I can't remember his last name -- he actually is not a lawyer; he's an advocate.

They don't have lawyers.

That's not determinative.

That's for the record.

Just so you know, I wouldn't require it be a lawyer, I mean, in the sense that we, you know, or that the western world thinks of lawyers. It's just someone with due expertise on Seneca law and authorized by Seneca.

Back to speaking. Sorry.

One question

Mr. Weiler.

Oh, yes.

-- is trading activity an investment? --

In this case it is because we're talking about the promotion of the establishment and promotion of a brand. The word "trading" is coming from these treaties that are hundreds of years old. So, in one sense, when one calls oneself --

I'm not talking of treaties. I'm saying, quite apart from the treaty the aspects of it, I assume you had nothing to do with the Indian tribes, et cetera or Indian Nation. Is a trading activity, simpliciter (ph), within a particular state or a nation an investment? I mean, do you trade in cigarettes or do you manufacture them within this territory?

You don't. You trade in them. Now, is trading activity an investment?

Trading without more is not investment.

That's what I wanted to know.

It requires something more such as the loan --

Something more.

What is that something more in your case?

The one example, there is this association that we've been discussing which is an enterprise established under Seneca law which qualifies under the investment code -- I'm sorry, the investment definition.

The next one is the seven-year loan of inventory in kind from the manufacturer arm to the
1 distributor arm which we have evidence on the
2 record stating was necessary to make the whole
3 operation work. So, and this loan, we chart --
4 the charts are in the record, again. It went into
5 the high millions for many periods of time. So,
6 and it even did have a credit limit. Admittedly,
7 I think the credit limit -- the first time I saw
8 the credit limit was about five years in which
9 maybe is because the evidence is they thought it
10 would take five years and then when I was looking
11 at the records I started finally seeing -- about
12 five years in I saw there's a credit limit that
13 can't go above this amount. Again, sounds like a
14 loan to me. So, the fact that they did not give
15 them millions of dollars but instead advanced them
16 millions of dollars of cigarettes without asking
17 for the money right away, that's a loan in kind,
18 and that's a very big commitment of capital. It's
19 a very big investment, and it was necessary for
20 this operation to work.
21
22 MR. VIOLI: Mr. President. May I add
23 under the investment, we have one of the

---

1 Claimants, Mr. Montour, Arthur Montour, he owns a
2 company situated in the United States that's
3 operating on land in the United States that has
4 assets in the United States, that owns a United
5 States trademark. Certainty, a patent or
6 trademark is an investment within the jurisdiction
7 as we know. We have a cross-licensing of that
8 trademark right. We also have the investor, the
9 individual investors through Grand River
10 Enterprises and Grand River Enterprises investing
11 now close to $50 million, which is held in bank
12 accounts in the United States as a condition to
13 doing business. Under those Escrow Statutes, you
14 must put that money in U.S. bank account in order
15 to continue to do business otherwise you will be
16 bound under the complimentary statutes. So, you
17 have that investment and the Respondent's expert
18 said that's a savings account, it's like a forced
19 savings account. These are all the investments
20 that these -- it's not just merely just the sale
21 of goods. There's a trademark, there's assets
22 here, vehicles here, there are bank accounts here,
River's name here and the funds there are held under the escrow agreements as Grand River's monies.

MR. FELDMAN: Counsel, is this information in the record?

MR. VIOLI: It is indeed. We've said what the bank accounts -- that there's bank accounts escrow accounts in the record. I think Mr. -- isn't it in the expert reports as well, the amounts of money that are there? Certainly the financial statements show it.

MR. WEILER: Just one point before I move on to the next set of slides. I want to stress that the Contraband Law, if you prefer, the -- slipping from me all of a sudden --

PRESIDENT NARIMAN: Complementary legislation.

MR. WEILER: Thank you, the complementary legislation, it operates by identification of brand, no two ways about it.

So, not only does it demonstrate the importance of that concept in the tobacco business, but again it demonstrates the nexus between the measure and the investment. So, you'll be happy to hear that we're getting towards finished. This is actually the only point I wanted to make I already made on that.

And then the final one is a couple of thoughts about the state of the evidentiary record.

On May 14, 2007, the Tribunal issued its order and it said that requests numbers 1 to 22 are not in conformity with Article 3 of the IBA Rules and therefore are denied. It goes on and it says, "however, the Respondent is directed to disclose such documents as are mentioned generally in Items 1 to 22 of the Claimant's request to produce," which Respondent considers to be included within the scope of Paragraph 1 of this order.

And then, on January 28th, 2008, and again confirmed on February 4, 2008, the Tribunal stated, "Each party is reminded that any unexplained non production of relevant documents would be a matter of raising of inferences."

So, first, the Chairman asked if there were any other internal NAAG documents earlier in this proceeding. You asked if there were these other internal NAAG documents, I think you said, that may have been amended or placed a gloss on them -- a gloss on the opinion or whose correctness and apparently that was Mr. Hering did agree that there were and again we'll confirm that on the record but it appeared that there are these other NAAG documents and we wanted to know about that, too, which is why we asked for, quote, all documents concerning the negotiation drafting implementation or enforcement of the NSA provision that relates to SPMs or NPMs.

Now. My friends answer at the time was pretty uncategorically -- he said, no, it's not relevant and then he mentioned also as they did, I think, in all of the answers that it was too broad and burdensome and unspecific. I would submit to you that those NAAG documents are pretty relevant and I think they should have included. And --
MR. LUDDY: I don't believe we're looking for additional discovery.

PRESIDENT NARIMAN: He's pointing out your evidentiary omissions. That's what he's leading too, that's why he's mentioning. He's not saying, now you produce it or don't produce it. He's only commenting on it.

ARBITRATOR CROOK: Mr. Weiler, the request you just read us, was that one of the original 28 or was that subsequent to the Tribunal's order?

MR. WEILER: One of the 22.

ARBITRATOR CROOK: One of the 22.

MR. WEILER: Yes. I actually -- funny, the one I found the quickest --

ARBITRATOR CROOK: Was that one of those that --

MR. WEILER: Yes one of the ones that was said --

ARBITRATOR CROOK: That was denied.

PRESIDENT NARIMAN: What was the answer to it?

MR. WEILER: The answer was, no, it's not relevant and also that it was insufficiently specific, overly broad and unduly burdensome.

PRESIDENT NARIMAN: But, then, couldn't you have narrowed it, because it is broad? Your request is very, very broad. Any documents pertaining to NAAG -- they can't bring cartloads of documents from NAAG.

MR. VIOLI: We did make a specific request with respect to what we think falls within the working group, Mr. President.

On the second request, number six we asked for all documents analyzing, comparing, or summarizing the operation effect or enforcement of the escrow statutes as amended or by the MSA or as originally enacted.

In respect of Claimant's, in particular, or considering other tobacco industry members, but as a class or whole.

PRESIDENT NARIMAN: (Off microphone.)

MR. VIOLI: Yeah, we asked for this, here, number six. And now we find out there's a working group but no documents -- they produced nothing of the sort.

MR. WEILER: No memorandum, no e-mail.

ARBITRATOR CROOK: And Mr. Violi, in your opinion, it's immaterial the Tribunal denied that request?

MR. VIOLI: I don't think the Tribunal knew -- well, let me ask -- I'm not going to ask the Tribunal but I'll leave it to you if you had known there was a Grand River working group and you had known that they knew and we didn't know would you have denied the request nonetheless. I'd leave that to you and then you would have to make the material -- I'm not going to make the materiality finding.

MR. WEILER: But I would add, Mr. Crook, as I read back the orders while the requests were ruled contrary to IBA(3) that nonetheless the word 'however' is there. The Respondent is directed to disclose these documents and then -- and it does say though that it feels is relevant but then we have two admonitions, I think, because we wrote too much to you, but we have two admonitions that say each party is reminded that unexplained non production of relevant documents would be a matter of raises inferences. I am requesting inferences to be raised on this point, which is the --I think we're fairly clear on that. So I'll move on.

PRESIDENT NARIMAN: What do you want?

MR. VIOLI: May I speak to that?

PRESIDENT NARIMAN: Yeah.

MR. VIOLI: From what we've seen, the few documents we've seen, they will show number of meetings between the tobacco companies and the attorneys general dealing with changing the law, the reason for changing the law. The effects of changing the law and he repercussions to Claimants. We will also see a particular working group something I've never seen before where imagine a whole country of attorneys general
focussing on one company and one particular industry. I thank them for their attention, but my time is limited, Mr. President, among many matters that's what we have. We have a concerted effort and we've seen the results of this concerted effort. Letters to Foreign Trade Zone, and I don't want to bring it up again, but these documents which shed light on the measures at issue and their enforcement, and we think they would go direct -- because everything -- we would get a piece of document here or someone would give us a document that they found somewhere, not through our friends, and none of them mentioned healthcare; we noticed that. There's a common theme throughout all these documents that are beyond the public purview, not one -- they all mention money, they mention reduction in market share, but they don't mention healthcare. So, it goes to the healthcare issue also. But certainly it goes to the intent, the purpose, and the effect of the measures at issue. PRESIDENT NARIMAN: What is the inference you want us to draw?

MR. VIOLI: The inference to draw is, number one, with respect to health measures, that they're either neutralized or nonexistent in comparison to what is the true purpose of these measures, and that is to take the market share away from the NPMs; that's the first inference, that the healthcare measures really aren't substantiated when we see that documents exist really speak to the true purposes of these inferences.

The second inference to draw is that there was an intent and an acknowledgement that these measures would harm Claimants in a quantifiable way, as measured by market share, lost volumes, and profits. So we think an inference can be drawn in that respect. Also the inference that can be drawn -- and we'll speak more to it in the closing -- the egregiousness of the conduct at issue. I think we have to reach that level of shock -- in one of the tests, in one of the provisions -- I believe it's

1105, right? We have to reach the shocking and sort of outrageous and we're really close -- we're really close as I explained this morning and I submit that they didn't want to provide the documents because we'd be past where we need to be. I think we're there, because these documents, like I said this morning, it confounds -- it's unbelievable that the government would do this. You have this working group and all that, so I think we met the standard but if there's a question whether we're just below that --

PRESIDENT NARIMAN: Which document you're talking about?

MR. VIOLI: The state's. The Respondent is vicariously responsible for the state's conduct. I'm talking about the state --

PRESIDENT NARIMAN: Vicariously under what?

MR. VIOLI: NAFTA.

PRESIDENT NARIMAN: NAFTA itself?

MR. VIOLI: Yeah, the federal government is responsible -- I'm not saying the federal government did anything wrong here in these measures. It's the state governments that the federal government is responsible for under NAFTA. NAFTA says we cannot sue -- if we would have brought the claim here against the states, we would have, but we can only bring the federal government and they have to stand in the shoes of their states.

So, what I was submitting before is that if you think we're just below that egregious standard and outrageous, shocking and outrageous, I submit that the documents, the little bit that we saw -- if we were given all of their documents -- and they're demonstrated here -- and brought before the Tribunal, they would be much worse than what I attempted to describe to you this morning. The picture would be much bleaker, much more grave.

Finally the inference is that -- competition. I'm not permitted to speak to you about something called an NPM proceeding, adjustment proceeding. I'm bound by a court order
that says I -- and their requirement that I not disclose certain matters to you. There's been a whole body of proceeding that the individuals testified where the tobacco companies want money back under the MSA; they want a credit, and they are adversarial to the states. The states are saying, we diligently enforce the law and there's been no market share lost and whatever they want to make as an argument.

In those proceedings, I can only tell you personally that they will or would have materially affected your decision on whether competition was affected -- competition was affected by these measures; whether we were harmed by these measures; and, third, whether they were truly needed.

PRESIDENT NARIMAN: Who injected you from --

MR. VIOLI: In the federal anti-trust case in New York where we're seeking a declaration -- we can't seek damages -- we were provided some documents of --

MR. LUDDY: Some.

MR. VIOLI: Some documents, not all.

They fought us on the some we received, where the states took a position and one of the documents that's in the record I believe --

MR. LUDDY: This is confidential.

MR. VIOLI: No, the one that's the public one.

MR. WEILER: The New York decision.

MR. LUDDY: No, no. Sorrell is the one who said that. If you're going to mention any of the NPM documents that are in the record, we have to go private.

MR. VIOLI: Can we go closed for one second -- or ten seconds or whatever. Closed, yes.

Closed, please.

MR. WEILER: And then wait on the --

(End of open session. Confidential business information redacted.)

MR. VIOLI: Right. For here, they only allowed four.

PRESIDENT NARIMAN: (Off microphone) I just want you to know -- all that you can get out of this case was these five documents --

MR. VIOLI: Right. For here, they only allowed four.

And your complaint is only made -- the Respondent is only --

COURT REPORTER: I can't hear you.

PRESIDENT NARIMAN: Yeah, okay.

MR. KOVAR: Mr. President, may I ask you a question, please?

I'm a little bit unclear about the discomfort you have here. There's a discovery order in this case that was reached after submissions by both parties, it was duly considered by the Tribunal.

The Claimants now are bringing in a lot of wild accusations where there's no information on the record, and I don't -- if there's a discomfort on the part of the Tribunal, I don't think you have information with which to address that. And I don't want to be in a position where the Claimants are upset and are making allegations. I think that creates a situation that could lead to unfairness.
PRESIDENT NARIMAN: (Off microphone) -- you have 13 hours to explain to us. I have no objection to listen to you. I haven't made up my mind, speaking for myself, but I am a little disturbed, you are right. (Off microphone) -- of this, even if there are wild allegations, you please tell us later when it gets to your turn. I am willing to accept it. Yes, that's right.

MR. KOVAR: Okay. We'll address it then, thank you.

MR. LUDDY: In terms of the rest of the day, I think -- are we going to take our break now? And then, I think we're going to run into an impasse on witnesses until tomorrow morning. We may -- we're going to consult amongst ourselves.

PRESIDENT NARIMAN: (Off microphone) -- have some sort of a --

MR. LUDDY: We have -- we actually have a brief tape of GRE that's in the record that we may play for the Tribunal.

PRESIDENT NARIMAN: What's that on?

MR. LUDDY: It's a historical tape of GRE that tells a little bit about the company.

PRESIDENT NARIMAN: (Off microphone) -- do you have any objection to any --

MR. FELDMAN: It's in the record.

MR. LUDDY: It's in the record.

MR. FELDMAN: We don't have an objection.

MR. LUDDY: And I think that's about 20 minutes or so. So, if we broke now that will probably take us to closer to 4:30, but then I just --

PRESIDENT NARIMAN: (Off microphone) -- we don't have to speed up -- want to do something; otherwise --

MR. LUDDY: Yeah.

PRESIDENT NARIMAN: -- let us have some argument on your part or something -- what's the use of wasting time -- because we have until 5:30.

MR. LUDDY: Yeah. Well, I mean, part of the problem is that, in terms of some of the arguments that we have left -- deals with witnesses that haven't been called yet, and through no fault, I'm sure, of Respondent's, and certainly not our own, Professor Gruber is not here until tomorrow, and we've been trying to work around the schedule. So, we're doing the best we can, your Honor. If we have a dead hour, one dead hour in the week I consider that a small victory and go on.

PRESIDENT NARIMAN: (Off microphone) -- have a break now and meet again or...

MR. FELDMAN: That's fine. That's fine.

PRESIDENT NARIMAN: Until 4:00 o'clock?

MR. VIOLI: Yes, please. (Whereupon, a recess was taken from 3:40 to 4:00 p.m.)

MR. WEILER: What we're about to see --

(VIDEO PLAYED.)

(VIDEO STOPPED.)

MR. LUDDY: We were going to describe that briefly. It's just a brief promotional video produced during the course of this litigation. It shows the facilities and the commitments of the company that we produce frankly for the Tribunal to see. I think the, I think we're probably at that hour that I forecasted before, Mr. President, where we may have a dead hour. If that's the only dead hour we have for the week, as I said, personally we consider it a success. Tomorrow we're planning on Professor Gruber first thing in the morning and then because Mr. Montour's counsel has to head to the west coast -- you know actually, either Gruber or Arthur Montour, first thing.

MR. FELDMAN: Yes.

MR. LUDDY: And one other witness tomorrow afternoon. After those two at some point, we'll -- I think that's it. All right. I think that's all for today.

PRESIDENT NARIMAN: Okay.

MR. LUDDY: Thank you, Mr. Chairman. (Whereupon, at 4:15 p.m., the hearing was adjourned until 9:00 a.m., the following day.)
CERTIFICATE OF REPORTER

I, John Phelps, RPR, CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by an of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

JOHN PHELPS, CSR, RPR, CRR