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

BETWEEN:

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

Claimants / Investors

- AND -

GOVERNMENT OF THE UNITED STATES OF AMERICA

Respondent / Party

CLAIMANTS' MEMORIAL

MERITS PHASE

10 July 2008

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INTRODUCTION

1. In this arbitration, Claimants seek damages from the Government of the United States pursuant to Chapter 11 of the North American Free Trade Agreement ("NAFTA"). At issue is a regulatory scheme that imposes discriminatory payment burdens on Claimants in comparison to competing tobacco companies in the U.S. market. In addition to applying to Claimants as investors, the measures expropriate and treat Claimants' investments in an unjust and discriminatory manner, by imposing an *in rem* ban on the sale of Claimants' trademarked products in any State where the offending regulatory payments have not been made.

2. In contravention of NAFTA, the measures do not operate even-handedly with respect to all investors and their investments in the Free Trade Area or the United States. Indeed, for the reasons and under the circumstances explained below, Claimants were entitled to a heightened level of vigilance and care with respect to receiving at least parity treatment under the measures at issue. The record demonstrates, however, that the purpose and effect of these measures, as recently amended, is to discriminate against Claimants and their investments in favor of a defined group of investors that Respondent has arbitrarily chosen to receive such favorable treatment. The further effect of these measures has been to expropriate Claimants' investments for the benefit of the aforementioned group of favored investors, in return for what one State Senator identified – rightfully so – as 'protection' money.

3. Respondent's measures have resulted in four basic types of breach under the NAFTA:

   - **Articles 1102 & 1103**: Respondent has failed to provide Claimants and Claimants' investments in their proprietary cigarette brands 'treatment no less favorable' than has been provided competing tobacco companies and their investments; and

   - **Article 1105**: Respondent has treated Claimants and their investments in an arbitrary and discriminatory manner, contrary to basic principles of fairness and due process and contrary to the basic human rights norms that condition how the customary international law standard of fair and equitable treatment should be interpreted particularly when the interests of First Nations members and communities are at stake;

- **Article 1105**: In establishing or expanding their investment, Claimants were entitled to rely on the transparency and stability of the law in the Host State. Claimants shared legitimate expectations that Respondent would not radically change the legal framework for tobacco distribution without effective notice or consultation, and certainly not with intent to drive them out of the market or depart from the obligations it holds to Native Americans under law;

- **Article 1110**: Respondent has expropriated Claimants' investment in specific markets within the United States without the payment of effective compensation or respect for due process under international law.

4. In defense of these claims, Respondent has raised collateral arguments alleging that Claimants are not "investors" who have made "investments" in the United States, and that the measures at issue do not relate to Claimants or their investments.

5. The evidence demonstrates that Claimants have collectively made significant investments in the United States, effected through their calculated effort to establish, promote, manufacture and distribute unique, proprietary brands of tobacco products known as Seneca® and, to a lesser extent, Opal®. These investments include, but are not limited to, investments made in connection with a vertically integrated enterprise, which Claimants organized and operated to promote and distribute their proprietary cigarette brands in the United States.

6. Respondent's contention that its measures do not "relate to" Claimants and their investments is belied, first and foremost, by the fact that Respondent has banned the sale of Claimants' U.S.-trademarked cigarette brands pursuant to the Contraband Laws and injunctions obtained under amended Escrow Statutes in many states, and has threatened to ban the sale of those products in most of the states where they are currently sold. If the measures did not "relate to" Claimants or their investments, Respondent would not have sought, and would not be continuing to seek, their enforcement against Claimants, their brands, and the distribution of those brands inside the customs territory of the United States.

7. As Claimants demonstrate in this Memorial on the Merits ("**Memorial**"), the measures have caused material harm to Claimants and substantially impaired the value of their investments in the United States.

PART I:
THE FACTS

The Claimants and Their Investments

8. Claimants Jerry Montour, Kenneth Hill, and Arthur Montour are citizens of Canada and members of two of the First Nations that comprise the Six Nations of North America, also known as the Iroquois Confederacy and amongst themselves as the Haudenosaunee.[1]

9. Jerry Montour and Kenneth Hill are the controlling shareholders of Claimant Grand River Enterprises Six Nations, Ltd. ("Grand River"), a corporation established under the laws of Canada.[2] Arthur Montour is the sole shareholder of Native Wholesale Supply ("NWS"), a corporation established under the laws of the Sac and Fox Nation.

10. Individually and as partners, Jerry Montour and Kenneth Hill first became involved in the tobacco industry in or about 1988, through various informal and formal business relationships and associations that principally involved the manufacture and distribution of tobacco products on Native American land in northern New York State. These business relationships included, among others, a contract manufacturing relationship with a Delaware corporation known as Star Scientific, Inc. ("Star Scientific"), pursuant to which Star Scientific manufactured Mr. Montour's and Mr. Hill's proprietary DKs®

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[1] Statement of Jerry Montour, sworn to July 10, 2008, at 1. (hereafter "J. Montour Stmt."); Statement of Kenneth Hill, sworn to July 8, 2008, at para 1. (hereafter "Hill Stmt."). Statement of Arthur Montour, sworn to July 10, 2008 at para 1. (hereafter "A. Montour Stmt.") Despite the similarity in their family names, Jerry Montour and Arthur Montour do not have a familial relationship. J. Montour Stmt at 12.

[2] J. Montour Stmt. at 2; Hill Stmt, at para 2. For the reasons explained further herein, Jerry Montour and Kenneth Hill are investors with standing under the NAFTA in their own right – separate and apart from the investment interest of all Grand River shareholders in bringing this claim (which, in any event, is also represented in the claim brought on behalf of Grand River by Messer's Montour and Hill, as its controlling shareholders under Article 1117). Jerry Montour and Kenneth Hill share a relationship with Arthur Montour and his distribution company in the United States, which is distinct from the arrangements agreed to by and among that company and Grand River, as a matter of domestic law.

and Putters® cigarette brands for subsequent distribution on Native American land principally in northern New York.

11. Building on the experience they gained in the marketing and distribution of their DKs® and Putters® brands, and using the profits from that business, Claimants subsequently expanded into manufacturing these brands in 1990, in their own right. To that end, they entered into a formal business relationship with a fellow Mohawk Nation member, named Lawrence Skidders, for the purpose of establishing a manufacturing facility that would take over production of these two brands from Star Scientific.[3] [redacted] They also contributed their distribution expertise and general knowledge of the tobacco business as well, while Mr. Skidders contributed land, construction expertise, and administrative and operational skills.[4] Together, Jerry Montour, Kenneth Hill [redacted] successfully constructed the cigarette manufacturing plant in Racket Pointe, New York on the Akwasesne Territory of the Mohawk Nation. This territory includes lands located within the borders of two Canadian Provinces, Ontario and Quebec, and one U.S. State, New York.[5]

12. Larry Skidders had previously owned and operated a successful construction company that became a model of First Nations success, employing a number of First Nations peoples to complete construction projects designed to advance the cause of First Nations members in North America. The First Nations people employed by Mr. Skidders in his construction company at that time included Claimant Arthur Montour [redacted] With the added enthusiasm of a young Arthur Montour, the industry experience

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3 J. Montour Stmt at 12.

4 J. Montour Stmt. at 13.

5 J. Montour Stmt. at 9-11. The Akwesasne Territory is also known as the "St. Regis Reservation" by residents of upper New York State.

of Jerry Montour and Kenneth Hill, and the facility and administrative acumen of Larry Skidders, the venture was seen, as described by Arthur Montour, as representing their collective future.[6]

13. In January 1991, at 40 years of age, Larry Skidders died suddenly while driving home from an American Football Superbowl sporting event in Tampa, Florida.[7] The parties' business relationship with the Skidders estate deteriorated shortly thereafter, and as such it no longer became feasible to maintain production at the recently launched facilities on Racket Pointe.[8] Accordingly, starting in 1993, Messrs. Montour and Hill began the process of moving production of their DKs® and Putters® brands to the Six Nations of the Grand River Territory in Ontario, Canada. Meanwhile, Arthur Montour had been developing a fairly successful tobacco distribution network among Native American traders in the United States, which he continued to serve subsequent to his departure from Racket Pointe, both in an individual capacity and through various associations with other Native American suppliers.[9] Arthur Montour's contacts and distribution networks also allowed him to branch out into trading commodities other than tobacco products.[10]

14. In 1994, Jerry Montour, Kenneth Hill [redacted] form a partnership known as "Grand River Enterprises," for the purpose of constructing a new cigarette manufacturing facility on Six Nations land, in Ontario, Canada.[11] The contemporaneous resolutions of the Band Councils and Assembly of First Nations attached to this memorial acknowledge a principal goal of Grand River Enterprises that parallels the intent and spirit of NAFTA: *i.e.*, to promote trade and commerce among *all First*

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6 A. Montour Stmt. at 7 .

7 A. Montour Stmt. at 8.

8 J. Montour Stmt. at 13.

9 A. Montour Stmt. at 9 .

10 A. Montour Stmt. at 9 .

11 J. Montour Stmt. at 14.

Nations members throughout North America, as if there were no borders among these respective member nations.[12]

15. As the video attached to Jerry Montour's statement demonstrates,[13] the intent behind Claimants' investments in the tobacco industry has always been to improve economic development among First Nations peoples in an area of commerce for which Six Nations traders had been involved for centuries, long before the arrival of European settlers and colonists.[14] Thus, in transitioning from Racket Pointe to the Six Nations of the Grand River Territory, Jerry Montour and Kenneth Hill maintained a consistent objective of establishing manufacturing facilities and distribution networks to serve First Nations territories in both Canada and the United States.[15] Their first efforts in the United States were hindered to some extent by a partner's premature death. After their manufacturing facility was relocated to Six Nations in Canada, however, they had to deal with a different obstacle: a legal dispute with the Government of Canada over taxation of their business. The Grand River partners wanted to ensure that the proceeds of any amounts paid in relation to their sales would actually benefit members of their community. The Government of Canada claimed that the Grand River partners could not manufacture cigarettes without a federal license and payment of taxes to the Federal Government, without restriction as to what community would benefit from its collection.[16] The Grand River partners maintained that they had a sovereign right, exercised since time immemorial, to manufacture and trade in tobacco products among Six Nations members, and other First Nations generally, free of such taxation.[17]

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12 Appendix of Claimants' Evidence, Ex. 15.

13 J. Montour Stmt., Ex 1.

14 J. Montour Stmt at 3. Statement of Professor Gary Warrick, at page 46; Statement of Prof. Jose Antonio Brandao, at page 17; Statement of Professor Robert Clinton, at page 16.

15 J. Montour Stmt at 11-12.

16 Hill Stmt at 5-6; J. Montour Stmt at 17.

17 J. Montour Stmt at 18.

16. As part of dealing with their dispute with the Government of Canada, the partners undertook to incorporate under the laws of Canada in 1996, as Grand River Enterprises Six Nations Ltd. (hereinafter "Grand River").[18] Thereafter, Grand River remitted federal excise taxes and duties to the Government of Canada. However, its, shareholders (still considered by Claimants essentially to be partners) remained personally exempt from government taxation relating to Grand River's operations, including compensation that they would receive from those operations.[19]

17. With some of their Canadian legal issues addressed, and their relationship with the Skidders Estate terminated, the Grand River partners turned their sights again on expanding their investment in the United States tobacco industry. In 1996, Jerry Montour, on behalf of some of his partners, entered into a venture relationship with the Omaha Tribe of Nebraska ("Omaha Tribe") to manufacture and distribute proprietary cigarette brands through Native American channels in the United States.[20] Profits of the venture were to be divided equally amongst the Omaha Tribe and Jerry Montour.[21] It was also agreed that Arthur Montour would be the person principally responsible for the distribution of any proprietary products manufactured by the venture for Claimants and would receive his share of compensation from that venture from those distribution proceeds.[22]

18. As part of their venture, Jerry Montour moved to, and resided in, Macy, Nebraska, between 1996 and 1998. His presence was required in the territory to oversee construction of the manufacturing facility and management of its initial operations.[23]

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18 J. Montour Stmt at 18. To be clear, the partners' incorporation of Grand River did not mean that they willingly submitted themselves or their enterprise to taxation by the Government of Canada. As part of their understanding with the Six Nations Band Council, they had planned to, and did, remit payments to the Council for the benefit for the Band. There is also no question that the Province in which the Band's territory was located had no authority to impose taxes upon Claimants or their enterprise.

19 J. Montour Stmt. at 18.

20 J. Montour Stmt. at 19.

21 J. Montour Stmt. at 19.

22 J. Montour Stmt. at 20.

23 J. Montour Stmt. at 20.

Jerry Montour also personally guaranteed the financial obligations of the venture with respect to the refurbishing of the machinery acquired to equip that production facility.[24]

19. After dedicating two years to the Omaha Tribe venture, however, it became apparent to Jerry Montour that fundamental business differences required that he and Claimants part company with the Omaha Tribe, and that Claimants would have to seek an alternative source for their manufacturing needs and distribution goals relative to the U.S. market.[25]

Establishing an Investment in the Seneca® Brand,

20. By the end of 1998, Jerry Montour returned to Canada and took the reins of Grand River as Chief Executive Officer. His first order of business was to work with Grand River's president, Steve Williams, in areas of the business that needed most attention, and to focus on a plan for meeting Claimant's U.S. production and distribution goals out of Grand River's facility in Ohsweken, Ontario.[26] To that end, in 1999 Grand River entered into a formal venture with Claimant Arthur Montour [redacted], who were operating under the trade name Iroquois Tobacco Direct. In commencing this new relationship, Messr's Montour and John founded Native Tobacco Direct ("NTD"), a company incorporated under the laws of the Sac and Fox Nation.[27] Arthur Montour had been previously engaged in tobacco and other businesses [redacted], and financed his capital contribution in Native Tobacco Direct by assigning his interest in those other companies [redacted].[28]

21. Despite the setbacks they had endured in their relationships with the Skidders Estate and then the Omaha Tribe, in 1999 Claimants continued pursuit of their goals with respect to the U.S. market. To his end, they memorialized some of the particulars of the roles each

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24 J. Montour Stmt at 19.

25 J. Montour Stmt. at 20.

26 J. Montour Stmt. at 21.

27 J. Montour Stmt. at 21 and 24; A. Montour Stmt. 2.

28 A. Montour Stmt. 13.

had assumed amongst themselves, by adopting a corporate structure and concluding written agreements in respect of the possession and use of intellectual property rights supporting their current and planned brands.[29] Specifically, Native Tobacco Direct would be established and would register and acquire a U.S. trademark for Claimants' new Seneca® brand of cigarettes, and would be responsible for the distribution of those products on Native American land in the United States.[30] In addition, NTD would hold that trademark beneficially for all Claimants as investors in this constituted enterprise.[31]

22. In 1999, NTD also applied for and received a U.S. tobacco importer permit issued by the U.S. Bureau of Alcohol, Tobacco and Firearms. The agreement among the parties also memorialized Grand River's exclusive rights with respect to the Seneca® brand, pursuant to an express cross-licensing arrangement.[32] Thus, Grand River held (and continues to hold) exclusive US manufacturing rights for the Seneca® brand of cigarettes, while NTD possesses the distribution rights for that brand in the United States. Together, Claimants have at all times possessed and controlled all of the property rights associated with the Seneca® brand and exercised those rights jointly, not severally.[33] Moreover, these exclusivity rights and obligations were to be similarly accorded to each party in respect of any other brands and attendant trademark and associated property interests that the parties might subsequently develop or acquire for the U.S. market.[34]

23. Thus, in order to refocus their business interests in the United States in 1999, Claimants established the basic structure of the business enterprise that continues to exist today. Revenues from this enterprise were divided pursuant to a formula that provided the remaining Grand River partners (now as shareholders of the corporation) with

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29 Claimants' Evidentiary Submissions, Ex. 17.

30 The Seneca® brand name was an original idea of Arthur Montour, while the logo and style for its packaging was created jointly by and among all Claimants. A. Montour Stmt. at 10 and 11.

31 J. Montour Stmt. at 25; A. Montour Stmt. at 13; Claimants' Evidentiary Submissions, Ex. 18.

32 Claimants' Evidentiary Submissions, Ex. 17; A. Montour Stmt. at 13.

33 A. Montour Stmt. at 13.

34 Claimants' Evidentiary Submissions, Ex. 17.

compensation derived from sales to NTD, while Arthur Montour [redacted] would receive compensation in the form of salary and income from sales revenues earned by NTD.[35] [redacted]

24. In connection with their U.S. business enterprise, Grand River also initially loaned equipment to NTD, including a truck that NTD used to make deliveries to its Native American customers throughout the United States.[37] In addition, in order assist NTD to commence business, Grand River agreed to allow NTD's bank to collateralize inventory in NTD's possession, but for which Grand River had yet to be paid, [redacted].[38]

25. Grand River also supported the firm establishment of NTD and then NWS by providing both with access to an inventory loan with open-ended terms. The loan was constantly in use between 1999 and 2006, providing interest free access to inventory on a revolving basis [redacted]

26. NWS succeeded to all the rights and obligations of NTD under the Claimants' agreement, and it continues to this day to operate as the U.S. marketing and distribution

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35 A. Montour Stmt. at 14; J. Montour Stmt. at 26.

36 J. Montour Stmt. at 26; A. Montour Stmt. 15.

37 A. Montour Stmt. at 14; J. Montour Stmt. at 29; Claimants' Evidentiary Submissions, Ex. 19.

38 Claimants' Evidentiary Submissions, Ex. 20. This collateralization reflected a concession and subordination by Grand River of the accounts receivable it necessarily ceded to a priority lien and claim of its bank.

39 A. Montour Stmt. at 18; J. Montour Stmt. at 31; Claimants' Evidentiary Submissions, Ex. 21.

facility for Claimants' Seneca® business venture.[40] Arthur Montour continues to draw salary and income derived from Native Wholesale Supply's sale and distribution of Seneca® cigarettes manufactured exclusively by Grand River; Grand River and its shareholders continue to receive revenue from the production and sale of those cigarettes [redacted].[41]

27. After Arthur Montour took over 100% of the ownership interest in NTD and formed NWS in 2000, it was necessary for him to complete his buy-out of his former partner, [redacted]. NWS took advantage of the inventory loan from Grand River to finance the regularly scheduled payments it was obliged to make [redacted] between May 31, 2001 to November 15, 2002 [redacted]

28. Also in 2000, Grand River began to produce cigarettes on a private label basis for other importers in the U.S. market.[42] Unlike the Seneca® brand, Grand River did not possess any trademark or property rights in these brands, nor did it advance credit or otherwise invest in the promotion or successful distribution of these other brands.[43] Nonetheless, Grand River became contractually bound to produce certain of these other brands and generated revenue from their production until Respondent's enforcement of the measures at issue herein caused Grand River to take steps to discontinue their production.[44]

29. As the financial statements, balance sheets, and accounting records of Grand River and NTD/NWS reflect, Claimants' investment efforts and enterprise relative to the U.S.

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40 A. Montour Stmt. at 2; Claimants' Evidentiary Submissions, Ex. 22.

41 A. Montour Stmt. at 15; J. Montour Stmt. at 26; Claimants' Evidentiary Submissions, Exs. 22 & 23.

42 J. Montour Stmt. at 33.

43 J. Montour Stmt. at 33.

44 J. Montour Stmt. at 34; Claimants' Evidentiary Submissions, Ex. 24.

market grew from humble beginnings in 1990, to achieve considerable success and profitability for Claimants.[45]

30. Please see table 1-1, attached, which provides a timeline and chronology of Claimants' business activities and their investments described above.

Adoption of the Escrow Statutes

31. The measures relating to Claimants' claims arose in the context of a litigation settlement agreement that forty-six (46) of Respondent's state governments entered into in November 1998, with the four largest U.S. cigarette manufacturers, and legislation subsequently adopted to implement that agreement.[46]

32. Beginning in 1994, several of Respondents' state governments commenced filing lawsuits in the United States against the major U.S. cigarette manufacturers: Philip Morris, Inc.; R.J. Reynolds Tobacco Company; Brown & Williamson Tobacco Company; and Lorrilard Tobacco Company (collectively, the "Major U.S. Manufacturers"). Together, the Major U.S. Manufacturers accounted for approximately 96-98% of the U.S. tobacco market in terms of cigarette sales.[47]

33. The lawsuits alleged that the Major U.S. Manufacturers had targeted youth in their advertising and marketing; knew of the addictive and adverse health consequences of smoking but failed to disclose that information to consumers; and conspired to withhold that information from the consuming public for the purpose of preserving their sales and revenue.[48] Respondent's state governments claimed that the aforementioned bad acts resulted in the States unfairly incurring Medicaid expenses relating to treatment of smoking-related illnesses of indigent smokers.[49] Notably, whatever may have been the

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45 Expert Report of Wayne R. Wilson, Jr. dated July 10, 2000 ("Wilson Report").

46 The subject States are sometimes referred to interchangeably herein as "Settling States."

47 Claimants' Evidentiary Submissions, Ex. 25.

48 Claimants' Evidentiary Submissions, Ex. 26.

49 Claimants' Evidentiary Submissions, Ex. 26.

justification or pretense for commencing these lawsuits, smaller tobacco companies, including Grand River, were not sued by Respondent's state governments, nor ever accused of such wrongdoing.

34. In 1997, in lieu of having these claims decided on the merits, the state governments proposed a resolution of the lawsuits through Congressional legislation that incorporated the terms of a settlement agreement (hereafter the "Federal Proposal"), which would impose a future fee on all manufacturers based on the quantity of their cigarette sales in the United States – including those that had not been sued.[50] Significantly, however, the Federal Proposal would treat all cigarette manufacturers, that agreed to the terms of the proposed settlement, equally. It would have imposed equal, per-unit payment requirements on all manufacturers pursuant to a rate schedule that did not deviate based on the market share of one group of competitor in comparison to others or their historical market shares.[51] The total payments under the Federal Proposal during the first twenty-five (25) years after its effective date were estimated to be approximately $368.5 billion.[52]

35. While the Federal Proposal was being considered by Respondent's Congress, some state governments entered into individual settlements with the Major U.S. Manufacturers, pursuant to terms that did not implicate or involve manufacturers other than those that had been sued. These States included Florida, Minnesota, Mississippi and Texas.[53]

36. Separately, and while the Federal Proposal was being negotiated, the Liggett Tobacco Company (which was the next largest manufacturer in the U.S. market after the Major U.S. Manufacturers) also entered into multistate settlement agreements with twenty-two state governments.[54] Pursuant to the terms of these settlements, those state governments

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[50] Claimants' Evidentiary Submissions, Ex. 27.

[51] Claimants' Evidentiary Submissions, Ex. 25.

[52] Claimants' Evidentiary Submissions, Ex. 25.

[53] Claimants' Evidentiary Submissions, Ex. 28.

[54] Claimants' Evidentiary Submissions, Ex. 29.

agreed to terminate their lawsuits in return for relatively minor payments *plus* an agreement by Liggett Tobacco Company to turn over highly confidential industry documents that apparently evidenced a conspiracy among the Major U.S. Manufacturers that had been concealed through their in-house counsel under an inter-company committee called "The Committee of Counsel."[55]

37. It was alleged that the Major U.S. Manufacturers used a committee composed of their counsel to undertake research into the health consequences of smoking, which was then withheld from the public under a claim of "attorney-client privilege."[56] It was also alleged that, through this 'Committee of Counsel,' these manufacturers conspired not to develop or market cigarettes that could be considered safer to the consuming public, because such developmental efforts might be interpreted as an admission that cigarettes were unsafe for consumption and that the manufacturers had known about their deleterious effects all along.[57]

38. Ultimately, the Federal Proposal was rejected by Respondent's Congress in April 1998, after Congress had commissioned a study by Respondent's Federal Trade Commission that concluded the Federal Proposal was likely to lead to anticompetitive conduct.[58] What followed next can best be described as evidence of a perverse dynamic in which the enforcement divisions of the state governments' executive branches reacted to rejection of the Federal Proposal. These officials remained undeterred in their desire for a mechanism that would allow them to avoid facing a judicial determination of their claims on the merits.[59] After all, their claims were unprecedented and had never been

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55 Claimants' Evidentiary Submissions, Ex. 30.

56 Claimants' Evidentiary Submissions, Ex. 30.

57 Claimants' Evidentiary Submissions, Ex. 30.

58 Claimants' Evidentiary Submissions, Ex. 25.

59 Claimants' Evidentiary Submissions, Ex. 31.

tested in the courts. The prospect of having a court or tribunal decide those claims on the merits presented too great a risk for Respondent's States to take.[60]

39. The States gave the task of principal negotiator for their settlement efforts to the Attorney General of the State of Washington, Christine Gregoire, whose claims against the Major U.S. Manufacturers were about to commence trial. Assisting Ms. Gregoire were the Attorneys General of seven (7) other States and their private trial attorneys.[61] The non-government lawyers representing the States – some of whom it was later discovered were former law partners and personal friends of the Attorneys General – stood to gain an astonishing, aggregate amount of over twelve billion dollars ($12,000,000,000) in attorneys fees if the settlement were concluded.[62]

40. It was apparent, then, that when the Major U.S. Manufacturer's demanded that their settlement with the remaining forty-six States be premised on the following two (2) conditions, the state officials and their non government lawyers capitulated with virtually no resistance. First, all of the remaining States had to be included in one final settlement (as the Major U.S. Manufacturers would not agree to settle on a piecemeal basis). Second, the States would be required to enact measures limiting competition from smaller tobacco manufacturers that had never been sued and who would accordingly not be directly subject to the conditions of any settlement agreement, including payment requirements.[63]

41. Between May 1998 and November 1998, through a secret negotiation process that involved a core group of eight Attorneys General and their non-government lawyers,

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60 In fact, subsequent cases revealed that these claims had no basis in fact or law, as Respondent's Justice Department later discovered when its case was tried to an ultimate determination on the merits – a conclusion and fate that every other sovereign experienced when they had their similar claims finally adjudicated on the merits. United States v. Philip Morris, Inc. 116 F. Supp. 2d 131, 134 (D.D.C. 2000); Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc., 3 N.Y. 3d 200, 818 N.E. 2d 1140, 3 N.Y. 3d 200, 2004 N.Y. Lexis 2440, 785 N.Y.S. 2d 399 (2004).

61 Claimants' Evidentiary Submissions, Ex. 31.

62 Claimants' Evidentiary Submissions, Ex. 32.

63 Claimants' Evidentiary Submissions, Ex. 31.

Respondent's state governments negotiated, and ultimately concluded, a settlement deal on behalf of forty-six states and six U.S. territories (hereafter "Settling States") that became known as the Tobacco Master Settlement Agreement ("MSA"), effective as of November 23, 1998.[64] The MSA, in its final form, was concluded beyond the purview of Respondent's Federal Government; and it did not have, nor was it purported by the Settling States to require, approval or sanction from Respondent's Federal Government.

42. The contemporaneous accounts of the MSA's settlement negotiations, and Respondent's complete lack of document production in this proceeding with respect to those accounts, also reveals that the Settling States did not review, analyze, or evaluate whether the MSA was permissible under U.S. competition laws, nor under international law, including NAFTA Chapter 11.[65]

43. As consideration for resolving the Settling State's claims and dismissal of their lawsuits, the four Major U.S. Manufacturers that negotiated the MSA (identified in the MSA as "Original Participating Manufacturers" or "OPMs") agreed to make annual "settlement" payments to the States and refrain from certain forms of advertising and marketing of their products.[66] In exchange, the Settling States agreed to include language in the MSA at the behest of the OPMs that made the MSA's payment terms and burdens applicable to *all* tobacco product manufacturers whose cigarettes would thereafter be sold in the United States.[67] That is, the Settling States agreed to enact model legislation annexed as Exhibit "T" to the MSA, which was intended to have the purpose and effect of "neutralizing" any alleged cost disadvantages that the MSA's Participating Manufacturers might experience as a result of the MSA, when they raised their prices to fund the settlement payments to the Settling States.[68]

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64 Claimants' Evidentiary Submissions, Ex. 33.

65 Claimants' Evidentiary Submissions, Ex. 31.

66 Claimants' Evidentiary Submissions, Ex. 33.

67 Claimants' Evidentiary Submissions, Ex. 31.

68 Claimants' Evidentiary Submissions, Ex. 34 at, (d)(2)(E).

44. The model legislation is commonly known as an "Escrow Statute," because it requires any tobacco product manufacturer whose cigarettes are sold in a Settling State to either join the MSA as a Subsequent Participating Manufacturer ("SPM"), or remain a non-party and make payments into an escrow account which are to be held for twenty-five (25) years for the benefit of that Settling State.[69] Companies choosing not to join the MSA are identified in the MSA and Escrow Statutes as "Non Participating Manufacturers" or "NPMs."

45. As recited in the MSA, the purpose of the Escrow Statute is to neutralize the alleged cost advantages that a NPM purportedly would otherwise experience *vis-à-vis* the MSA's Participating Manufacturers, and, second, to create a fund to secure payment of "Released Claims" (defined in the MSA) in the event a Settling State sues the NPM in the future and the NPM is found to have acted "culpably" by the courts.[70] Theoretically, if no such claim and determination of culpability was made, the escrow payments were to be returned to the NPM twenty-five (25) years after they were deposited.

46. Under the MSA, the annual payments due from a SPM are calculated based on the aggregate cigarette sales volumes of the OPMs in the United States during the prior calendar year, and, second, the ratio of the SPM's market share in comparison to the aggregate market shares of the OPMs in the United States during that year.[71]

47. Under the Escrow Statutes as originally enacted, the amount that a NPM was required to deposit and hold in escrow for a given State in any year was ultimately based on the amount that the State would have received from the NPM for that year had it been a SPM under the MSA. The escrow payment process involved two steps. First, a manufacturer was required to make a payment into escrow based on the number of units of that NPM's cigarettes sold in that State. Next, the NPM was entitled to an immediate return (i.e. 'release') of that payment, to the extent the payment exceeded the amount the

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69 Claimants' Evidentiary Submissions, Ex. 35.

70 Claimants' Evidentiary Submissions, Ex. 34 and 35.

71 Claimants' Evidentiary Submissions, Ex. 36 at (i).

Settling State would have received from the NPM had it been an SPM under the MSA during that year.

48. Unbeknownst to Claimants, just prior and subsequent to execution of the MSA, the non-government lawyers that represented the Settling States set out to solicit smaller tobacco product manufacturers into joining the MSA as SPMs and be bound by its payment and conduct restrictions.[72] As an inducement to join the MSA, the Settling States offered these smaller tobacco companies exemptions from the MSA and Escrow Statute's payment requirements. The MSA provided, however, that agreement to join the MSA had to be undertaken within ninety (90) days of the MSA's execution date.[73]

49. Specifically, the MSA provides that any SPM that joined the MSA within ninety (90) days after its execution date *shall not have any payment obligation under the MSA or Escrow Statutes* for its volume of sales in any year that is equivalent to one hundred percent (100%) of its 1998 U.S. market share, or one-hundred twenty-five percent (125%) of its 1997 U.S. market share in terms of national cigarette sales.[74] Companies that were offered such an inducement and joined the MSA within such 90 days are called "Exempt SPMs."

50. Respondent has not provided any explanation, reason, or justification for if its granting exemptions only to a select group of manufacturers with whom its state officials and their attorneys chose to deal within ninety (90) days after the MSA's execution, other than to say in a self-serving, perfunctory way that the exemptions were offered to induce those manufacturers to join the MSA.[75]

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72 R. Parloff, "Is the $200 Billion Tobacco Deal Going Up in Smoke?" Fortune Magazine March 7, 2005 at 126; found at Tab 1, Factual Materials, Claimants' Counter Memorial on Jurisdiction.

73 Claimant's Evidentiary Submission, Ex. 34 at (i) "&" 33 at Amendment 2.

74 Claimant's Evidentiary Submission, Ex. 34 at (i).

75 Incredibly, if an Exempt SPM thus possessed 1% of the U.S. cigarette market in terms of cigarette sales in 1997, it would be permitted to continue to sell as much as 1.25% of all the cigarettes sold in the United States every year, in perpetuity, without ever having to make any payment under the MSA or Escrow Statutes. So, for example, if the MSA and Escrow Statute payment requirements were $5.00 per carton of cigarettes in any year, and the total volume of cigarettes sold in that year by all manufacturers in the U.S.

(continued…)

Enforcement of the Original Escrow Statutes

51. As noted above, for any manufacturer that chose not to join the MSA, the original model Escrow Statute provided the NPM with an immediate release of funds deposited into escrow for a given Settling State, if the amounts deposited in a given year exceeded the State's "allocable share" of the payments the manufacturer would have otherwise made as a non-exempt SPM under the MSA. Under the MSA, a non-exempt SPM makes one payment to all the Settling States based on its national market share of cigarette sales. The Settling States then divide the payment among them, according to the allocable share percentage for each State.[76]

52. Under the original Escrow Statute, if the percentage of an NPM's sales in a Settling State in comparison to all its sales in the U.S. market was greater than that Settling State's allocable share, the NPM would generally receive some form of immediate release of the escrow it deposited in that year.[77]

(…continued)

market was 1,750,000,000 cartons, the Exempt SPM in this example would pay $0 for the first 21,875,000 cartons of cigarettes it sold in that year. In contrast, any non-exempt SPM or NPM (including Claimants) whose cigarettes accounted for 1.25% of the U.S. cigarette sales in that year would be forced to pay $109,375,000 under the MSA or Escrow Statutes for those same sales.

Similarly, using the example above, if the Exempt SPM sold 2.5% of all the cigarettes sold in the U.S. market, its payment obligation under the MSA would average $2.50 per carton, for a total $109,375,000 on 43,750,000 cartons sold. In contrast, in selling the same amounts under the Seneca brand, Claimants would have to pay double that amount under the MSA or Escrow Statues – $218,750,000.

[76] New York, for example, has an allocable share of 12.7620310% under the MSA. MSA, Annex "A." This means that, for every million dollars ($1,000,000) paid by a SPM under the MSA, New York would receive $127,620.31; each of the Settling States would similarly receive its "allocable share" of that same one million dollars.

[77] For example, if 2,000,000 cartons of a manufacturer's cigarettes were sold in the U.S. market, then using the figures noted in the footnote above, the maximum amount that New York would receive from that manufacturer had it joined the MSA would be $1,276,203.10 (2,000,000 cartons x $5.00 per carton x 12.7620310% = $1,276,203.10). Under the Escrow Statutes, if the manufacturer sold 1,000,000 cartons in New York and 1,000,000 cartons elsewhere in the United States, the manufacturer would initially have to deposit $5,000,000 into escrow for New York (1,000,000 cartons sold in New York x $5.00), but it would be entitled to an immediate release of $3,723,796.90 from those funds ($5,000,000 – $1,276,203.10 = $3,723,796.90).

53. Thus, as an NPMs cigarettes were sole in fewer States, its net escrow obligation in each State and in the aggregate decreased under the terms of the Original Escrow Statute.

Adoption of the Contraband Laws

54. Claimants have obtained documents from other sources demonstrating that Respondent refused to produce evidence in this arbitration proceeding, indicating an oppressive pattern and practice of the Settling States to concentrate enforcement efforts on NPMs of foreign origin. Specifically, Claimants have come into possession of memoranda, initially exchanged among the Settling States shortly after adoption of the measures at issue, which admit that officials themselves were in doubt as to whether they even had the necessary authority, under their measures, to subject either foreign 'tobacco product manufacturers' or Native American tobacco enterprises to escrow payment demands, or court action.

55. Respondent took pains to stress during the jurisdictional phase of the arbitration that Claimants were very much an object of attention for enforcement officials from a large number of Settling States. As the memorandum cited in the immediately preceding footnote demonstrates, there was considerable uncertainty amongst the lawyers working for the Settling States' Attorneys General over whether they had authority to adopt one of the enforcement strategies they appear to have preferred. Nonetheless, they seemed to have had little compunction about zealously prosecuting NPMs whom they were not even convinced they could legitimately pursue. Adoption of the Contraband Laws was intended to dispel such doubt, providing the Attorneys General with much stronger means for banning the brands of out-of-jurisdiction NPMs.'

56. NAAG officials have actually been more candid about their authority under Escrow Statutes when speaking amongst themselves. For example, in an undated document circulated by NAAG, entitled: "Model NPM Statute: Frequently Asked Questions," a state representative poses a question whether "… in the case of a foreign manufacturer, do the states have jurisdiction to require the foreign manufacturer to make escrow payments?" The official notes the answer "…is a legal determination that we cannot

make…" Such equivocation is remarkable given that it comes in the form of a 17 page, 57 paragraph advisory document distributed by the National Association of Attorneys General to its members, who are obviously lawyers working in the enforcement divisions of Settling States. The same memo continues:

> Q. If the manufacturer is out-of-state, we may not have jurisdiction over the company and may not be able to require it to make escrow payments. Likewise, if an importer is out-of-state and sells imported product through an out-of-state intermediary (e.g., an off-shore corporation) to an out-of-state wholesaler, we may not have jurisdiction over the importer and could not require it to make escrow payments.
>
> A: **Correct.**
>
> Q: We have limited practical ability to enforce a statute like the Model Statute on an Indian reservation. There are Non-Participating Manufacturers located on reservations. As a practical matter, it is not possible to make these manufacturers comply. How will this affect the MSA payments?
>
> A: It is possible that taxable sales by NPMs on Indian reservations could result in a reduction of MSA payments if those sales result in a decrease in the Participating Manufacturers' market shares. However, if those sales on Indian reservations are nontaxable or nonescrowable, they should not affect the MSA payments.[78]

57. To be clear, the targeting of out-of-jurisdiction 'tobacco product manufacturers' was motivated by the Settling States' desire to locate and prosecute the NPMs who were least likely to contest enforcement activities against them, as it was assumed that enterprises without a physical presence in a jurisdiction would either be: (1) disinclined to appear (assuming that it would be very difficult for a settling state to enforce any judgment it obtained, in another jurisdiction); or (2) unaware that a case had even been filed against it (because of inadequate service of documents). From a functional perspective, it did not matter if the targeted NPM was located in a foreign jurisdiction or operating on Native American land, as the same result could be, and was, expected. Regardless of why the targeted NPM might choose not to oppose an action brought against it, the Settling States' attorneys could still expect to obtain the positive result

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[78] Claimant's Evidentiary Submissions Ex. 37 at ¶¶39-40 & 11.

they sought – a judgment and an injunction against the NPM and all brands allegedly manufactured by it.

58. Accordingly, unsatisfied with pursuing a strategy of targeted enforcement against certain types of NPM, the Settling States elected to go further with adoption of the Contraband Laws. The Contraband Laws were drafted by the Settling States in collaboration with the OPMs and SPMs and represented the next logical step in the logic of their campaign against out-of-jurisdiction NPMs. The Contraband Laws were designed to operate in a manner that obviated the need for an attorney general to go to the trouble of bringing suit under an Escrow Statute in order to ban the brands of a targeted NPM from its market. The Contraband Laws mandated that, before any brand could be legally sold in that Settling State, an entity capable of being deemed by its Attorney General to be its 'tobacco product manufacturer' was required to submit a substantive application to the Settling States, certifying that it was in compliance with its Escrow Statute. Failure to receive certification would result in designation of the brand as contraband in a given Settling State, no matter how the products in question came to be sold there.

59. The Contraband Laws were the natural extension of the Settling States' enforcement strategy, to target a certain group of NPMs first, because they demonstrate the Settling States' continued commitment to diligent enforcement of the Escrow Statutes, as required by the MSA. The Contraband Laws simply make it easier for the Settling States to identify, and exclude the brands of, any NPM that is not resident within their territorial jurisdiction. As stated by the Assistant Attorney General for Alaska in support of that State's passage of its Contraband Law:

> Mr. Barnhill explained that under the settlement agreement, Alaska's revenues are reduced in certain circumstances. To avoid those reductions, Alaska enacted an NPM (non-participating manufacturers) statute, AS 45.53, in 1999, an actively enforces the statute. Unfortunately, he stated it's difficult to enforce the statute because the tobacco manufacturer that is failing to comply may be a small manufacturer located in a *far-flung jurisdiction*, such as India or the Philippines. Alaska has, on occasion, filed suit against a tobacco manufacturer in India, hiring a process server to serve the summons and complaint in India, and has ultimately

> obtained a default judgment. But that's the difficult way of [enforcing the statute], he said.[79] (emphasis added).

60. In other words, adopted as a natural extension of the arbitrary and discriminatory enforcement practices of most Settling States, the Contraband Laws were designed to confer upon each of their attorneys general the power of judge, jury, and executioner in respect of the continued presence of a brand in a Settling State's market. They did so by allowing an attorney general to ban the sale of a manufacturer's brands if he or she deemed that a NPM was not in compliance with an Escrow Statute. These Contraband Laws also required a foreign manufacturer to establish a legal presence in each Settling State by appointing an agent for service of judicial process, before its products could even be distributed or sold in that Settling State.

61. Reinforced with the addition of the Contraband Laws to their arsenals, most Attorneys General renewed their strategy of targeting out-of-jurisdiction 'tobacco product manufacturers.' The had an incentive to do so, because the MSA required all Settling States to demonstrate vigilance in respect of enforcing MSA implementation measures against NPMs. Through the simple expedient of this "easy kill" strategy, the Settling States would be assured of a default by the foreign manufacturer under the Escrow Statutes, which would then permit the Attorneys General to obtain an injunction and ban against the sale of the manufacturer's products for two years under the Escrow Statutes and, permanently, under the Contraband Laws, until the manufacturer complied with the Escrow Statute by paying any escrow allegedly due and penalties imposed for its apparent non-compliance.

62. In short, it has become apparent that most Settling States have pursued any enterprise they believe to be an out-of-jurisdiction (i.e. in the eyes of Settling State enforcement officials: "foreign") 'tobacco product manufacturer.' When these targeted enterprises have not spent the millions of dollars required to defend themselves before each Settling

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[79] Michael Barnhill, Assistant Deputy Attorney General, Commercial Section, Civil Division, Department of Law, Government of Alaska, Committee Meetings on Alaska HB-224 – Cigarette Sales Requirements, April 9, 2003.

State's own court – to argue why the laws do not apply to them or their brands – the Settling States have obtained judgments against them, as well as injunctions banning the sale any cigarette brands alleged to have been manufactured by them, in their territories. This litigation strategy was clearly pursued for the purpose of driving brands from the U.S. market in order to protect sales of brands made by the MSA's OPMs and Exempt SPMs.

Adoption of the Allocable Share Amendments

63. Additional documents withheld by Respondent, but obtained by Claimants from other sources, also evidence a concerted effort among the MSA's Participating Manufacturers, including Exempt SPMs and the Settling States, to amend the Escrow Statutes in a discriminatory manner.[80]

64. In 2002 and thereafter, the Settling States began to insist that the Escrow Statutes and Contraband Laws directly related, and applied, to Grand River and NTD/NWS. To that end, the Settling States asserted that Claimants had to comply with those laws by making the required payments under the Escrow Statutes and otherwise satisfying the certification requirements of the Contraband Laws. Respondent's States made the foregoing demands and instituted such enforcement actions against both Grand River and NTD/NWS, notwithstanding that all of Claimants' sales of tobacco products, whether in support of their own US brands or under contract to produce private label products for third parties, were completed on Six Nations territory in Ohsweken, or in northern New York. That is, Respondent's States asserted, and continue to assert, that Grand River would be held responsible for escrow payments under the Escrow Statutes, including when independent third parties that have taken title and possession of Claimants' products on First Nations territory and have subsequently sold those products outside of Native American territory in one of the Settling States.

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[80] Claimant's Evidentiary Stmt. Ex. 38.

65. To be clear, in public there was no indication that most of the Settling States recognized that they lacked jurisdiction to interfere with Native American commerce. Rather, their threats and subsequent actions demonstrated that they planned to take all steps necessary to impair Claimants' investment in the Seneca® brand in Native American territory. Yet, their private legal memoranda candidly conceded that they had no such jurisdiction over out-of-state NPMs or NPMs operating on Native American Land.

66. After conferring with counsel beginning in May 2002, Claimants endeavored to convince the Settling States through various means, including judicial processes, that requiring Grand River to make regulatory payments in every State where products it manufactured might be sold by independent third parties over whom Grand River exercised no control, or where it was distributing its own brand of products on sovereign Native American territories, violated United States law. The Settling States rebuffed Claimants' position and Claimants were thus faced with a critical ultimatum: to either comply with the Settling States' demands, or risk having their brands systematically banned from sale and distribution in the United States.[81] Restricting their investment to Native American territory was not going to suffice.

67. In searching for a means to comply with the Escrow Statutes that would still allow their own brands to remain competitive in pricing *vis-à-vis* those of Exempt SPMs and the premium brands offered by the OPMs, Claimants learned that they could mitigate the escrow compliance payments demanded by Respondent's and reduce the payments due under the Escrow Statutes, by phasing out production of non-proprietary brands and making an investment in expanding the sale of their proprietary brands to a limited number of States.[82] That is, through the operation of the Allocable Share Release provisions explained above, Claimants could reduce their net escrow payment obligations on an annual basis, provided that sales of their brands were not dispersed nationwide. In this way, Claimants could obtain immediate releases of their escrow

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[81] J. Montour Stmt. at 35.

[82] J. Montour Stmt. at 34, 39, 42 and 43.

payments in the few States where their cigarettes would be sold and factor those reduced payment obligations into the pricing of their brands at a level that would allow them to effectively compete with cigarette brands marketed by the MSA's Participating Manufacturers, especially the Exempt SPMs.

68. Beginning in late 2002, Claimants thus restructured their focus and plans for the Seneca® and Opal® brands and the U.S. market. Specifically, they instituted a plan to phase out production of all cigarettes manufactured under private label brand contracts from U.S. customers, and focus on expanding their investment in the Seneca® and Opal® brands.[83] They continued the production of these proprietary brands for distribution through Native Wholesale Supply on Native American territory in the United States and they entered into an agreement with Tobaccoville USA, Inc. ("Tobaccoville"), pursuant to which Tobaccoville was granted a license for the use the Seneca® and Opal® trademarks in distribution of those brands outside of Native American territory in the United States.[84]

69. The further understanding among Claimants and Tobaccoville was that Tobaccoville would limit the number of States in which these cigarettes were sold,[85] so as to reduce the escrow liability for these products in the manner explained above, which would, in turn, allow Claimants to keep the prices for their brands at a level that allowed them effectively to compete against the MSA's Participating Manufacturers, particularly Exempt SPMs.[86]

70. In order to put this plan into effect, early in 2003 Claimants began to come into compliance with a select group of Settling States' Escrow Statutes on a without prejudice basis. Chronologically, these States were: North Carolina, South Carolina, Oklahoma, Arkansas and Georgia. By initially focusing and limiting the off-reservation

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83 J. Montour Stmt. at 34, 40 and 41.

84 Statement of Larry Phillips, sworn to July 10, 2008, (hereinafter "Phillips Stmt.") at 4.

85 Phillips Stmt. at 7.

86 J. Montour Stmt. at 43-45.

sales of their Seneca® and Opal® brands to these five States, Claimants were able to reduce their net escrow obligations on average in all States from over $3.00 per carton, to approximately $.50 per carton.[87] This reduction allowed Claimants to price their brands at a level that allowed them to compete with the discount brands of Exempt SPMs, with which Claimants' products principally competed in those States and, to some extent, the discount and premium brands of the OPMs.[88]

71. Unbeknownst to Claimants, however, around the same time Claimants adopted this reformulated business plan, the MSA's Participating Manufacturers had been communicating privately with the Settling States for the purpose of amending the Escrow Statutes. Their object was to have the Settling States terminate the refunds available under the Escrow Statutes. Again, through documents secured from other sources and which Respondent refused to produce in this case, Claimants have discovered that the MSA's Participating Manufacturers began to correspond and meet with the Settling States, in or about mid-2002, for purposes of drafting an amendment to the Escrow Statutes and promoting its adoption by each Settling States' legislature.[89]

72. In 2003, certain Settling States began to adopt such an Amendment. The MSA's Participating Manufacturers, and their private lobbyists, participated in the lobbying of these laws also in certain states.[90] In short, the amendment agreed to by and among the MSA's Participating Manufacturers and the Settling States was intended to, and has had the effect of, increasing the escrow payments due for NPM brands, including Claimants' Seneca® and Opal® brands, in any Settling State that adopted such an amendment.

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87 J. Montour Stmt. at 50. As noted above, these net escrow obligations in any State were tied to sales volumes of Claimants' cigarettes nationwide, which included Native American land in the United States. Thus, as Claimants sold more cigarettes on Native American land, the net escrow burden in each State increased.

88 Claimant's Evidentiary Stmts. Ex. 7.

89 Claimant's Evidentiary Stmts. Ex. 38 (6/18/01).

90 Claimant's Evidentiary Stmts. Ex. 38 at Emails.

73. In the words of the Settling States' Chairman of NAAG, this legislation was designed and intended to stop the alleged "proliferation" of NPM sales. According to the Chairman, any sale by any NPM, in any Settling State, hurts all States under the MSA as well as the four States that had separate agreements with the OPMs. This was acknowledged to be true among all States, because the settlement payments under both the MSA and the separate State agreements were tied to the Participating Manufacturers' national market share. In other words, *every State had an interest in reducing NPM sales – including sales of Claimants' brands – in all States*:

> These results underscore the urgency of all States taking steps to deal with the proliferation of NPM sales, including enactment of complementary legislation and allocable share legislation and consideration of other measures designed to serve the interests of the States in avoiding reductions in tobacco settlement payments.
>
> It should be stressed that NPM sales anywhere in the country hurt all States. All payment calculations are done on the basis of cigarette sales nationally. NPM sales in any state reduce payments to every other State. All States have an interest in reducing NPM sales in every State.[91]

74. For public consumption, Settling States explained that an amendment to the Escrow Statutes was needed to stop NPMs from taking advantage of the Escrow Statutes' release provisions and selling "cheap" cigarettes.[92] The Settling States claimed that the releases permitted NPMs to lower their prices and unfairly compete with the MSA's Participating Manufacturers, thus causing a decline in the market share of Participating Manufacturers, which, in turn, caused a decline in the States' revenues under the MSA.

75. Beneath the surface, however, and intentionally withheld from the public and the States' legislatures, was the actual reason for changing what was originally a fundamental and common element of every Escrow Statute. The MSA's payment provisions are tied to the sales volumes and market shares of the OPMs. Thus, if OPMs lose sales volumes

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91 Claimant's Evidentiary Stmts. Ex. 40.

92 Claimant's Evidentiary Stmts. Ex. 37.

and market share to NPMs, the States' payments under the MSA decline. Also, the MSA contains a provision that allows the OPMs to reduce their MSA payments by 3% for every 1% in market share that they lose to NPMs under certain circumstances. At least two courts have described these MSA provisions as "coercive," in that they coerce the Settling States to adopt an Escrow Statute and enforce them against NPMs.[93]

76. Following the MSA's execution in 1999, the OPMs implemented price increases, through 2003, that were several multiples of the amount needed to fund their MSA payments to the Settling States.[94] The price increases caused a decline in the MSA payments, because, as noted above, MSA payments are tied to sales volumes and market shares of the OPMs. Initially, the Settling States conceded that the cause of the decrease in MSA payments was attributable to the OPMs' price-gouging of consumers, which caused them to lose market share. It was not due, as Settling State officials would candidly admit, to some unfair advantage possessed by NPMs under the Escrow Statutes or otherwise. The following statements of Respondent's representative are enlightening in this regard:

> In fact, the major cigarette manufacturers raised prices by several multiples of their MSA costs. The price increase that created the market opportunity for NPMs is not attributable to the MSA, but rather to the decision by the OPMs to inflate per-pack profit margins at the cost of losing market share. The Report correctly notes that the market share of NPMs has risen. As noted previously, this increase is principally the result of price increases by the OPMs far in excess of

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93 A.D. Bedell Wholesale Co. v. Philip Morris Inc., Court of The United States 534 U.S. 1081, 1222. Ct. 813; 151 L. Ed. 2d 697, 2002 U.S. Lexis 255; 70 U.S. W.W. 3427, January 7, 2002; and Freedom Holdings, Inc., et al. v. Eliot Spitzer, et al., 02 Civ. 2939, 2004 U.S. Dist. Lexis 18296, 2001-2 Trade Cas. (CCH) P74.573. The coercive effect of these provisions may be best illustrated by the following: If a State does not adopt and diligently enforce an Escrow Statute, it runs the risk of bearing the entire expense of the NPM Adjustment *even if the OPMs do not lose market share in that State*. For example, assuming that OPMs are entitled to an NPM Adjustment of $1 billion for a given year because of their loss of market share nationwide, and all but one State has adopted an Escrow Statute, the MSA imposes that $1 billion adjustment on the one State that did not adopt the Escrow Statute, even if OPMs did not lose market share in that State. Thus, a Settling State risks losing all of its annual MSA payments if it does not adopt and diligently enforce and Escrow Statute, notwithstanding that the State's failure to do so may have no effect on the OPMs' loss of market share giving rise to that adjustment.

94 Claimant's Evidentiary Stmts. Ex. 41.

> the costs imposed by the MSA and the decision by OPMs to widen their profit margins.

77. According to the OPMs' representations at the time the Federal Proposal was under consideration, the OPMs should have lost nearly 60% of their market share as a result of the price increases they implemented after the MSA's execution through 2003.[95] Instead, they lost substantially less.[96]

78. This confirms that NPMs, including Claimants, did not enjoy any sort of unfair advantage under the Escrow Statutes. .[97]

79. As General Sorrell advised Settling State officials in non-public communications, the Settling States needed to stop *all* NPM sales, because any NPM sales would reduce the MSA payments that the States could otherwise receive under the MSA. The simple expedient and means of stopping the growth of NPM brands, including Claimants' Seneca® and Opal® brands, was accomplished by the Settling States through the uniform amendment of the Escrow Statute's Allocable Share Release provisions, which all the Settling States (except Missouri) had adopted by 2006.

80. These amendments came to be known commonly as the "Allocable Share Amendment." and the initiative for their adoption grew from just a few States initially to an "all State" objective, as described by the Settling States' officials. As these officials further described, because MSA payments are calculated based on *nationwide* sales, a "critical mass" of States was needed to adopt the Allocable Share Amendment for it to become effective in reducing NPM sales and preserving the *nationwide* market share of the OPMs and SPMs to which the MSA payments were tied.[98]

Application of the Amended Escrow Statutes to Claimants and Theirs Investments

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95 Claimant's Evidentiary Stmts. Ex. 42.

96 Claimant's Evidentiary Stmts. Ex. 43.

97 Claimant's Evidentiary Stmts. Ex. 13.

98 Claimant's Evidentiary Stmts. Ex. 44 & 38 Meeting Notes 1/20/04.

81. The effect of the Allocable Share Amendment has been to substantially impair the operation of Claimants' investment in Seneca® brand in off-reserve markets.[99] In Arkansas alone, the Allocable Share Amendment increased Claimants' escrow obligation by 1,000%. By way of example, the amount Arkansas was requesting Claimants to pay under the Allocable Share Amendment for each carton of their cigarettes sold in Arkansas was 10,000% greater than the amount Arkansas received for each carton of Participating Manufacturer cigarettes sold in Arkansas.[100]

82. The obvious result and effect of the Allocable Share Amendment has been to deprive Claimants' of the investment-backed returns they were entitled to enjoy from having established their propriety Seneca® and Opal® brands in certain state markets located in the southeastern and central United States. By immediately raising Claimants' escrow compliance costs from $0.50 to over $4.00 per carton, the Allocable Share Amendments had an instantaneous effect of requiring the price of Claimants' brands to increase to a level at which they could not compete with the brands of the MSA's Participating Manufacturers,[101] particularly the Exempt SPM brands that occupied a similar tier of the market as Seneca® and Opal® branded products.[102]

83. Given the tier of the market in which Seneca® and Opal® branded products competed, it was simply not possible to indefinitely support the full escrow payment due for their sales and yet find a price point comparable or appropriate, vis-à-vis the brands of Exempt SPMs.[103] Thus, when Claimants could not make the escrow payments that were claimed to be due under the Allocable Share Amendment, Settling States immediately banned the sale of Seneca® and Opal® brands in those markets under their Contraband Laws. In addition, these States have initiated litigation against Claimants to collect tens

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99 J. Montour Stmt. at 55 and 62.

100 Phillips Stmt. at 10.

101 Phillips Stmt. at 11.

102 Statement of Marvin Wesley, sworn to July 10, 2008, (hereinafter "Wesley Stmt.") at 4-9; Phillips Stmt. at 14.

103 Phillips Stmt. at 15.

of millions of dollars in escrow payments and penalties they claim are due under the amended Escrow Statutes, for sales in 2005 and thereafter.[104]

84. In the States of North Carolina and South Carolina, Tobaccoville initiated a price increase effective January 1, 2006, to cover the full cost of the increased escrow attributable to the Allocable Share Amendment. That price increase caused all wholesale purchases of Seneca® and Opal® branded products to cease in those States until prices were lowered (because Tobaccoville has taken out substantial loans to allow it make escrow payments in the short term, hoping that a remedy will soon be forthcoming). Indeed, one regional distributor provided notice to all its corporate stores that it was replacing Claimants' brands with the brands of an Exempt SPM, which could now be offered at a price that was nearly $5.00 less under the Allocable Share Amendment.[105]

85. Since the Allocable Share Amendment has taken effect in the U.S. markets identified above, Claimants have experienced a precipitous decline in the sales of their brands, which has had dramatic consequences to Claimants' good will, market share, and income streams.[106] As stated above, the price at which Claimants' products needed to compete with Exempt SPMs could not be sustained, given the impact of the Allocable Share Amendment. Claimants' and their brands were thus deprived of all their good will and market share in the States of Arkansas, Oklahoma and Kansas.[107]

86. Sales of the Seneca® brand have been reduced to only North Carolina, South Carolina, Tennessee and Georgia, [redacted]

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104 J. Montour Stmt. at 56.

105 Claimant's Evidentiary Stmt. Ex. 45; Phillips Stmt. at 14.

106 J. Montour Stmt. at 55-62.

107 J. Montour Stmt. at 62.

87. [redacted].[109] Consistent with Claimants' experience to date, when [redacted] the price of Claimants' products are forced higher to bear the full, increased expense imposed by the Allocable Share Amendment, most off-reserve sales of Claimants' Seneca® and Opal® brands will be displaced in the relevant U.S. markets.

Discriminatory Impact Upon and Expropriation of Off-Reserve Investment

88. Respondent has not denied that all sales made by Claimants are completed at, or on, First Nations territories in Canada and the United States. Notwithstanding, the Settling States have enforced the Escrow Statutes against Claimants by proceeding under the fiction that Claimants are selling *to consumers* in any Settling State whenever products manufactured by them are sold to consumers by third-parties – even third-parties with whom Claimants are not, nor have never been, in privity.[110]

89. For example, the State of Oklahoma is presently suing Claimants under the Oklahoma Escrow Statutes for products that Claimants sold, and were shipped, to Native American wholesalers doing business on Native American land located within the geographic boundaries of Oklahoma.[111] The Oklahoma Tax Commission has been harassing the Free Trade Zone in Northern, New York, with which Claimants does business, alleging

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108 To facilitate the borrowing, Grand River has had to subordinate its right to payment for goods delivered to Tobaccoville to the lending institution that extended such financing.

109 Phillips Stmt. at 13.

110 This fiction is the legal and factual equivalent of the Maryland State Department of Assessments and Taxation imposing a tax on a Native American fabricator of clothing or other commodities doing business on Native American land in Arizona, when the fabricator's products are sold in Maryland by independent retailers who acquired the goods from an independent distributor or liquidator.

111 Claimant's Evidentiary Stmts. Ex. 46; A. Montour Stmt. at 23.

that Claimants are violating the Escrow Statutes any time they cause their products to be shipped to *any* persons or entities located within Oklahoma.[112] Moreover, just this week the State of Oklahoma sued Native Wholesale Supply Company for more than $5 million, claiming that NWS violated Oklahoma's Contraband Laws by selling Claimants' products to Native-owned and operated businesses doing business on Native American land in Oklahoma, after Oklahoma deemed Grand River to be non-compliant with Oklahoma's Escrow Statute and Contraband Law.

90. Other Settling States are now seeking to terminate all trade amongst Claimants and their Native American counterparts throughout Native American territory. The Idaho Attorney General now claims, for example, that Claimants are prohibited from selling their products to Native American tobacco outlets in Idaho, because Claimants have allegedly failed to comply with the Idaho Escrow Statute.[113] The State of California has similarly asserted that Claimants' sales to Native Americans located within the geographic borders of California are prohibited and in contempt of court under the Escrow Statute and Contraband Law.[114] The latter is now seeking the enforcement of default judgments it allegedly obtained under its Escrow Statutes against Grand River for millions of dollars.

91. Respondent's threats and harassment have caused Native American Tribes and wholesalers to cease, or refrain from, doing business with Claimants for fear of retribution instilled by the Settling States.[115] Currently, Claimants are actively defending against seven separate lawsuits in the United States, arising out Respondent's imposition of the foregoing measures against them.[116] The sum total of these measures and enforcement actions by Respondent's States has caused Claimants to incur and

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112 A. Montour Stmt. at 23.

113 A. Montour Stmt. at 25.

114 A. Montour Stmt. at 24.

115 A. Montour Stmt. at 26-27; Claimant's Evidentiary Stmts. Ex. 12.

116 J. Montour Stmt. at 56.

suffer damages no less than $175 million to date, and such harm and damage is continuing.

92. Please see table 1-2, attached, which provides a timeline and chronology of the events and measures giving rise to Claimants' claims.

PART II:
THE ARGUMENT

SECTION I Claimants Have Satisfied the Requirements of NAFTA Chapter 11

A. Claimants are Investors Entitled to the Protections of the NAFTA

93. To bring a claim under Chapter 11 of the NAFTA, a claimant must be an "Investor of a Party." NAFTA Article 1139 defines an "Investor of a Party" as:

> a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment.

94. Claimants are nationals of Canada and a Canadian corporation that have at all times since 1990 made tobacco-related investments in the United States and Canada; sought to make such investments in the United States and Canada; and have continued to make such investments in the United States and Canada.

95. Claimants also comprise an *enterprise* within the meaning of the NAFTA's definition of an investor. Specifically, NAFTA Article 201 defines an enterprise as:

> … any entity constituted or organized under applicable law ... including any corporation, trust, partnership, sole proprietorship, joint venture or other association.

As the record demonstrates, Claimants have at various times since 1990, and continuously in one form or another since that time, associated themselves through corporations, partnerships, sole proprietorships, a joint venture, and other mutually beneficial and co-dependent business relationships for the purpose of carrying on the production and distribution of proprietary tobacco products in the United States and Canada.

B. Claimants have made Investments Recognized under the NAFTA

96. The term "investment" under the NAFTA is expansively articulated and is to be broadly interpreted. Thus, NAFTA Article 1139 defines an "investment" in pertinent part as follows:

(a) an enterprise;

(b) an equity security of an enterprise;

(c) a debt security of an enterprise

(i) where the enterprise is an affiliate of the investor, or

(ii) where the original maturity of the debt security is at least three years,

but does not include a debt security, regardless of original maturity, of a state enterprise;

(d) a loan to an enterprise

(i) where the enterprise is an affiliate of the investor, or

(ii) where the original maturity of the loan is at least three years,

but does not include a loan, regardless of original maturity, to a state enterprise;

(e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;

(f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);

(g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and

(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under

(i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or

(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise.

97. Previous tribunals have recognized that the NAFTA definitions of 'investment' and 'enterprise' are to be construed broadly, reflecting the object and purpose of the NAFTA. For example, the Tribunal that was convened to decide the NAFTA proceeding *Feldman* v. *Mexico* observed:

> A threshold question is whether there is an "investment" that is covered by NAFTA. The term "investment" is defined in Article 1139, in exceedingly

> broad terms. It covers almost every type of financial interest, direct or indirect, except certain claims to money.[117]

98. Broad constructions of the term of 'investment' under the NAFTA are consistent with the application of international law in similar contexts. Thus, many investment treaty tribunals have construed the term 'investment,' found in treaties similar to the NAFTA, expansively.[118] For example, in *Bayinder* v *Pakistan*, the tribunal recognized that an investor's contribution of know-how, equipment and personnel constituted a kind of asset that was to be considered an 'investment' under Article I of the Turkey - Pakistan BIT.[119] Similarly, both the Tribunal and the Annulment Committee in *Mitchell* v. *Congo* determined that "movable property and any documents, like files, records and similar items, of [Mitchell's law] firm" and his "rights with respect to know-how and goodwill as well as the right to exercise his [legal services business]" all demonstrated the existence of an investment that fell "well within the scope of application" of the definition of 'investment' under Article I(c) of the BIT between the United States and the Democratic Republic of the Congo, which is similar in scope to the definition of 'investment' in Article 1139 of the NAFTA.[120]

99. The Tribunal in *MCI Power Group* v. *Ecuador* also construed one of Respondent's BITs as providing "a broad definition of investment and that the rights and interests alleged by the Claimants to have subsisted as a consequence of the [investor's] project, after the entry into force of the BIT—such as the intangible assets of accounts receivable, the existence of an operating permit – would [also] fit that definition."

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117 *Marvin Feldman* v *United Mexican States*, Award, ICSID Case No. ARB(AF)/99/1 (16 December 2002) at para. 96.

118 This is not an ICSID case, and therefore the jurisprudence of tribunals on the requirement of an 'investment dispute' pursuant to Article 25 of the New York Convention are not binding here. Nonetheless, there are persuasive examples from the case law demonstrating how other tribunals have applied a broad and remedial construction to investment definitions contained within other treaties.

119 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29 (14 November 2005), at para's. 115-116.

120 *Patrick Mitchell v Democratic Republic of Congo*, Annulment Decision, ICSID Case No. ARB/99/7 (27 October 2006) at para. 35.

100. In *Sedelmayer* v. *Russia*, the Tribunal found that an "in kind contribution of chattels to [the] capital [of the investment enterprise] and vehicles and equipment" constituted an investment under Article 1(a) of the Germany-USSR BIT, which contains language similar to the US Model BIT. For example, the definition in that treaty also included: 'claims to money invested to create economic value or to any performance having an economic value' and 'shares and other forms of participation in business enterprises and organizations.'[121] The Tribunal in *Tradex Hellas* v. *Albania* also recognized in-kind contributions by an investor to the business venture being conducted in the host state as an investment.[122] The Tribunal in *Alcoa Minerals* v. *Jamaica* likewise observed that a contribution of capital to commercial activity in the territory of the host state is also generally regarded as an investment in such cases.[123]

101. In view of the NAFTA definitions and investment treaty jurisprudence set out above, it is clear that Claimants' activities – namely their establishment of an integrated commercial undertaking for the creation, establishment, manufacturing, marketing and distribution of their proprietary Seneca® and Opal® brands of tobacco products – clearly constitute significant "investments" in the territory of the United States.

a. Goodwill and Intellectual Property Embodied in Claimants' Seneca® and Opal® Brands

102. Claimants' business venture and interests in the United States have been, at all times since 1998, principally focused on the successful development, production, promotion and distribution of their Seneca® brand of cigarettes.[124] Claimants' Seneca® and Opal® brands, and the goodwill associated with them, are an intangible form of property that

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121 *Franz Sedelmayer v. The Russian Federation*, Award, S.C.C. #07071998, (7 July 1998), at Sec. 3.2.

122 *Tradex Hellas S.A. v Republic of Albania*, Award, ICSID Case No. ARB/94/2 (29 April 1999) at para. 124.

123 *Alcoa Minerals of Jamaica, Inc. v. Jamaica*, ICSID Case No. ARB/74/2), Decision on Jurisdiction and Competence of July 6, 1975, 4 Yearbook Commercial Arbitration 206 (1979).

124 The Opal brand was established in order to satisfy US market demand for specialty '120' size cigarettes. Subsequently Claimants have shifted production to a new Seneca 120 product. Statement of Jerry Montour, at para. 41.

constitutes an investment under Article 1139(g).[125] Similarly, the trademarks supporting the Seneca® and Opal® brands also constitute a form of intangible property under Article 1139(g).

103. In cases where proof of impairment has been used as a basis for awarding damages for lost profits caused by the imposition of a measure, international tribunals have endorsed the concept of goodwill as an asset requiring protection under investment treaties,. As explained by the *Sola Tiles* tribunal:

> Goodwill can best be defined, at least for the purposes of the present case, as that part of a company's value attributable to its business reputation and the relationship it has established with its suppliers and customers.[126]

104. This is particularly true when brand goodwill is fundamental to the performance of an enterprise in a certain industry. The tobacco industry is exactly the kind of industry where an investor's business depends upon the goodwill it has established in the brands under which it sells its cigarettes.[127]

105. In this case, Claimants created the trademarks supporting the Seneca® and Opal® brands with the explicit intention of investing in the US market.[128] Thus, the Seneca® trademark

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125 *See* Patrick Mitchell v Democratic Republic of Congo, Annulment Decision, ICSID Case No. ARB/99/7 (27 October 2006) at para. 35. Both the Tribunal and the Annulment Committee in *Mitchell* v. *Congo* determined "rights with respect to know-how and goodwill as well as the right to exercise his [legal services business]" all demonstrated the existence of an investment that fell "well within the scope of application" of the definition of 'investment' under Article I(c) of the BIT between the United States and the Democratic Republic of the Congo, which is similar in scope to the definition of 'investment' in Article 1139 of the NAFTA.[125]

126 *Sola Tiles Inc.* v. *Iran*, Partial Award, 14 IRAN-U.S.C.T.R. 223 (1987), at para. 62. For lost profits analysis, *see* paras. 161-164. *See also Asian Agricultural Products* v. *Sri Lanka*, (1996) 4 ICSID Rep. 246 at 292; *See also, e.g.,: Patrick Mitchell v Democratic Republic of Congo*, Annulment Decision, ICSID Case No. ARB/99/7 (27 October 2006) at para. 35; *Asian Agricultural Products Ltd v Republic of Sri Lanka*, Final Award, ICSID Case No. ARB/87/3 (27 June 1990), at paras. 102-103; *Técnicas Medioambientales, TECMED S.A. v United Mexican States*, Award, ICSID Case No. ARB/AF/00/2 (29 May 2003), at 194-195. And in *Ethyl Corporation* v. *The Government of Canada*, Award on Jurisdiction, UNCITRAL Arbitration (24 June 1998), at para. 70, the respondent did not object to a claim for goodwill on the basis that it did not constitute an 'investment' within the meaning of Article 1139, but only that the claimant could not claim for impairment of "worldwide goodwill" for a measure imposed solely by Canada.

127 Wesley Stmt. at 11.

128 A. Montour Stmt. 10-13; J. Montour Stmt. 21.

is registered in the US, and held by NWS, [redacted], and their use is governed under cross-licensing arrangements effectively granting all Claimants joint and several control over them. Indeed, the intellectual property supporting the Seneca® brand is the combined product of Arthur Montour's concept for the brand name and Jerry Montour's leadership in commissioning the packaging, artwork, blending and taste of the products to be sold under the Seneca® name.[129] The Opal® brand, whose trademark was registered and is controlled by Grand River in the United States,[130] is a similar product of the joint efforts and know-how of the Individual Claimants.[131]

106. This method of operation illustrates the collective nature of Claimants' business venture in the United States. Not unlike any other tobacco enterprise, the Claimants profited from establishing and expanding their own brands via the production and distribution of particular products, which bear the trademarks collectively developed and registered in support of the associated brand.[132] Also in keeping with standard practice in the tobacco industry, the products marketed under the Seneca® brand were designed specifically by Claimants to establish and create their own identity, in terms of composition, taste, packaging and price point.[133]

107. Thus, over the years, as the individual Claimants have shared a common interest in the establishment and growth of the Seneca® brand, they have each contributed their own know-how and the resources of their respective companies towards its success.[134] They have each also shared in the profits generated by the brand, and each has re-invested significant amounts of those profits in order to benefit from its continued growth.[135]

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129 A. Montour Stmt. at 10.

130 Claimant's Evidentiary Stmts. Ex. 18.

131 J. Montour Stmt. at 19.

132 J. Montour at 41.

133 A. Montour Stmt. at 11 and 12; J. Montour Stmt. at 22 and 23.

134 J. Montour Stmt. 22-27.

135 A. Montour Stmt. at 14 ; J. Montour Stmt. at 26.

b. The Claimants' Business Enterprise

108. In addition to the intellectual property and the goodwill associated particularly with the Seneca brand, the business supported by that brand also constitutes an investment under NAFTA Article 1139(a), which states that 'investment' in the territory of another NAFTA Party includes an 'enterprise.' In turn, NAFTA Article 201 defines 'enterprise' as "any entity constituted or organized under applicable law … including any corporation, trust, partnership, sole proprietorship, joint venture or other association." This definition is as broad as the definition of investment itself, including "any … other association" by which investors choose to organize their business activities as an 'investment' under the NAFTA.

109. Claimants' business venture, under which they have established and profited from the promotion of specific, trademarked brands, supporting specific products, tailored for a specific US clientele, is exactly the kind of 'association' that meets the NAFTA definition of 'enterprise,' and thereby constitutes an investment under the treaty. This interpretation is also consonant with the plain meaning and general usage of the term 'enterprise,' which is defined in Black's Law Dictionary as "a business venture or undertaking."[136]

110. In its Statement of Defense to Claimants' Allocable Share Claim, Respondent asserts that neither Jerry Montour, Kenneth Hill nor Grand River have made any investment in the United States. Although Respondent has thus far failed to offer any further substantiation for this myopic assertion, it is apparent that Respondent has focused solely on the fact that Jerry Montour and Kenneth Hill do not own shares in either NWS or NTD.[137] Such an analysis ignores the object and purpose of the NAFTA, disregarding the reality of Claimants' investment in the United States and the totality of the definition of investment contained in Article 1139.

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[136] Sixth Edition, at 531.

[137] Statement of Defense, para. 22 "None of these Claimants has any ownership interest in any of the U.S. enterprises identified by Claimants"

111. Since 1999, Claimants have maintained and expanded their investments in the United States through two legally distinct corporate branches: Grand River for manufacturing and NTD/NWS for distribution. The individual Claimants decided together to adopt this corporate structure in order to minimize their tax liability and to formally assign their respective areas of primary responsibility.[138] The fact that Grand River and NWS constitute separate legal entities cannot and does not change the collective nature of the Claimants' underlying business venture in the United States, or the fact that they are entitled to protection under Chapter 11.

112. The nature of this venture is first and foremost illustrated by the fact that the individual Claimants directed their respective companies to enter into a contractual relationship under which Grand River was designated by NWS as the exclusive manufacturer and packager of Seneca® branded products and NWS was designated by Grand River as the (then) exclusive importer and distributor of Seneca® products in the United States.[139] As the exclusive distribution arm for Claimants' products until the end of 2002, NWS' warehouse also served as the headquarters for Claimants' marketing campaigns and other brand promotional activities in the United States.[140]

113. In addition, after formally incorporating their manufacturing and distribution arms, the individual Claimants have continued, and are required, to consult with each other before making important strategic decisions about marketing and distribution of the Seneca® brand, just as they had always worked together.[141] [redacted]

138 J. Montour Stmt. at 24-28.

139 J. Montour Stmt. at 27.

140 A. Montour Stmt. at 17.

141 A. Montour Stmt. at 19 ; J. Montour Stmt. at 32.

142 A. Montour Stmt. at 15

[redacted]

114. The cooperation between the Claimants has not been limited to mere consultation, however. For example, in 1999 Kenneth Hill and Jerry Montour caused Grand River to contribute chattel property to their collective business venture, in the form of a delivery truck worth approximately $30,000, which has been used by NWS to conduct its distribution activities.[144]

115. Furthermore, between 1999 and 2006, Claimants caused Grand River to forward millions of dollars in inventory to NTD and then NWS,[145] and to concurrently extend millions of dollars in credit for these advances of inventory, such that this practice has effectively constituted a continuous loan of over $1,000,000 to NWS for periods lasting well over three years.[146] Indeed, but for Grand River's willingness to subordinate its interest in $1 million of inventory [redacted], Arthur Montour would not have been able to buy out the interest of his then partner [redacted] in the distribution arm of the business.[147]

116. By the time Arthur Montour incorporated NWS to replace NTD in 2000, Grand River's in-kind contribution of credit to the enterprise stood at approximately [redacted] at the end of each month. By August 2002, this revolving inventory loan had doubled to [redacted]. Moreover, Grand River assisted in financing the buyout of NTD by Arthur Montour and NWS, by agreeing to subordinate its loans, capital

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143 J. Montour Stmt. at 28.

144 J. Montour Stmt. at 29.

145 A. Montour Stmt. at 31.

146 These transactions are recorded as aged accounts receivable and payable in the corporations' respective accounting records. A. Montour Stmt. at 18.

147 A. Montour Stmt. at 6.

commitments and receivables from NWS, to a priority lien and claim [redacted]

117. Subsequently, between August 2002 and August 2006, as the effects of the Allocable Share Amendments on Claimants' sales were becoming increasingly severe, the amount of monthly in-kind credit extended by Grand River to NWS ranged between [redacted].[149] The purpose of directing Grand River to forward such large sums of inventory to NWS was clearly to contribute to, and subsidize, the establishment and expansion of the Seneca® brand in the United States.[150]

118. If the NAFTA Parties did not intend its Chapter 11 protections to apply to a territorially-focused business venture such as the one operated by Messrs. Montour, Montour and Hill, the Parties could easily have made this clear in the NAFTA text. Instead, the Article 201 definition explicitly lists a number of forms of business associations that qualify as an 'enterprise,' including corporations, partnerships and joint ventures, before also including the catch-all term: 'other association.' Although Claimants may have chosen not to evidence their relationship with respect to the U.S. market through a written partnership agreement or formal parent-subsidiary corporate relationship, it is clear that the association they chose led to their sharing and participation in numerous business activities in the territory of the United States, including the execution of contracts, the extension of loans and credit facilities, and the establishment of intellectual property and

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148 A. Montour Stmt. at 6

149 J. Montour Stmt. at 31; Starting in January 2004, GRE accounting records specifically included a notation indicating that the "credit limit" for NWS would be $4.2 million.

150 A. Montour Stmt. at 17. Claimants forwarded approximately $1 million in inventory to their new distributor, Tobaccoville, between December 2004 and April 2005. Claimants did not maintain any accounts receivable or provide credit to this new distributor because they wanted to be sure that it would be able to meet its initial payment obligations. They did so effectively maintaining control over their inventory during that time, using the services of a free trade zone located in the United States. Claimants planned to divert this inventory to NWS, had Tobaccoville been unable to meet its first payment obligations to GRE. This inventory constituted tangible property used for the purpose of economic benefit in the United States, conforming with the definition of investment found at subsection (g) of NAFTA Section 1139.

goodwill in the territory of the United States. As such, Claimants' tobacco business in the United States it is an enterprise that constitutes an 'investment' under Article 1139(a).

c. Claimants' Contribution of Capital to Escrow and Penalties

119. Although Claimants' establishment of the Seneca® brand, and their business venture to promote, manufacture and distribute Seneca® branded products in the US market are both more than sufficient to satisfy the requirements of Article 1116, it must be emphasized further that Claimants have deposited millions of dollars into escrow accounts in the US – the principal of which is currently the property of Claimants. Like the money Claimants have paid as penalties under the measures, these funds constitute an investment under Article 1139(g), as property employed in the territory of the United States for the purpose of conducting business or investment in the territory of the United States. These funds also represent a commitment of capital to the United States, contributed in furtherance of Claimants' ability to continue selling products in the markets it had established under the Seneca® brand. As such, they also constitute an investment that meets the threshold definition under Article 1139(h) of the NAFTA. Thus far, the payments made under these measures by Claimants or on behalf of the Seneca® brand as a condition to its continued sale and distribution in the United States total approximately [redacted].[151]

d. Conclusion

120. As discussed above, other tribunals have identified the elements present in this case as meeting the threshold definition of investment contained in similar treaties. Trademark and intellectual property rights; multimillion-dollar aged accounts receivable; commitments of capital, inventory and know-how; and in-kind contributions of capital are all present in this case. Moreover, as cases such as *Mitchell* demonstrate, intangible property such as goodwill also constitutes an investment under treaties based on the United States Model BIT, such as the NAFTA.

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151 J. Montour Stmt. at 52.

121. Finally, it is worth noting that Claimants' investment was also encouraged by, and completely consistent with, the explicit objectives of the NAFTA found in Article 102(1), including: promotion of 'fair competition in the free trade area' and increasing 'substantially investment opportunities in the territories of the Parties.' In agreeing to the NAFTA, Respondent obliged itself and its state governments to 'ensure a predictable commercial framework for business planning and investment'; to 'promote trade in goods and services that are the subject of intellectual property rights'; and to 'create new employment opportunities and improve working conditions and living standards in their respective territories.'

122. All of these objectives were promised by Respondent in the preambular text of the NAFTA and all had been realized with Claimants' investment in the territory of the United States. By establishing and supplying a popular US brand to US markets, Claimants generated new employment opportunities and increased standards of living for many Six Nations members.

123. Accoridingly, there can be no question that Claimants have collectively established, operated and maintained exactly the sort of business interests in the United States that were intended by the contracting Parties to constitute an "investment" in the territory of the United States under Articles 1139 and 1101 of the NAFTA.

C. The Dispute Falls Within the Scope of NAFTA Chapter 11

124. Article 1101 establishes the scope of application for NAFTA Chapter 11. Like all NAFTA provisions, its terms must be construed in light of the object and purpose of the treaty, which is to promote opportunities for investment and ensure fair competition in the territories of the NAFTA Parties. Article 1101 states, in relevant part:

> 1. This Chapter applies to measures adopted or maintained by a Party relating to:
>
> (a) investors of another Party; and

> (b) investments of investors of another Party in the territory of the Party.

125. Article 1101 thus provides that Chapter 11 broadly applies when two elements are satisfied: (1) a Party has adopted or maintained measures; and (2) those measures relate to investors of another Party, or investments of those investors in the territory of the Party that has adopted the measures.

126. "Measures" are defined in NAFTA Article 201 to include "any law, regulation, procedure, requirement or practice." It is evident that the MSA, the Escrow Statutes, the Contraband Laws and the Allocable Share Amendments, as well as enforcement actions undertaken pursuant to any of the foregoing, all constitute "measures" for purposes of the NAFTA. Measures "relate to investors" whenever a measure directly affects an investor or its investment in any manner. Thus, where a measure can be seen as connected to the investor or the investment activities of the investor or its competitors, the measure falls within the parameters of Article 1101.[152]

127. Each of the measures at issue in this case relates to Claimants. The measures have been designed, implemented and enforced against Claimants and their investment in establishing and profiting from proprietary tobacco brands. Moreover, the measures have plainly achieved their intended effect, resulting in severe damage to Claimants' business. Respondent does not contest either the aim or the impact of the measures. Instead, it asserts only that: (1) the measures cannot relate to Jerry Montour, Kenneth Hill or Grand River because they allegedly do not have an investment in the US; and (2) the measures cannot relate to Arthur Montour, Jr. because his companies "are not subject to the Escrow Statutes or the Allocable Share Amendments."[153] In so doing, Respondent misreads both the letter and intent of the NAFTA text.

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[152] *See, e.g., S.D. Myers, Inc. v. Canada*, NAFTA/UNCITRAL, NAFTA/UNCITRAL Tribunal, First Partial Award (13 November 2000) at paras. 233-236.

[153] See paras. 22-23 of Respondent's Statement of Defense to Claimants' Allocable Share Claim, dated 21 December 2006.

128. As demonstrated above, Claimants have made substantial investments and collectively engaged in a business venture since 1999, founded upon their collective collaboration and establishment, promotion, and distribution of the Seneca® brand in the US market. Indeed, Respondent has thus far been remarkably silent in addressing the fact that, if payments are not made by Claimants under the Escrow Statutes for products sold under the Seneca® brand (as specifically identified in various judgments obtained under Escrow Statutes and prohibitions arising from the application of Contraband Laws), Settling States have sought to ban sales or distribution of Seneca® branded products as a result.

129. In view of the collective nature of Claimants' investments and the over-reaching application of Respondent's measures, Respondent's assertion that Arthur Montour's companies are not subject to the measures is plainly inaccurate. There is no question as to whether the MSA States have sought to impose their measures directly upon Grand River by construing it as a "tobacco product manufacturer" under their legislation. However, demands issued and judgments obtained under an Escrow Statute always name both the alleged "tobacco product manufacturer" **and the brands** it is alleged to have produced. Thus, whenever Grand River or any entity is found to be non-compliant with the Escrow Statutes' requirements with respect to sales of Seneca® brand cigarettes, all of the Claimants suffer and are harmed, because future sales of their Seneca® brand are banned and prohibited.

130. Furthermore, in this case, the MSA states have not only made demands against Grand River, they have also applied the MSA-related measures *directly* to NWS as the rights-holder, importer and distributor of the Seneca® brand. For example, within the past weeks and months, NWS received letters from the Attorneys General of California and Idaho, respectively, directing NWS to cease and desist the distribution of the Seneca® brand anywhere in their States under threat of contempt of court.[154] Despite the fact that the state of California has no constitutional jurisdiction to regulate whether or how NWS distributes tobacco products on sovereign, First Nations territories, it is obvious that its

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[154] A. Montour Stmt. at 24-27.

Attorney General purports to possess the right to do so – thereby demonstrating a yet another way in which the measures relate to NWS and Arthur Montour, as enforced by Respondent.

131. In similar disregard for Claimants' rights and expectations under US Federal Indian Law, the State of Oklahoma has also just launched a disgorgement lawsuit against NWS, seeking over $5 million in damages in respect of sales of Seneca® products it admits were sold by NWS in Native American territory to First Nations customers.[155]

132. The importance under the NAFTA of the relationship between the harm caused to an investor when its products are adversely affected by a measure was best described by the Tribunal in the NAFTA arbitration *UPS* v. *Canada*:

> Canada's argument that the conduct of Canada Customs is at most treatment of items and not the investment or the investor is not correct. That argument would essentially open an enormous hole in the protection of investments and investors.... Treatment is not only open to items but to enterprises.[156]

133. In other words, when a measure applies to an investor's proprietary products, from which cash flows generated by that business support growth of those brands, the measure is deemed to relate to the investor and its investments under NAFTA.

SECTION II Interpretation of NAFTA Chapter 11

A. Interpretation of the NAFTA Must be in Accordance with Applicable Rules of International Law

134. NAFTA Article 1131(1) states that a tribunal shall decide issues in dispute in accordance with the NAFTA and the applicable rules of international law. NAFTA Article 102(2) further provides that NAFTA provisions shall be interpreted and applied in accordance

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155 Claimant's Evidentiary Stmts. Ex. 46.

156 *United Parcel Service v. Canada*, UNCITRAL/NAFTA, Award (24 May 2007), at para. 85.

with the applicable rules of international law and in light of the objectives of the NAFTA set out in Article 102(1).[157]

135. It is well settled in the jurisprudence of NAFTA tribunals that the term "applicable rules of international law," used in Article 102(2) and 1131(1), includes the customary international law rules of treaty interpretation that are codified in the *Vienna Convention on the Law of Treaties* ("VCLT").[158]

136. The VCLT further provides that "any relevant rules of international law applicable in the relations between the parties" to a treaty "shall be taken into account, together with the context" of the treaty, including its text and preamble, in interpreting the obligations owed by a party to that treaty.[159] Accordingly, treaties in which the United States has undertaken certain obligations in respect of its treatment of the Haudenosaunee, constitute applicable international law rules that must be considered in the Tribunal's construction of NAFTA obligations where Claimants' rights and interests, as Haudenosaunee, are involved.

137. Similarly, customary international law and international human rights norms may also constitute applicable rules of international law for the purposes of interpretation of a provision of NAFTA Chapter 11 as it pertains to Claimants, as Haudenosaunee investors, just as fundamental human rights norms, including but not limited to *jus cogens*

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157 *United States – In the Matter of Cross-Border Trucking Service* (2001), USA-MEX-98-2008-01 at para. 218. See also: *Meltaclad Corporation v. The United Mexican States*, ICSID/NAFTA Case No. ARB(AF)/97/1, Award at para.70 (30 August 2000).

158 See generally *Ethyl Corporation v. Canada*, UNCITRAL/NAFTA, Award on Jurisdiction at para. 50 (24 June 1998); *Canfor Corp. v. the United States of America and Tembec Corp. v. the United States of America*, UNCITRAL/NAFTA, Decision on Preliminary Question at para. 177 (6 June 2006) [*Softwood Lumber*]; *Mondev International Ltd. v. United States of America*, Award, ICSID Case No. ARB(AF)/99/2 (11 October 2002), at para. 43; *Methanex Corporation v. United States*, UNCITRAL/NAFTA, Final Award (3 August 2005) Part II, Chapter B at paras. 15-23, and Part IV, Chapter B at para. 29; *United Parcel Service v. Canada*, UNCITRAL/NAFTA, Award on Jurisdiction (22 November 2002), at para's. 40-42; *Meltaclad* at para. 70, *supra* note 29; *Tariffs Applied by Canada to Certain U.S.-origin Agricultural Products* (1996), CDA-95-2008-01 at para. 119; *Grand River Enterprises et al v. United States of America*, UNCITRAL, Jurisdictional Decision at para. 34 (20 June 2006); and *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL Arbitration (26 January 2006), at paras. 89-91.

159 Vienna Convention on the Law of Treaties, art. 31(3)(c), May 23 1969, 1155 U.N.T.S. 331.

principles, must also inform a NAFTA tribunal's interpretation of the provisions before it wherever the claimant investor is an individual.

138. Both the customary international law rules of treaty interpretation and the applicable rules of international law relevant to the interpretation of the NAFTA with respect to Claimants, as Haudenosaunee investors, are detailed below.

B. Customary International Law Rules of Treaty Interpretation as Applied to the NAFTA

139. There is consensus that the customary international law rules of treaty interpretation have been accurately restated in VCLT Articles 31 and 32.[160] VCLT Article 31(1) memorializes the general rule of treaty interpretation, providing that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Under this general rule of interpretation, the text of the treaty is presumed to be the authentic expression of the parties' intentions. *Post facto* statements by a respondent party, about its alleged intent behind a particular treaty provision, must therefore be met with considerable doubt and scrutiny. In any event, the starting place for any exercise in interpretation must be the treaty text itself.[161]

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[160] Vienna Convention on the Law of Treaties, May 23 1969, 1155 U.N.T.S. 331. The Tribunal is not obliged to follow the determinations of past tribunals in making any of its findings, as NAFTA Article 1136(1) confirms: awards issued by a tribunal "shall have no binding force except between the disputing parties and in respect of the particular case." Nonetheless, both in respect of the findings of other NAFTA tribunals, and those of other international adjudicatory bodies, their findings may prove helpful to the Tribunal in executing its interpretative role. See e.g.: *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Final Award at para. 391 (14 July 2006). See also Ian Brownlie, *Principles of Public International Law,* 6th ed. (Oxford University Press 2003) at 602.

[161] *Suez, Sociedad General de Aguas de Barcelona S.A, and Interagua Servicios Integrales de Agua S.A and the Argentine Republic*, ICSID, ARB/03/17, Decision on Jurisdiction at para's 54-55 (16 May 2006). See also: *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19, Decision on Jurisdiction at para. 54 (3 August 2006); *National Grid PLC v. Argentina*, UNCITRAL/BIT Arbitration, Jurisdictional Decision at para. 80 (20 June 2006); and *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* (2002), WTO Doc. WT/DS213/AB/R and Corr.1 at para's 61-62.

140. The ordinary meaning of the text is normally conclusive of the obligations owed by a party to a treaty. Such meaning is also informed by the context in which the subject text appears and the object and purpose of the treaty in question. As indicated by the International Court of Justice:

> The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavor to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context that is an end of the matter.[162]

141. The object and purpose of a treaty provides interpreters with guidance as to how the ordinary meaning of its text should be interpreted in context.[163] NAFTA Article 102 explicitly sets forth its object and purpose:

> 1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favoured-nation treatment and transparency, are to:
>
> (a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
>
> (b) promote conditions of fair competition in the free trade area;
>
> (c) increase substantially investment opportunities in the territories of the Parties;
>
> (d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;
>
> (e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and
>
> (f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.

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162 *Competence of the General Assembly For The Admission Of A State To The United Nations*, [1950] I.C.J. Rep. 4 at 8 (Advisory Opinion).

163 *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award at para. 52 (12 October 2005) [*Noble Ventures*].

142. NAFTA Tribunals have consistently applied the objectives found in Article 102(1) when interpreting substantive provisions of Chapter 11.[164] For example, the *Ethyl* Tribunal noted:

> Given the relevance under Article 31(1) of the Vienna Convention of NAFTA's "object and purpose," it is necessary to take note of NAFTA Article 102, particularly its (1)(c) and (e) […] The Tribunal reads Article 102(2) as specifying that the "object and purpose" of NAFTA within the meaning of those terms in Article 31(1) of the Vienna Convention are to be found by the Tribunal in Article 102(1), and confirming the applicability of Articles 31 and 32 of the Vienna Convention.165

143. Interpretation of the objectives found in Article 102(1) can also be informed by text of the NAFTA preamble.[166] Preambular text provides the context within which the specific terms of such a provision should be interpreted. Other tribunals have had recourse to preambular text, using it to ascertain the object and purpose of a treaty where explicit objectives were not included in its text.[167] For example, the *S.D. Myers* Tribunal has opined:

> The NAFTA provides internal guidance for its interpretation in a number of provisions. In the context of a Chapter 11 dispute, it is appropriate to begin with the Preamble to the treaty, which asserts that the Parties are resolved, inter alia, to … ***Create an expanded and secure market for the goods and services produced in their countries... to ensure a predictable commercial framework for business***

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164 See e.g.: *Pope & Talbot v. Canada*, NAFTA/UNCITRAL, Award on the Merits, Phase 2, (10 April 2001), at para. 115. See also: *United Parcel Service v. Canada*, Award, NAFTA/UNCITRAL (24 May 2007), at para's. 60-61,and *United States – In the Matter of Cross-Border Trucking Services*, Panel Report, USA-MEX-98-2008-01, 6 February 2001, at para. 222.

165 *Ethyl Corporation* v *Canada*, Award on Jurisdiction, 24 June 1988, 38 ILM 708, at para. 56.

166 VCLT Article 31(2) confirms that the preamble and annexes of a treaty are to be included in one's analysis of the context of treaty text.

167 See e.g.: *Siemens AG* v *Argentina*, Award, ICSID Case No ARB/02/8 (06 February 2007), at para. 81; *Continental Casualty Company. v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Jurisdiction at para. 80, (22 February 2006); *Azurix*, *supra* note 33 at para. 307; and *SGS Société Générale de Surveillance v. Republic of the Philippines*, ICSID Case N° ARB/02/6, Jurisdiction at para. 116 (29 January 2004). See also: *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc., WT/DS58/AB/R at para. 153 (Appellate Body Report).

> ***planning and investment... and to do so in a manner consistent with environmental protection and conservation*** […][168] [emphasis in original]

144. And the Panel in *Cross-Border Trucking* has noted:

> The objectives develop the principal purpose of NAFTA, as proclaimed in its Preamble, wherein the Parties undertake, *inter alia*, to "create an expanded and secure market for the goods and services produced in their territories."[169]

145. In summary, the jurisprudence of NAFTA Chapter 11 is settled: provisions found in NAFTA Chapter 11 are to be construed in a broad and remedial manner consistent with the object and purpose of the NAFTA. As such, when interpreting the plain language of a provision, in context, if a tribunal is presented with two equally plausible meanings it should choose the one most in accord with the objectives of promoting investment and competitive opportunity as stated explicitly in Article 102(1) and the preambular language of the NAFTA.

C. Applicable International Law Concerning the Individual Rights and Protection of Indigenous Peoples

146. As noted above, Article 31(3)(c) of the VCLT provides that "any relevant rules of international law applicable in the relations between the parties" to a treaty "shall be taken into account, together with the context" of the treaty, including its text and preamble, in interpreting the obligations owed by a party to that treaty.[170] And as Lord McNair observed in his famous treatise:

> It is arguable that the relevance of a rule of international law in deciding upon the interpretation to be placed upon a treaty can be attributed either to the fact that a rule pertains to a legal system to which the contracting parties are subject or on a contractual basis. The latter explanation was put forward in the *North Atlantic Coast Fisheries Arbitration* (Oral Argument, pp. 1073 and 1282) both by Sir William Robson (the British Attorney General) and by Senator Elihu Root on

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168 *S.D. Myers, Inc. v. Canada*, NAFTA/UNCITRAL, NAFTA/UNCITRA, First Partial Award (13 November 2000) at para. 196 (13 November 2000).

169 *United States – In the Matter of Cross-Border Trucking Services*, Panel Report, USA-MEX-98-2008-01, 6 February 2001, at para. 219; citing: *In the Matter of Tariffs Applied by Canada to Certain United States Origin Agricultural Products*, CDA 95-2008-01, Final Panel at para. 122 (2 December 1996) [*Tariffs*].

170 Vienna Convention on the Law of Treaties, art. 31(3)(c), May 23 1969, 1155 U.N.T.S. 331.

> behalf of the United States of America. The former said (at p. 1073): 'Of course in dealing with international law in relation to treaties – a subject with which I have already dealt at such length, -- I admitted that international law, when well established and clearly proved, like municipal law, may be taken as the basis of a contract, and may be read into a contract on those matters as to which the contract is silent because, no doubt, the parties were contracting with knowledge of the law.' And Senator Elihu Root later said (p. 1282): 'The effect of a rule of international law, if such a rule there be, which may be relevant in any degree to the consideration of a treaty between two independent nations is rather that of a rule of construction than of statute upon which rights are based. Again, I am indebted to the learned Attorney-General for the very just exposition of that relation.'[171]

147. Claimants are Haudenosaunee, for whose benefit the United States and the United Kingdom undertook certain obligations in the *Jay Treaty* of 1794, which came into force in 1796. The Parties reaffirmed the obligations they undertook to First Nations, and to the Haudenosaunee in particular, with the 1814 *Treaty of Ghent*.[172] These obligations remain in force today[173] and accordingly constitute applicable rules of international law in cases where the economic interests of First Nations are at issue. As such, these obligations should be considered by the Tribunal in its construction of NAFTA provisions at issue in this case.

148. One of the Parties' obligations, found in Article III of the *Jay Treaty*, is to ensure that "Indians" can freely traverse the territorial boundary between the United States and Canada, and to freely carry on trade and commerce with each other thereby. The "Indians" that the parties primarily had in mind when they undertook these obligations were the Haudenosaunee, whose traditional commerce and territories extended across what would become the border between Canada and the United States.[174]

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171 A.D. McNair, *The Law of Treaties* (Oxford: Clarendon, 1961), at 466. See, e.g.: *Saipem S.p.A.* v *People's Republic of Bangladesh*, Decision on Jurisdiction, ICSID Case No. ARB/05/07, (21 March 2007) at para. 82.

172 Statement of Professor Robert Clinton, at page 26-27.

173 Statement of Professor Robert Clinton, at page 21-22 ; Canada acceded to all international law obligations of the United Kingdom in respect of the Dominion of Canada in1931.

174 Statement of Professor Robert Clinton, at pages 22, 24.

149. When concluding the *Jay Treaty*, the Parties recognized that they each bore a special obligation to aboriginal peoples whose traditional territories were divided by the new borders they had created. Indeed, the Parties had the Haudenosaunee specifically in mind when these obligations were affirmed in 1794 and 1814.[175] In doing so, they were effectively promising not to treat the Haudenosaunee as if they were foreign nationals for the purposes of regulating their rights in land or their traditional commercial activities.[176] This obligation is not only specifically enshrined in the *Jay Treaty* and affirmed in the *Treaty of Ghent*; Claimants assert that it is a rule of customary international law, as reflected in Article 32 of *ILO Convention No. 169*, which provides:

> Governments shall take appropriate measures, including by means of international agreements, to facilitate contacts and co-operation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields.[177]

150. As an evolving norm of customary international law, the duty of States to respect and protect the rights and interests of First Nations across borders, in good faith, must be considered in the interpretation of treaty rights when the interests of First Nations individuals are directly involved. The NAFTA provisions at issue in this case should be interpreted in conformity with such obligation, particularly given that the rights and interests of indigenous peoples specifically contemplated in the *Jay Treaty* – an instrument still in force as between the two NAFTA Parties concerned – are at issue. This approach to interpretation of NAFTA provisions is also in accord with the customary international law obligation of States to honor obligations undertaken with respect to First Nations, as reflected in Article 40 of the United Nations *Declaration on the Rights of Indigenous Peoples*, which provides:

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175 Statement of Professor Robert Clinton, at page 25-28, 47.

176 Statement of Professor Robert Clinton, at page 25-29, 47.

177 International Labour Organisation, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (Sept. 5, 1991), adopted by the General Conference of the ILO on June 27, 1989, in force beginning Sept. 5, 1991; available at http://www.ilo.org/ilolex/english/convdisp1.htm; last visited 1 April 2008.

> Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.[178]

151. Respondent's obligation to honor its NAFTA and *Jay Treaty* obligations in good faith, thereby promoting and protecting cross-border Haudenosaunee investments in its territory, is also supported by its customary international law obligation to respect the rights of indigenous peoples to occupy and enjoy their traditional territories. This obligation has also been recognized both in Article 14(2) of *ILO Convention 169* and by the Inter-American Court of Human Rights in *Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*.[179] Such obligation is also consonant with evolving customary international law norms for the protection of the rights of indigenous peoples whose traditional territories are today divided by 'international' borders. This principle of constant promotion and protection for First Nations members, in respect of their ability to benefit from undertaking their traditional commercial activities on their territories across borders, is also reflected in Article 36 of the *United Nations Declaration on the Rights of Indigenous Peoples*, which provides:

> 1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.
>
> 2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.[180]

152. The traditional territories of the Haudenosaunee, including the lands upon which the Six Nations of the Grand River Territory and the Seneca Nation Cattaraugus Territory sit today, exists on either side of the frontier that today represents the political border

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178 *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, A/RES/61/295

179 *The Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*, Judgment (31 August 2001), Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001).

180 *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, A/RES/61/295.

between Canada and the United States. As Professor Clinton explains, under the *Jay Treaty* Claimants have always been – and remain – entitled to be treated by Respondent as if all of their traditional territories were located on federally-recognized tribal land in the United States.[181] These rights of commerce and free passage were promised to the Haudenosaunee by Respondent and the Crown after their military aggression against each other twice disturbed the territories of the Six Nations and severed the *Great Law of Peace* that served as the Haudenosaunee constitution since the 11th Century.[182] In other words, Respondent and Claimants' forefathers understood that the Haudenosaunee were promised, in perpetuity, by both the Crown and the United States, that they would always be free to conduct their commercial, political and social affairs as if the border designated by these Europeans to separate themselves from each other had never existed.

153. As noted above, in *Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*, the Inter-American Court of Human Rights interpreted the treaty provisions before it consistently with other applicable international law obligations. The Court concluded that its interpretation of Article 21 of the *Inter-American Convention on Human Rights*[183] must be informed by evolving customary international law norms respecting the protection and promotion of the rights and interests of indigenous peoples.[184] And as with the interpretation of NAFTA Chapter 11,[185] the Court also noted that its interpretation of the treaty text could not be unduly restrictive.[186] In so doing, the Court determined that the term "property" found in Article 21 must be construed so as to include an OAS State's obligation to recognize and safeguard the communal property rights of indigenous peoples, such as the Awas Tingni, in the territories they have traditionally occupied, and

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181 Statement of Professor Robert Clinton, at page 23;

182 Statement of Professor Robert Clinton, at page 15, 28;

183 O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978.

184 *Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 ¶¶ 2, 148 (Aug. 31, 2001).

185 *See, e.g.: The Loewen Group, Inc. and Raymond L. Loewen* v. *United States of America*, Award on Jurisdiction, 5 January 2001, ICSID Case No. ARB(AF)/98/3, at ¶ 51, citing: *Ethyl Corporation* v *Canada*, Award on Jurisdiction, 24 June 1988, 38 ILM 708, at ¶ 83.

186 *Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*, at 148.

did occupy prior to European contact. The Inter-American Commission for Human Rights advocated this finding, arguing that: "there is an international customary international law norm which affirms the rights of indigenous peoples to their traditional lands."[187] There is no reason for this Tribunal to adopt an interpretative approach different from that which has been observed in the Inter-American system.

SECTION III RESPONDENT HAS BREACHED ITS OBLIGATIONS UNDER ARTICLE 1105 OF NAFTA

A. NAFTA Article 1105 and the Customary International Law Standard of Fair and Equitable Treatment

154. The standard of 'fair and equitable treatment' set out in NAFTA Article 1105 has been unanimously recognized by all three NAFTA Parties as being required under customary international law.[188] Application of the standard in any given case is a context-specific endeavor.[189] It requires due respect for the right of a sovereign State to regulate in the best interests of its citizens,[190] as balanced against the obligations of good faith and fair dealing required under international law.[191] The standard is neither static nor frozen in time, and evidence of a Party's egregious or bad faith conduct is not required for a tribunal to find that the standard has been breached. As confirmed in the NAFTA Free Trade Commission (FTC) statement on the interpretation of Article 1105, dated 1 July, 2001, and observed by the tribunal in *Mondev* v. *USA*:

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187 *Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*, at 140.

188 T.H. Cheng, "Precedent and Control in Investment Treaty Arbitration" 30 FDMILJ 1014 at 1031 (2007), where Prof. Cheng unambiguously observes: "The fair and equitable standard undoubtedly forms part of customary investment law."

189 *Mondev International Ltd. v. United States of America*, Award, ICSID Case No. ARB(AF)/99/2 (11 October 2002), at para. 118.

190 See, e.g.: *Eastern Sugar BV* v *Czech Republic*, Partial Award, SCC 088/2004 (27 March 2007), at para's 272-274: "A violation of a BIT does not only occur through blatant and outrageous interference. However, a BIT may also not be invoked each time the law is flawed or not fully and properly implemented by a state. Some attempt to balance the interests of the various constituents within a country, some measure of inefficiency; a degree of trial and error; a modicum of human imperfection must be over-stepped before a party may complain of a violation of a BIT."

191 *Técnicas Medioambientales, TECMED S.A.* v *United Mexican States*, Award, ICSID Case No. ARB/AF/00/2 (29 May 2003), at para's. 155-158.

> [Since the opening decades of the 20th century] … both the substantive and procedural rights of the individual in international law have undergone considerable development. In the light of these developments it is unconvincing to confine the meaning of 'fair and equitable treatment' and 'full protection and security' of foreign investments to what those terms—had they been current at the time—might have meant in the 1920s when applied to the physical security of an alien. To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.
>
> … the FTC interpretations incorporate current international law, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce. Those treaties largely and concordantly provide for 'fair and equitable' treatment of, and for 'full protection and security' for, the foreign investor and his investments.[192]

155. And as the Tribunal in *MCI Power v. Ecuador* observed about the minimum standard provision contained within Respondent's BIT with Ecuador:

> The Tribunal notes that fair and equitable treatment conventionally obliges State parties to the BIT to respect the standards of treatment required by international law. The international law mentioned in Article II of the BIT refers to customary international law, i.e., the repeated, general, and constant practice of States, which they observe because they are aware that it is obligatory. Fair and equitable treatment, then, is an expression of a legal rule. Inequitable or unfair treatment, like arbitrary treatment, can be reasonably recognized by the Tribunal as an act contrary to law.[193]

156. The Article 1105 standard of fair and equitable treatment is both informed by, and required under, customary international law. It is a general standard that can be manifested in many ways, depending upon the context of the case in question. As summarized by the Tribunal in *Waste Management II*:

> The search here is for the Article 1105 standard of review, and it is not necessary to consider the specific results reached in the cases discussed above. But as this survey shows, despite certain differences of emphasis a general standard for Article 1105 is emerging. Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and

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192 *Mondev International Ltd* v *United States*, Award, ICSID Case No ARB(AF)/99/2 (11 October 2002), at para's. 116 and 125.

193 *MCI Power Group LC and New Turbine Inc v Ecuador*, Award, ICSID Case No ARB/03/6 (31 July 2007), at para. 369; citing *Técnicas Medioambientales, TECMED S.A.* v *United Mexican States*, Award, ICSID Case No. ARB/AF/00/2 (29 May 2003), at para. 102.

> equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety - - as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.[194]

157. Customary international law protections afforded to individuals, vis-à-vis the State, are articulated in a wide array of international instruments. It is generally accepted that the instruments that best articulate the meaning and scope of the rights vouchsafed under the UN and OAS Charters are the *Universal Declaration of Human Rights*; the *American Declaration on the Rights and Duties of Man*; and the *American Convention on Human Rights*. Both of the aforementioned declarations also form part of the customary international law tapestry of protection for indigenous peoples. Respondent is a party to both the *Charter of the United Nations* and the *Charter of the Organization of American States*, whose ratification requires an undertaking to promote human rights.[195] Ratification of the latter also obliged Respondent to recognize good faith as a principle that shall govern its relations with other parties to the Charter, including the other Parties to the NAFTA.

158. Evidence that Respondent believes all States to be bound by the principles contained within these instruments can be seen in its adoption of the *Universal Declaration of Human Rights* as the basis for its evaluation of the human rights records of other States conducted annually by its State Department.[196] Indeed, Respondent proclaims that it will continue to: "Hold governments accountable to their obligations under universal human

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194 *Waste Management, Inc* v *Mexico*, Award, ICSID Case No ARB(AF)/00/3 (30 April 2004), at para. 98.

195 *Charter of the United Nations*, 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force 24 October 1945, Articles 1(3) & 55(c); *Charter of the Organization of American States* art. 106, 119 U.N.T.S. 3, entered into force 13 December 1951; amended by *Protocol of Buenos Aires*, 27 February 1967, 721 U.N.T.S. 324; amended by *Protocol of Cartagena*, approved 5 December 1985, 25 I.L.M. 527; amended by *Protocol of Washington*, approved 14 December 1992, 33 I.L.M. 1005; amended by *Protocol of Managua*, adopted 10 June 1993, 33 I.L.M. 1009.

196 Claimant's Evidentiary Stmts. Ex. 48.

rights norms and international human rights instruments" and "Promote the rule of law, seek accountability, and change cultures of impunity" with respect to those rights.[197] As a matter of good faith, Respondent must also believe itself to be bound by the same standards against which it judges other nations, and it should be held to them by any tribunal authorized to use applicable international law in coming to its decision.[198]

159. Within the context of the present case, Respondent's obligation to ensure fair and equitable treatment for Claimants' investment is manifested in three ways:

i. Violation of Respondent's customary international law obligation to act in accordance with basic principles of fairness and due process in designing and applying their measures; and

ii. Claimants' detrimental reliance upon the legal regime under which they expanded their investment would remain stable and transparent, and not be abruptly changed or ignored in an arbitrary or discriminatory manner, contrary to the customary international law principle of good faith; and the legitimate expectation that Respondent's administrative and elected officials would respect international

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197 Claimant's Evidentiary Stmts. Ex. 49.

198 These is also evidence that Respondent does not disagree with the proposition that some of the norms articulated in another important international instrument concerning the rights of First Nations groups and individuals may be binding or at least evocative of customary international law obligations. That instrument is the United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, A/RES/61/295. In its statement of observations on the Declaration, which was issued conterminously with its adoption, Respondent pledges that it will continue to oppose "racial discrimination against indigenous individuals and communities and continue to press for full indigenous participation in democratic electoral processes throughout the world." *See* United States, Mission to the United Nations, "Explanation of vote by Robert Hagen, U.S. Advisor, on the Declaration on the Rights of Indigenous Peoples, to the UN General Assembly, September 13, 2007," at http://www.un.int/usa/press_releases/20070913_204.html, last visited 1 April 2008.

Indeed, with its observations Respondent does not appear to reject or even criticize the obligations reflected in Articles 19, 20, 36 or 37 of the Declaration, which were contained in a document attached to the statement it issued conterminously with adoption of the Declaration by the United Nations General Assembly. This statement of observations purports to constitute Respondent's "views with respect to the core provisions of the text." One can therefore only assume that if it vehemently rejected any of the obligations contained within Articles 19, 20, 36 and 37 of the Declaration, it would have said so in its statement. As described below, the obligations reflected in Articles 19, 20, 36 and 37 of the Declaration are all relevant within the context of the present case. Moreover, just because Respondent may have chosen not to recognize certain core obligations, as identified in its statement of observations, does not mean that they are not binding as a matter of customary international law. Respondent's is but one voice among many in the international community, the vast majority of whom supported the Declaration in its entirety, as being expressive of the kind of conduct that should be undertaken by States in their intercourse with indigenous peoples.

law protections for indigenous peoples and specific treaty promises made for the benefit of the Haudenosaunee; and

iii. Violation of Respondent's customary international law obligation to avoid both *de jure* and *de facto* discrimination against indigenous peoples, including the obligation to consult with indigenous groups and individuals prior to imposing a discriminatory measure.

160. What follows is an explanation of the legal basis upon which these claims will be made further below.

a. Good Faith, Legitimate Expectations and Detrimental Reliance

161. The essence of the protection afforded to investors under the 'fair and equitable treatment' standard, as confirmed generally customary international law, is reflected in the principle of good faith. In application, the customary international law principle of good faith requires Respondent to treat the investment of a foreign national in a manner that "will not affect the basic expectations that were taken into account by foreign investor to make the investment."[199]

162. Recent NAFTA and investment treaty case law supports application of the principle of good faith in defining the meaning of 'fair and equitable treatment.' In short, an investor who relies upon a legitimate expectation of treatment from a Party to his detriment is entitled to compensation for losses caused thereby.[200] As stated in this oft-cited passage from the award in *Tecmed* v. *Mexico*, the customary international law standard of fair and equitable treatment requires a State:

> … to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be

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199 *Sempra Energy International* v *Argentina*, Award and partial dissenting opinion, ICSID Case No ARB/02/16 (28 September 2007), at para. 298; citing *Técnicas Medioambientales, TECMED S.A.* v *United Mexican States*, Award, ICSID Case No. ARB/AF/00/2 (29 May 2003), at para. 254.

200 *Siemens AG* v *Argentina*, Award, ICSID Case No ARB/02/8 (06 February 2007), at para. 299.

> able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any pre-existing decisions or permits issued by the state that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the state to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.[201]

163. Investors are entitled to reasonably rely upon promises made by a State, both implicit and explicit. The less ambiguous the promise, the more reasonable the expectation.[202] The more specific the promise, the more reasonable the expectation.[203] Application of the principle is contextual, depending upon the facts of a given case. Still, where an investor detrimentally relies upon a promise made specifically to him as an individual or as the member of a group, the breach will be manifest.

b. Stability and Transparency of the Host State's Legal Regime

164. An investor is entitled to protection for its reasonable expectations arising from its reasoned and prudent assessment of "the state of the law and the totality of the business environment" at the time its investment decision was made.[204] Absent other applicable international obligations, no investor may reasonably expect that the circumstances prevailing at the time its original investment was made would remain totally unchanged. Nonetheless, it can still expect that the subsequent conduct of the host State will be fair and equitable, rather than arbitrary, discriminatory or non-transparent.

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201 *Técnicas Medioambientales, TECMED S.A.* v *United Mexican States*, Award, ICSID Case No. ARB/AF/00/2 (29 May 2003), at para. 154; approved in: *MTD Equity Sdn Bhd and MTD Chile SA v Chile, Award*, ICSID Case No ARB/01/7, (25 May 2004), at para's. 114-115.

202 *International Thunderbird Gaming Corp. v. United Mexican States*, Sep. Opn, UNCITRAL Arbitration (26 January 2006), at para's. 241-243.

203 *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Širketi* v *Turkey*, Award, ICSID Case No ARB/02/5 (19 January 2007), at para's 241-243.

204 *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Širketi* v *Turkey*, Award, ICSID Case No ARB/02/5 (19 January 2007), at para. 255; citing *Saluka Investments BV* v *Czech Republic*, Partial Award, UNCITRAL Arbitration (17 March 2006), at para. 305.

165. In other words, legitimate expectations can be reasonably founded upon a host State's obligation to provide a transparent and predictable business and regulatory climate:

> This interpretation suggests that where an investment treaty does not expressly provide for transparency, but does for fair and equitable treatment, then transparency is implicitly included in the treaty. Secondly, where a foreign investor wishes to establish whether or not a particular State action is fair and equitable, as a practical matter, the investor will need to ascertain the pertinent rules concerning the State action; the degree of transparency in the regulatory environment will therefore affect the ability of the investor to assess whether or not fair and equitable treatment has been made available in any given case.[205]

166. Accordingly, in cases where the violated expectation arises from a legal regime of general application, the presence of a "roller coaster effect" of regulatory change will also require compensation under the customary international law standard of fair and equitable treatment.[206] As noted above, the investor is entitled to expect a certain degree of stability and certainty, based upon the state of the regulatory landscape when its original or subsequent investment decisions were made.[207] The longer that a general policy remains in place, and is not immediately corrected by officials the more reasonable an investor's grounds for reliance will be.[208]

167. As demonstrated in *CME* v. Czech Republic: "the evisceration of the arrangements in reliance upon which the foreign investor was induced to invest" constitutes a breach of the fair and equitable treatment obligation and the principle of good faith under customary international law. And as Professor Wälde observed in *Thunderbird* v. *Mexico*:

> Investors need to rely on the stability, clarity and predictability of the government's regulatory and administrative messages as they appear to the

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205 1999 UNCTAD Report on Fair and Equitable Treatment, at p. 51 (see; also: the 2004 UNCTAD Report on Transparency, at p. 71).

206 *PSEG Global Inc and Konya Ilgin Elektrik Üretim ve Ticaret Limited Širketi* v *Turkey*, Award, ICSID Case No ARB/02/5 (19 January 2007), at para's. 248-250.

207 See, also: *Eureko BV* v *Poland*, Partial Award, UNCITRAL Arbitration (19 August 2005), at para's. 235 and 242.

208 *Eastern Sugar B.V. (Netherlands)* v. *Czech Republic*, Partial Award, 27 March 2007, UNCITRAL Arbitration, SCC No. 088/2004, at para. 244

> investor when conveyed – and without escape from such commitments by ambiguity and obfuscation inserted into the commitment identified subsequently and with hindsight. This applies not less, but more with respect to smaller, entrepreneurial investors who tend to be inexperienced but provide the entrepreneurial impetus for increased trade in services and investment which NAFTA aims to encourage. Taking into account the nature of the investor is not formulation of a different standard, but of adjusting the application of the standard to the particular facts of a specific situation.
>
> … under developed systems of administrative law, a citizen – even more so an investor - should be protected against unexpected and detrimental changes of policy if the investor has carried out significant investment with a reasonable, public-authority initiated assurance in the stability of such policy.... Such protection is, however, not un-conditional and ever-lasting. It leads to a balancing process between the needs for flexible public policy and the legitimate reliance on particular investment-backed expectations... The "fair and equitable standard" can not be derived from subjective personal or cultural sentiments; it must be anchored in objective rules and principles reflecting, in an authoritative and universal or at least widespread way, the contemporary attitude of modern national and international economic law. The wide acceptance of the "legitimate expectations" principle therefore supports the concept that it is indeed part of "fair and equitable treatment" as owed by governments to foreign investors under modern investment treaties and under Art. 1105 of the NAFTA.[209]

168. In summary, when a foreign investor is making key decisions in respect of the establishment, expansion or operation of its investment in the territory of the Host State, it is entitled – under the customary international law standard of fair and equitable treatment – to enjoy stability and predictability in the regulatory environment in which such decisions were made.[210] The investor is not entitled to expect that things will never change, but it is entitled to expect none of the changes, nor the process by which changes are made, will be arbitrary, discriminatory or non-transparent, as a matter of customary international law.

c. Respect for the Customary International Law Rights of Indigenous People

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[209] *International Thunderbird Gaming Corp. v. United Mexican States*, Separate Opinion, UNCITRAL/NAFTA (26 January 2006), at para's 5 & 30.

[210] *CMS Gas Transmission Company* v *Argentina*, Award, ICSID Case No ARB/01/8 (12 May 2005), para's. 274-277; and *CMS Gas Transmission Company* v *Argentina*, Annulment Decision, ICSID Case No ARB/01/8 (25 September 2007), at para. 89.

169. As described above, because Claimants are Haudenosaunee, all of the norms protecting the economic rights of indigenous peoples serve as "applicable international law" for the purposes of this dispute, as per Articles 102(2) and 1131(1) of the NAFTA. They cover the same subject matter: guaranteeing a minimum standard of fair and equitable treatment to them under international law. The NAFTA provides a remedy for 'investors' to seek 'fair and equitable treatment in accordance with international law' and it directs tribunals to 'decide issues in dispute in accordance with the Agreement and applicable rules of international law.' Thus, international rights safeguarding the interests of indigenous peoples should be applied in the interpretation of what "fair and equitable treatment" means in the instant case.

170. Such applicable rules also include individual rights afforded to indigenous peoples in international human rights law, as demonstrated both by custom and convention, which are oftentimes based upon universal human rights, such as the right to property referred to in Article 21 of the *Inter-American Convention on Human Rights*,[211] as well as in Article 17 of the *Universal Declaration of Human Rights*,[212] to which Respondent is bound as a signatory to the United Nations Charter,[213] which provides:

> Article 17.
>
> (1) Everyone has the right to own property alone as well as in association with others.
>
> (2) No one shall be arbitrarily deprived of his property.

171. In addition, both Article 19 of the *United Nations Declaration on the Rights of Indigenous Peoples*, and Article 6(1)(a) of ILO Conv. No. 169 make reference to the

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211 *American Convention on Human Rights*, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978.

212 *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948). See, also: Article XXXIII of the *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

213 Charter of the United Nations, 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force 24 October 1945.

international law principle of good faith, which has also been consistently accepted by international investment tribunals as the foundation stone for the customary international law standard of fair and equitable treatment.[214] The obligation to take pro-active steps to engage in good faith consultations with indigenous peoples – before imposing a measure that impairs individual or group property rights and/or indigenous economic activities – is based upon the principle of good faith, which is a substantive norm recognized in customary international law.

172. As the Inter-American Court of Human Rights observed in *Hilaire, Constantine and Benjamin et al.* vs. *Trinidad and Tobago*:

> The rule of *pacta sunt servanda*, which incorporates the concept of good faith (bona fides) effectively transcends the law of treaties, being characterized by doctrine, whether as a norm of customary law or as a general principle of international law.
>
> Its inclusion in the Vienna Convention reconstituted the *pacta sunt servanda* as an axiomatic paradigm: it came to form part of a convention on codification, which undeniably established its broad scope. However, long before the enshrinement of the *pact sunt servanda* in the Vienna Convention of 1969, it had become, more than a general rule of treaty interpretation, a norm of 'customary international law' or a veritable general principle of international law, endowed with wide jurisprudential recognition.
>
> Treaty law is closely related to the tenets of International Law, including the area of law concerning the international responsibility of States. The scope of the *pacta sunt servanda* rule, as with the previous issue of the validity of International Law norms, transcends the sphere of treaty law. Regardless, the *pacta sunt servanda* rule finds itself profoundly rooted in the system of International Law as a whole. I trust that Trinidad and Tobago will know, in light of the international obligations that it has assumed, and bearing in mind the established principle of international law *pact sunt servanda*, to fulfill, in good faith, the obligations of the present Judgment of the Inter-American Court of Human Rights on the merits and reparations in the Hilaire, Constantine and Benjamin et al Case.[215]

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214 See, e.g.: *Técnicas Medioambientales, TECMED S.A. v United Mexican States*, Award, ICSID Case No. ARB/AF/00/2 (29 May 2003), at para. 153.

215 *Hilaire, Constantine and Benjamin et al.* vs. *Trinidad and Tobago* - Series C No. 94 [2002] IACHR 4 (21 June 2002), at para's. 41-43. In applying the principle of good faith, the Court did not accept the argument that because Trinidad and Tobago had denounced the *American Convention on Human Rights* before the proceeding, the Respondent was not bound to the obligations contained therein.

173. The Tribunal in *AMCO Asia* v. *Indonesia* has stated that good faith is a general principle upon which investment treaty claims can be founded, because all foreign investors are entitled: "to realize the investment, to operate it with a reasonable expectation to make profit and to have the benefit of the incentives provided by law" without suffering the arbitrary exercise of a right which would prevent such enjoyment.[216] That good faith is a substantive requirement of international law; there can be little doubt. Governmental discretion must be exercised in good faith or else the conduct would be considered arbitrary, and therefore contrary to the customary international law minimum standard of fair and equitable treatment. This position is in accord with the opinions of the International Court of Justice and the most highly qualified publicists in international law:

> The principle of good faith in international law is a fundamental principle from which the *pacta sunt servanda* and other legal rules distinctively and directly related to honesty, fairness and reasonableness are derived, and the application of these rules is determined at any particular time by the compelling standards of honesty, fairness and reasonableness prevailing in the international community at that time.[217]
>
> The principle of good faith requires that every right be exercised honestly and loyally. Any fictitious exercise of a right for the purpose of evading either a rule of law or a contractual obligation will not be tolerated. Such an exercise constitutes an abuse of the right, prohibited by law.[218]
>
> . . . [D]iscretion must be exercised in good faith, and the law will intervene in all cases where this discretion is abused . . . . Whenever, therefore, the owner of a right enjoys a certain discretionary power, this must be exercised in good faith, which means that it must be exercised reasonably, honestly, in conformity with the spirit of the law and with due regard to the interest of others.[219]

174. As such, Respondent's obligation to conduct itself in genuine good faith includes taking pro-active steps to consult with indigenous investors prior to imposing a measure that will impact upon them or their community, especially when such measure provides less

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216 *AMCO Asia* v. *Indonesia*, 1 ICSID Reports, 377 at 490 & 493. See, also: the Sapphire Award (1963) 35 ILR 136 at 181.

217 J.F. O'Connor, *Good Faith in International Law* (Dartmouth: Aldershot, 1991), at p. 124.

218 *Anglo-Norwegian Fisheries Case* (1951) ICJ Reports 116 at 142.

219 Bin Cheng, *General Principles of Law* (Grotius Press: 1987, Cambridge UK) at 132-134.

favorable treatment to indigenous peoples than others. Good faith is a source of legal rules respecting all manner of Respondent's interaction with First Nations individuals or groups. As observed in Article 37 of the United Nations Declaration on the Rights of Indigenous Peoples:

> 1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.
>
> 2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.[220]

175. When Respondent fails to uphold the obligations it solemnly undertook in a previous treaty, such as Article III of the Jay Treaty,221 it does not just breach that treaty. Such conduct can also serve as evidence that its conduct did not meet the customary international law minimum standard of fair and equitable treatment – because innocent parties may have relied upon such promises, to their detriment. This does not mean that the breach of a different treaty provision automatically constitutes a breach of NAFTA Article 1105, but such conduct is relevant in a determination of whether State conduct falls below the minimum standard expected as a matter of customary international law. This is because a State that fails to conduct itself in accordance with the terms of a treaty to which it is bound is frustrating legitimate expectations arising from the promises it makes, and which it must keep.

176. In cases where the State has long since enjoyed the benefits of a treaty, but now no longer seems willing to honor the obligations owed under that treaty, it is committing an abuse of right, contrary to the principle of good faith in international law. Such conduct would be directly germane to a tribunal's determination of whether the standard of fair and equitable treatment has been met in any given case.

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220 United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, A/RES/61/295, Article 37.

221 In fact, Respondent actually made a specific undertaking, in Article XXVIII, to observe its obligations under the *Jay Treaty* "with punctuality and the most sincere regard to good faith."

177. In this case, such conduct would speak to the legitimate expectations of First Nations investors to enjoy treaty obligations undertaken for their benefit, such as those contained within the *Jay Treaty*, as described above. Also as described above, the obligation to honor treaty obligations is arguably magnified under customary international law in cases where would-be beneficiary of a treaty obligation is an indigenous group or one of its members.

178. In summary, by operation of the customary international law principles of non-discrimination (equality) and good faith, Respondent is under a positive duty to consult with First Nations investors prior to taking decisions that impact significantly upon their investments. It is simultaneously under a duty to engage in such consultation in a good faith manner. In addition, Respondent is obligated to avoid according treatment to First Nations investors that is less favorable than that which has been offered to other, non-Native American competitors. Finally, Respondent must ensure that its conduct does not compromise the legitimate expectations of First Nations investors to enjoy rights guaranteed to them under customary international law or convention. State action contrary to these principles stands as evidence that Respondent has failed to live up to the fair and equitable treatment standard that must be met under NAFTA Article 1105 and international law.

d. Even-Handedness and Fair Dealing in the Prevention of Discrimination Against First Nations Investors

179. The customary international law protections owed by Respondent to foreign investors in its territory are complemented by the customary international law protections owed more generally by Respondent as fundamental human rights. In circumstances such as the present case, these obligations exist conterminously with current and emerging norms of customary international law for the protection of the human rights of indigenous peoples. As the United Nations Committee on the Elimination of Racial Discrimination has observed: "the situation of indigenous peoples has always been a matter of close attention and concern..." and "… [that therefore] all appropriate means must be taken to combat

and eliminate [discrimination involving indigenous persons]."[222] These principles are relevant to any international tribunal called upon to decide a dispute in accordance with 'applicable rules of international law,' including this Tribunal, as per NAFTA Article 1131(1).

180. Freedom from discrimination on the basis of race is an *ergo omnes* obligation of customary international law.[223] It is also one of the fundamental norms emerging in the context of the customary international law protection for the individual and communal rights of indigenous peoples. The present claim involves the assertion of Claimants' individual rights, but the impact of the measures about which they complain have affected the Six Nations communities in which they are based, both through job losses and reduced tax revenue that would have been earned, but for impositions of the measures at issue.[224]

181. For First Nations investors, the right to be free from discrimination means *de facto* equality as between themselves and non-indigenous investors; not just *de jure* equality on the face of the measure at issue. As recalled in Article 4(d) of the United Nations Committee on the Elimination of Racial Discrimination's General Recommendation XXIII on the Rights of Indigenous Peoples, States are under a special obligation to "ensure that members of indigenous peoples have equal rights in respect of effective participation in public life."[225] This principle is embedded in the international prohibition

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222 Committee on the Elimination of Racial Discrimination, General Recommendation 23, Rights of indigenous peoples (Fifty-first session, 1997), U.N. Doc. A/52/18, annex V at 122 (1997), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 212 (2003), Article 1.

223 *Re: Barcelona Traction, Light and Power Company (Belgium v. Spain)*, Judgment (Second Phase), 1970 ICJ Reports 3. at 514-517. See, also: *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, 17 September 2003, Inter-Am. Ct. H.R. (Ser. A) No. 18 (2003) at 23.

224 J. Montour Stmt. at 2; Statement of Chief William Montour, at para. 4.

225 Committee on the Elimination of Racial Discrimination, General Recommendation 23, Rights of indigenous peoples (Fifty-first session, 1997), U.N. Doc. A/52/18, annex V at 122 (1997), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at para. 212 (2003), Article 4(d); *see also* CERD, *Conclusions and Recommendations of the Committee on the Elimination of Racial Discrimination: Australia*, at para. 9, U.N.
(continued…)

against discrimination on the basis of race.[226] For example, as noted by the European Committee of Social Rights:

> …equal treatment requires a ban on all forms of indirect discrimination, which can arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all.[227]

182. And as the Inter-American Court of Human Rights has recently observed:

> In international human rights law, the principle of non-discrimination enshrines equality between persons and imposes certain prohibitions on States. Distinctions based on gender, race, religion or national origin, are specifically prohibited in relation to the enjoyment and exercise of the substantive rights embodied in international instruments. Regarding these categories, any distinction that States make in the application of benefits or privileges must be carefully justified on the grounds of a legitimate interest of the State and of society, "which cannot be satisfied by non-discriminatory means."
>
> **International human rights law prohibits not only deliberately discriminatory policies and practices, but also policies and practices with a discriminatory impact on certain categories of persons, even though a discriminatory intention cannot be proved.**
>
> …
>
> **At times the principle of equality requires States to adopt positive measures to reduce or eliminate the conditions that cause or facilitate the perpetuation of the discrimination prohibited by the treaties.**
>
> …
>
> The rights embodied in the human rights treaties may be regulated reasonably and the exercise of some of them may be subject to legitimate restrictions. The establishment of such restrictions must respect the relevant formal and substantive limits; in other words, it must be accomplished by law and satisfy an urgent public interest. Restrictions may not be imposed for discriminatory purposes, nor may they be applied in a discriminatory manner. Furthermore,

(…continued)

Doc. CERD/C/304/Add.101 (Apr. 19, 2000); and, generally: Theodore Meron, *Human Rights and Humanitarian Norms and Customary International Law* (Oxford: Clarendon, 1991).

226 See, e.g.: *Connors* v *United Kingdom*, (ECHR), Case No. 66746/01 (27 May 2004), 16 B.H.R.C. 639, (2005) 40 E.H.R.R. 9, [2004] H.L.R. 52, [2004], at para. 84; U.N. Comm. on Econ., Soc. & Cultural Rts., 5th Sess., The Nature of States' Parties Obligations, P 10, U.N. doc. E/1991/23, Annex III, at pp. 9-11.

227 *ERRC* v *Italy* (2006) 43 E.H.R.R. SE7, at para. 20.

> "any permissible restriction of rights may never imply the total negation of the right."[228] [**emphasis added**]

183. Professor Garcia-Amador, a former Special Rapporteur on State Responsibility for the International Law Commission, recognized decades ago that an "international principle of non-discrimination" applies to the conduct of States as a "… well-established rule of traditional international law."[229] A number of investment treaty tribunals have also observed that the standard of fair and equitable treatment "should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment."[230]

184. It is impossible to act in a just and even-handed manner with First Nations investors if *de facto* inequalities between indigenous and non-indigenous investors are brought about by operation of the State's measure. States act in an arbitrary manner, and therefore contrary to the customary international law standard of fair and equitable treatment, when their actions or measures have an unnecessarily discriminatory impact upon members of a protected group, such as First Nations investors. As Professor Schwarzenberger observed:

> Arbitrariness in any form is – or ought to be – abhorrent to *homo juridicus*. His whole professional outlook is dominated by the attitude that, in the eyes of the law, equal situations require equal remedies.[231]

185. In addition, the Article 1105 term: 'fair and equitable treatment' must be interpreted in accordance with pre-emptory norms of customary international law such as non-

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228 *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, 17 September 2003, Inter-Am. Ct. H.R. (Ser. A) No. 18 (2003) at 23.

229 F.V. Garcia-Amador, *The Changing Law of International Claims*, Vol. I (New York: Oceana, 1984) at 277 & 285-287. See, also: Andreas Hans Roth, *The Minimum Standard of International Law Applied to Aliens* (Geneva: Sijthoff, 1949) at 65.

230 *MTD Equity Sdn Bhd and MTD Chile SA v Chile, Award*, ICSID Case No ARB/01/7, (25 May 2004), at para. 113; approved by the *Ad Hoc* Committee in its Annulment Decision (16 February 2007), at para's. 70-71; *Siemens AG* v *Argentina*, Award, ICSID Case No ARB/02/8 (06 February 2007), at para. 290; and *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Final Award at para. 391 (14 July 2006), at para. 360.

231 Schwarzenberger (1971) at pp. 100-101.

discrimination. Article 53 of the *Vienna Convention on the Law of Treaties* provides that treaty terms must not be interpreted in a manner that conflicts with pre-emptory norms of international law, or else the treaty provision is to be considered void to the extent of the inconsistency. Given that Article 1105 itself indicates that the Parties must act in accordance with "international law, including fair and equitable treatment" it is inconceivable that these terms could be construed in a manner that does not reflect a pre-emptory norm applicable in the instant case.

186. The International Labor Organization's *Convention No. 169* ('ILO Conv. No. 169') has been recognized as providing a basis for identifying emerging customary international law rights of indigenous peoples.[232] This is not to say that every obligation included in the ILO Conv. No. 169 has necessarily acquired the status of customary international law. Rather, its provisions are demonstrative of obligations that – when recognized and regarded as binding by States through subsequent international practice – are either included, or in the process of being included, within the corpus of customary international law applicable to the rights and interests of indigenous peoples.

187. Article 2 of ILO Conv. No. 169 provides, in part:

> 1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.
>
> 2. Such action shall include measures for:
>
> (a) Ensuring that members of these peoples **benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population**… [emphasis added]

188. Respondent does not meet the obligation to ensure that its measures do not discriminate against First Nations individuals and groups when its officials effectively marginalize members of indigenous groups from decision-making that directly impacts upon their

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232 Lenzerini, "Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples" 42 TXILJ 155 at 180 (2006); A. Fodella, "International Law and the Diversity of Indigenous Peoples" at 577 (1996) The Convention was ratified by Mexico on 5 September 1990, but has not yet been ratified by the other two NAFTA Parties.

economic livelihood. Indeed, customary international law arguably requires States to particularly ensure that indigenous peoples are granted "effective participation, at all levels of decision-making, in decisions which may affect them."[233] As the Report of the United Nations Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations between Indigenous Peoples and States stated:

> The discrimination is of a dual nature: on the one hand, gradual destruction of the material and spiritual conditions [required] for the maintenance of their [economic and social prosperity], on the other hand, **attitudes and behaviour signifying exclusion or negative discrimination when indigenous peoples seek to participate in the dominant society**.[234] [emphasis added]

189. As a customary international law norm, the nature of this obligation to engage in meaningful consultation with members of First Nations, prior to adopting measures that directly impact upon the economic well being of their communities, is both positive and mandatory. It is also reflected in the language of the Articles 38 and 19 of the United Nations Declaration on the Rights of Indigenous Peoples, which was recently adopted by an overwhelming majority of the members of the General Assembly:

> Article 38
>
> States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.
>
> Article 19
>
> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

190. And as Article 6(1)(a) of ILO Conv. No. 169 similarly provides:

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233 F. Lenzerini, "Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples" 42 TXILJ 155 at 188 (2006).

234 *Report of the United Nations Seminar on the Effects of Racism* and Racial Discrimination on the Social and Economic Relations between Indigenous Peoples and States, U.N. Doc. E/CN.4/2989/22, HR/PUB/89/5 at 5.

> 1. In applying the provisions of this Convention, Governments shall:
>
> (a) Consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
>
> …
>
> 2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.[235]

191. In other words, in order to ensure that *de facto* discrimination is not visited upon a member or members of an indigenous community, Respondent's officials are required to pro-actively engage in good faith consultations with affected members of indigenous communities prior to imposing a measure that will have a significant impact upon their property; their way of life; or their commercial activities. This is so because such activities most often sustain the economic well being of entire First Nations communities.

192. Both the obligation to avoid imposition of discriminatory measures against First Nations investors and the obligation to pro-actively consult with them prior to taking legislative action that will have a substantial impact upon them should accordingly be regarded as norms of customary international law. In the instant case, these human rights norms augment and/or reinforce the customary international law obligation Respondent owes to all foreign investors: to refrain from engaging in arbitrary or discriminatory conduct, and to otherwise refrain from acts that would violate a sense of fair dealing or even-handedness in the mind of an objective observer. They are therefore applicable in this case both directly, under Article 1105, and indirectly, as a means of interpreting the term 'fair and equitable treatment.'

e. Fundamental Due Process, Equality and the Right to be Heard

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[235] International Labour Organisation, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (Sept. 5, 1991), adopted by the General Conference of the ILO on June 27, 1989, in force beginning Sept. 5, 1991, Article 6; available at http:// www.ilo.org/ilolex/english/convdisp1.htm; last visited 1 April 2008.

193. Due process and basic procedural fairness are fundamental elements of the customary international law standard of fair and equitable treatment.[236] The customary international law requirement to afford due process of law means providing a foreign investor with her day in court before imposing measures that impair her investment.[237] Due process is particularly essential in cases where similarly situated enterprises have been afforded that right but not one or more foreign investments.

194. Freeman wrote that international law demanded States to provide access to courts to safeguard "personal and property rights so that the alien's defense of these interests may be effectively raised."[238] As the Tribunal in *ADC* v. *Hungary* observed:

> Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that "the actions are taken under due process of law" rings hollow. And that is exactly what the Tribunal finds in the present case.[239]

195. The Tribunal in *Myers* v. *Canada* has explained how "Article 1105 imports into the NAFTA the international law requirements of due process, economic rights, obligations of good faith and natural justice." In his treatise on denials of justice, Paulsson noted how the Tribunal in *Mondev* recognized that the NAFTA Article 1105 standard evolved out of the doctrine of denial of justice commonly found in early 20th Century decisions

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236 See, e.g.: *International Thunderbird Gaming Corp. v. United Mexican States*, Award, UNCITRAL Arbitration (26 January 2006), at para's. 197-198; *Waste Management, Inc* v *Mexico*, Award, ICSID Case No ARB(AF)/00/3 (30 April 2004), at para. 98; *BG Group Plc.* v. *Argentina*, Award, UNCITRAL Arbitration (24 December 2007), at para. 341; *Saluka Investments BV* v *Czech Republic*, Partial Award, UNCITRAL Arbitration (17 March 2006), at para. 308; *Loewen Group Inc and Loewen* v *United States of America*, Award, ICSID Case No ARB(AF)/98/3 (25 June 2003), at para. 132.

237 *American Manufacturing & Trading, Inc.* v *Republic of Zaire*, Award, ICSID Case No. ARB/93/1 (21 February 1997), at para. 7.18.

238 A.V. Freeman, *The International Responsibility of States for Denial of Justice*, (Kraus: New York, 1970), at 547.

239 *ADC Affiliate Limited and ADC & ADMC Management Limited* v. *Hungary*, Award, ICSID Case No ARB/03/16 (2 October 2006), at para. 435.

of mixed claims commissions.[240] Saluting him as the "true intellectual grandfather of denial of justice," Paulsson then cites Vatell's 1758 treatise for the proposition that the failure of a State to provide access to a forum for the adjudication of an alien's rights has always constituted a denial of justice that triggers State responsibility,[241] concluding:

> The right of access to courts is fundamental and uncontroversial; its refusal the most obvious form of denial of justice. Legal rights would be illusory if there were no entitlement to a procedural mechanism to give them effect.[242]

196. Again, as indicated in the UN Committee on the Elimination of Racial Discrimination's General Recommendation XXIII, States are considered by many to be under a special obligation to "ensure that members of indigenous peoples have equal rights in respect of effective participation in public life." Obviously a State cannot provide indigenous peoples with an equal right to be heard before its local courts and tribunals when it permits one group of enterprises to enjoy a right to defend their business interests in civil court, and even to elect to settle claims by government entitites against them on most favorable terms, while effectively stripping the same opportunities from a First Nations enterprise, and imposing payment obligations on it in the event that it later decides to take the First Nations enterprise to court. As noted above, imposition of such an obligation upon a First Nations enterprise is particularly egregious if the State fails to take the necessary, proactive steps required to engage in full consultation with that enterprise before imposing the measure.[243]

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240 J. Paulsson, *Denials of Justice in International Law* (Cambridge, 2005) at 68; citing *Mondev International Ltd. v. United States of America*, Award, ICSID Case No. ARB(AF)/99/2 (11 October 2002), at para. 99.

241 J. Paulsson, *Denials of Justice in International Law* (Cambridge, 2005) at 65 & 75.

242 J. Paulsson, *Denials of Justice in International Law* (Cambridge, 2005) at 134.

243 Committee on the Elimination of Racial Discrimination, General Recommendation 23, Rights of indigenous peoples (Fifty-first session, 1997), U.N. Doc. A/52/18, annex V at 122 (1997), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at para. 212 (2003), Article 4(d).

197. The right to have one's own day in court is a bedrock principle of international law, as demonstrated by its inclusion in a number of human rights conventions and declarations relevant to Respondent's conduct,[244] including the following:

> Universal Declaration of Human Rights,[245]
>
> Article 10.
>
> Everyone is entitled ***in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations*** and of any criminal charge against him.
>
> American Convention on Human Rights,[246]
>
> Article 8.
>
> 1. ***Every person has the right to a hearing***, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or ***for the determination of his rights and obligations of a civil, labour, fiscal, or any other nature***.
>
> Article 24.
>
> All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.
>
> International Convention on the Elimination of All Forms of Racial Discrimination,[247]
>
> Article 5.

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244 See, also: Article II of the *American Declaration of the Rights and Duties of Man*, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992); and Article 3(l) of the *Charter of the Organization of American States* art. 106, 119 U.N.T.S. 3, entered into force 13 December 1951; amended by *Protocol of Buenos Aires*, 27 February 1967, 721 U.N.T.S. 324; amended by *Protocol of Cartagena*, approved 5 December 1985, 25 I.L.M. 527; amended by *Protocol of Washington*, approved 14 December 1992, 33 I.L.M. 1005; amended by *Protocol of Managua*, adopted 10 June 1993, 33 I.L.M. 1009.

245 Universal Declaration of Human Rights, G.A. Res. 217 A(III), 10 December 1948.

246 American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123 (in force 18 July 1978).

247 International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, 660 U.N.T.S. 195, 5 I.L.M. 352 (in force 4 January 1969).

> In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and ***to eliminate racial discrimination in all its forms and to guarantee the right of everyone***, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in **the enjoyment of the following rights**:
>
> (a) **The right to equal treatment before** the tribunals and all other **organs administering justice**;

198. In summary, customary international law requires a State to provide equal access to its courts in order to adjudicate claims concerning the property rights of foreign investors, and certainly before such property is confiscated. As noted by leading arbitrators in the field,[248] the obligation to accord due process to individuals, including access to courts for the adjudication of civil claims brought against them under domestic law, is also supported as a bedrock principle in the international law of human rights.

199. This obligation extends all the more to a State's treatment of indigenous peoples, to whom it owes the highest standard of care.

B. Respondent's Breaches of Article 1105

200. Respondent's breaches of Article 1105 and the customary international law standard of 'fair and equitable' treatment fall into the four following categories:

(a) Failure to meet the Investors' legitimate expectation that Respondent would provide them with a transparent and predictable business and regulatory climate within which to invest;

(b) Failure to honor Respondent's obligation to prevent measures from resulting in *de facto* discrimination against First Nations investors, and failure to proactively consult with those investors in order to prevent such discrimination from occurring;

(c) Failure by Respondent's officials to act in accordance with either the treaty obligations it owed for the benefit of the Haudenosaune or the domestic constitutional law rules to which its states are expected to conform, and upon which investors were entitled to rely; and

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[248] See, e.g.: J. Paulsson, *Denials of Justice in International Law* (Cambridge, 2005) at 75-78; and T. Buergenthal, "The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law", Address delivered to the Colloquium on Consolidation of Proceedings in Investment Arbitration, organized by Geneva University and the Project on International Courts and Tribunals (21 April 21 2006).

(d) Failure to honor Respondent's obligation to ensure that all tobacco enterprises, and especially First Nations tobacco enterprises, received the equal opportunity to choose whether to face tort allegations against it within the context a civil trial, and to actually be held liable for an actionable wrong first, before being forced to make millions of dollars in payments, ostensibly in order to permit state officials to collect at some future moment in time, should they ever attempt to pursue any sort of action in tort against Claimants in respect of their US business venture.

201. Each of these breaches stands on its own as independent and sufficient reason to award Claimants the damages claimed, as described in the damages section below. It is not necessary for the Tribunal to find that all four species of breach have occurred in order for liability to attach.[249]

a. Respondent Failed to Provide a Transparent and Predictable Business and Regulatory Climate

202. The customary international law standard of fair and equitable treatment obliges Respondent to ensure that a transparent and predictable framework for foreign investment exists and is made available to Claimants. The first NAFTA case to address the issue was *Metalclad* v. *Mexico*, chaired by Sir Eli Lauterpacht. In that case, a local government imposed measures upon the investor that effectively destroyed the value of its investment, contrary to the investor's legitimate expectations, which it formed by familiarizing itself with the local regulatory framework that would govern the establishment of its investment, and through investor-initiated contacts with local officials. The *Metalclad* Tribunal found that, in the totality of the circumstances, Mexico "failed to ensure a transparent and predictable framework for Metalclad's business planning and investment" and that therefore it breached the expectation rightfully held by

[249] For example, it is not necessary to find that Claimants have not been accorded fair and equitable treatment because of Respondent's failure to accord treatment to them owed because they are First Nations investors. The egregious conduct at issue in this claim would constitute a violation of Article 1105 even if Claimants were not Haudenosaunee. That Claimants were treated as poorly as they were, given their special rights under international law as indigenous peoples, only demonstrates how Respondent's failure to accord fair and equitable treatment to Claimants is even more manifestly egregious than it might have otherwise been.

that investor to be treated in a "fair and just" manner as required under Article 1105.[250] It stated:

> An underlying objective of NAFTA is to promote and increase cross-border investment opportunities and ensure the successful implementation of investment initiatives. (NAFTA Article 102(1)).
>
> Prominent in the statement of principles and rules that introduces the Agreement is the reference to "transparency" (NAFTA Article 102(1)). The Tribunal understands this to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known by all affected investors of another Party. There should be no room for doubt or uncertainty on such matters. Once the authorities of the central government of any Party (whose international responsibility in such matters has been identified in the preceding section) become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is properly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws.[251]

Similar conclusions have been drawn by other more recent tribunals.[252]

203. The MSA regime, implemented through introduction of the Escrow Statutes, represented a unilateral offer from states to tobacco producer/distributors: either join the MSA regime or comply with the escrow payment regime. The Claimants chose the latter, on the understanding that if they restricted their sales to only a limited number of state markets they would be entitled to obtain a refund reflecting their proportionate share of the

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250 In a much-criticized decision, seen as an unacceptable substitution of the Court's opinion for that of a tribunal chaired by Sir. Eli Lauterpacht, a British Columbia trial level judge named Tysoe purported to annul the Tribunal's finding upon judicial review of the award. His judgment, which was clearly made in excess of his jurisdiction under the local UNCITRAL Model Law legislation, was appealed. However, the Government of Mexico made payment on the Award before the appeal could be heard.

251 *Metalclad Corp.* v. *Mexico*, Final Award, UNCITRAL Arbitration (2 September 2000), at ¶¶ 75-76

252 See, e.g.: *Waste Management, Inc.* v. *The United Mexican States*, Award, ICSID Case No. ARB(AF)/3 (30 April 2004), para. 98; Técnicas Medioambientales, TECMED S.A. v United Mexican States, Award, ICSID Case No. ARB/AF/00/2 (29 May 2003), at para. 154; *Saluka Investments BV* v *Czech Republic*, Partial Award, UNCITRAL Arbitration (17 March 2006), at para. 499; *Iurii Bogdanov, Agurdino-Invest Ltd., Agurdino-Chimia* JSC v *Government of the Republic of Moldova*, Award, SCC Inst. (22 September 2005), at sec. 4.2.4.

national market as defined under the MSA. As Respondent was only too keen to point out earlier in these proceedings:

> There was widespread media coverage of the MSA and its provisions, as evidenced by the numerous news reports on the establishment of the MSA regime submitted by the United States with its Objection. These reports – all pre-dating March 12, 2001 – discussed the negotiation of the MSA, its impact on all cigarette manufacturers with sales in the U.S. market, and the opportunity for manufacturers other than the original participating manufacturers ("OPMs") to join and receive an exemption from payment. Similarly, media coverage pre-dating March 12, 2001 reported on the enactment of the Escrow Statutes and MSA states' enforcement efforts, including enforcement against Grand River.
>
> … Reports about the MSA, in any event, were also carried on public radio, public television, and other broadcast media, and included accounts of the MSA's impact on cigarette manufacturers other than the OPMs. The reasonable step for a market participant to have taken upon hearing even a "passing reference" to a development as monumental as the MSA would have been to review its publicly available text and determine what its impact would be, either with or without the assistance of counsel.[253]

204. While Claimants and Respondent clearly disagree as to the date upon which Claimants should have become fully informed about the MSA and the impact it had upon the US tobacco industry as a whole, the fact remains that Claimants did eventually realize the magnitude of the circumstances in which they found themselves, and so in May 2002 they retained counsel to retrench and review their options. By the Summer of 2002, with the MSA the Escrow Statues firmly fixed as a permanent part of the regulatory landscape, Claimants were prepared to amend their collective business model so as to conform to the rules of the new regime.[254]

205. As reasonable and prudent investors, Claimants took note of the fact that the Escrow Statutes were the product of careful refinement by forty-six states attorneys general, as well as a host of regulatory lawyers and civil litigators. They also noted that, after years of negotiation and consensus building, forty-six different legislatures enacted identical versions of the same measure. They therefore felt confident that they could rely on the

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253 Respondent's Reply on Jurisdiction, 6 February 2006, at pp. 22-23.

254 J. Montour Stmt. at 51.

framework of the new regulatory regime, which they reasonably assumed would not easily amenable to sudden change.[255] There was no obvious indication, at the time they began to establish their brand off-reserve in 2002, that any aspect of the new regime, especially the allocable share release mechanisms included in each statute, was conditional, accidental or otherwise unintended.

206. As such, during the summer of 2002 Claimants undertook a careful analysis of both the risks and opportunities presented under the new regime. The investment decisions they took as a result were not entered into lightly, as they represented a wholesale change in the manner in which they had planned to grow their business. By the end of the year, Grand River had started terminating all of its contractual relationships for private label product runs[256] and the investors had started the process establishing their Seneca® and Opal® brands in five state markets: North Carolina, South Carolina, Oklahoma, Arkansas and Georgia, employing the services of a third-party distributor.[257]

207. The decision to establish the Seneca® and Opal® brands in new markets was not entered into lightly. Claimants had learned that at least one tobacco enterprise had actually decided not to join the MSA – even when offered a grandfathered exemption – because it served a regional market and would fare better under the allocable share mechanisms included in each Escrow Statute.[258] The incentive to dedicate one's business to serving regional markets was obviously intended with the inclusion of the allocable share mechanisms in each Escrow Law. There was no other reason to include such a mechanism in the measures. Claimants had no reason to believe that, in the coming years,

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255 J. Montour Stmt. at 51.

256 J. Montour Stmt. at 34.

257 J. Montour Stmt. at 42. [redacted]

258 R. Parloff, "Is the $200 Billion Tobacco Deal Going Up in Smoke?" Fortune Magazine March 7, 2005 at 126; found at Tab 1, Factual Materials, Claimants' Counter Memorial on Jurisdiction.

NAAG officials would be holding private meetings with representatives of the OPMs on the immediate elimination of these very same mechanisms.[259]

208. Over the next four years, before the first of the Allocable Share Amendments would come into effect, Claimants were very successful in establishing and growing their Seneca® brand in these selected state markets.[260] Particularly in respect of the Seneca brand, their marketing strategies, the composition of their products, their manufacturing processes and their prices were all directed towards achieving success in these particular markets.[261] Their success was achieved due, in part, to their reliance on the availability of a mechanism found in each Escrow Statute clearly intended to encourage regional tobacco enterprises to refrain from competing on a national basis. The allocable share mechanisms provided Claimants with one additional option under the original legislation: take your brands national, and join the MSA; or choose to focus on a smaller, regional market and pay only a proportionate amount of the total escrow obligations that would be owing had one been distributing nationally.

209. It is important to remember the public mantra repeated so often by state officials when the measures were originally introduced: the Escrow Statutes were allegedly intended to provide industry members with a 'level playing field.'[262] Claimants were entitled to take them at their word, as the inclusion of an allocable share mechanism was obviously intended both to provide a level playing field as between NPMs and non-exempt SPMs and to provide a level playing field for regional brands, vis-à-vis the national value brands of SPMs for which a grandfathered exemption had been provided. Again, there was no obvious reason to suspect that within a few years' time, the same officials would be referring to the MSA regime as critically flawed because of the allocable share release 'loophole.'

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259 Claimant's Evidentiary Stmts. Ex. 38 Meeting Notes.

260 J. Montour Stmt. at 46-50.

261 J. Montour Stmt. at 46-50.

262 Claimant's Evidentiary Stmts. Ex. 50.

210. In other words, Claimants reasonably entertained a legitimate expectation that the expansion of their brand to a limited number of new state markets was encouraged under the MSA regulatory framework. They would not learn until 2004 that state officials were planning to remove the very basis upon which this new investment had been made. As explained above, the customary international law principle of good faith serves to protect the legitimate expectations of foreign investors under the standard of 'fair and equitable treatment.' Investors are entitled to rely upon public pronouncements, and clearly defined legislative frameworks when making their investment decisions. They do not expect that the officials responsible for those measures will secretly meet with their commercial competitors in order to plot changes to the regime intended specifically to impair the investments made in reliance on its provisions.

211. The same requirements, of stable, transparent and even-handed treatment that US investors have come to expect to receive when investing abroad under the protection of a bilateral investment treaty, are also owed by Respondent's own state governments. As affirmed by the NAFTA Parties themselves, the standard of fair and equitable treatment has passed into customary international law and, founded upon the principle of good faith, it has been used by more than one US investor to receive compensation where its reasonably held investment-backed expectations have been thwarted by host government action. Claimants request no more, and no less.

212. Had the MSA states not reneged on the NAFTA and customary international law promise of fair and equitable treatment for investors who chose to focus on development of their brands in a limited number of states, Claimants would still be enjoying continued growth and profitability, rather than pursuing a NAFTA claim.[263]

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[263] To be clear, had Claimants never been subjected to the MSA regime in the first place, they would have been able to establish their brands on a national basis, reaping even greater cash flows from their investment. The second best scenario, in an imperfect world, would have been for them to continue to enjoy the success they had achieved in restricting sales of their brands to a small number of state markets, while continuing to sell their products on reserve, without any diminution of the brand suffered as a result of the illegal application of the measures to their business on First Nations territory in the United States.

b. Respondent Breached its Obligation to Proactively Consult First Nations Investors

213. As described below, state officials failed twice in respect of their obligation to observe Respondent's customary international law obligation to proactively consult Claimants, as First Nations investors with commercial activities likely to be significantly affected by their measures. This obligation is owed as a function of the *erga omnes* rule prohibiting discrimination against special and/or disadvantaged groups. As demonstrated above, this fundamental norm prohibiting discrimination on the basis of race is owed, of necessity, as an element of the 'fair and equitable treatment' standard included in NAFTA Article 1105. It imposes an obligation upon the State to ensure that First Nations members do not receive less favorable treatment, on a *de facto* basis, under its measures.

214. In order to properly ensure that a measure does not fall disproportionately upon indigenous persons in particular, Respondent's officials should have taken the proactive step of consulting Claimants and other First Nations tobacco enterprises before imposing the Escrow Laws in the first place, and they certainly should have consulted Claimants before amending their measures to remove the allocable share mechanisms from each of them. By 2004, state officials were certainly well aware of Claimants' active participation in these particular state markets, as they had been receiving their escrow payments and processing refunds for them for one to two years before even announcing the Allocable Share Amendments.[264] Given that they were demanding payment of escrow fees as early as 2002, it is obvious that state officials could have sought out Grand River before agreeing with the Majors to revoke the allocable share release mechanisms from their measures.

215. When they decided to draft and impose the Contraband Laws to 'complement' enforcement of the Escrow Statutes, the MSA states were also under an obligation to seek

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[264] Claimants are not entitled to such treatment because they just so happened to be First Nations individuals fortunate enough to benefit from the current state of customary international law with respect to a fundamental norm of non-discrimination. They were entitled to be proactively consulted by the MSA states before these measures were imposed because the commercial activities represented in their US investment were, and remain, crucial to the economic wellbeing of over two hundred indigenous families.

out, and consult with, First Nations tobacco enterprises. Engaging in consultation could have permitted the parties to ensure that the MSA respected their constitutional obligations towards First Nations tobacco enterprises in imposing and enforcing these measures. Because they failed to do so, today Claimants are finding even their on-reserve markets being impaired by the reputational impact of having one's flagship brand be deemed contraband and subjected to seizure by overzealous officials working in individual states.[265]

216. Similarly, Respondent's states were under a duty to proactively consult with Claimants and any other First Nations tobacco enterprise known to them before making significant amendments to their Escrow Statutes. Removal of the allocable share release mechanisms was a significant change that the states ought to have known might substantially impair the commercial activities of a First Nations enterprise such as that of the Investors. Indeed, the record demonstrates that state officials did know that the contemplated changes would result in dramatic impairment of the ability of an enterprise pursuing a regional brand strategy to compete; that is precisely why these measures were imposed.[266] It was therefore incumbent upon the state officials to identify whether First Nations investors would be among any of those whose businesses would be impaired by introduction and enforcement of the new measure.

217. Had state officials consulted with the Investors prior to imposing the Allocable Share Amendments, just as they had consulted with SPMs prior to imposing the original Escrow Statutes, an acceptable resolution could have been identified. For example, they could have agreed on providing the Investors with an exemption from the allocable share revocation for sales of Seneca® and Opal® brands based upon the same grandfathering formula they had used for NPMs years earlier. Instead, it appears as if the only tobacco enterprises that benefited from proactive consultations with state officials when the

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265 A. Montour Stmt. at 23-27.

266 Claimant's Evidentiary Stmts. Ex. 40.

allocable share amendments were being designed were the OPMs that stood to benefit from them.

218. It was not in accordance with the customary international law standard of fair and equitable treatment for the MSA states to have removed the allocable share release mechanisms without first attempting to ameliorate the resulting impact upon Claimants, as First Nations investors. In imposing these new measures, state officials created at least two classes of small tobacco enterprise: the NPMs that were still benefitting from the exemption granted to them years ago in exchange for their joining the MSA; and those whose per-carton compliance costs were about to skyrocket by over $4 per carton because they had relied upon the allocable share release mechanisms originally provided under each measure.

219. Imposition of the Allocable Share Amendments thus gravely impaired Claimants' ability to enjoy the returns they reasonably expected from having successfully established their brands in North Carolina, South Carolina, Oklahoma, Arkansas and Georgia. Respondent has therefore failed to satisfy its customary international law obligation to avoid discrimination against the Claimants generally, and as First Nations investors in particular, by taking proactive steps to consult with them and by mitigating the effects of their new measures upon them. Claimants were entitled to receive treatment on a *de facto* basis that was no less that that which was being received by their competitors, the exempt SPMs, for whose benefit the Allocable Share Mechanisms were designed.

c. Claimants had a Legitimate Expectation that Respondent Would Honor its Obligations Toward Haudenosaunee Investors Under Applicable International and Domestic Laws

220. As demonstrated above, not unlike any other investor, Claimants were entitled to hold a reasonable expectation concerning the conduct they could expect from each state government, based upon customary international law obligations owed by Respondent. However, whereas any investor who pursued a regional brand strategy was entitled to expect that state officials would not conspire to remove the legislative mechanism upon which it was based, Claimants were entitled to hold even greater expectations.

221. As Professor Clinton has explained, at the time of the negotiation and ratification of the 1794 *Jay Treaty*, Respondent fully understood that it could not, and would not, attempt to assert its regulatory jurisdiction over the commercial activities of Haudenosaunee individuals and enterprises.[267] It has also been clearly established by Professors Warrick and Brandao that the Haudenosaunee have been engaged in the tobacco trade, throughout the territories that they still inhabit today, since well before European contact.[268]

222. Professor Clinton explains that even as the United States of America took shape, well into the 19th Century, Respondent still believed itself to be bound to the people of the Six Nations in respect of the treaty promises it had made to them, and to the Crown – now held in the Right of Canada – for their benefit.[269] Indeed, almost a century later Respondent still demonstrated that it appeared to believe itself to be bound to its commitment to leave Haudenosaunee Nations and their commerce undisturbed, under its own laws dealing with Native American tribes.[270] It was not until later in the 19th Century that Respondent began to reinterpret its obligations under the *Jay Treaty*,[271] contrary to customary international law and the principle of good faith expressed in the *pacta sunt servanda* rule.[272]

223. Regardless of whether Respondent's courts have re-cast its obligations under the *Jay Treaty*, Claimants are entitled to receive the full benefit of them, as they were originally understood by Respondent and their forbearers at the time it was negotiated. Accordingly,

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267 Statement of Professor Robert Clinton, at page 33-34.

268 Statement of Professor Gary Warrick, at page 37-46; Statement of Professor Jose Brandao, at page 16-17.

269 Statement of Professor Robert Clinton, at page 34-43.

270 Statement of Professor Robert Clinton, at page 43-44.

271 Statement of Professor Robert Clinton, at page 44.

272 Of course, a State is not permitted to unilaterally re-interpret the extent of its treaty obligations by recourse to the operation of its domestic legal system. As affirmed by the Tribunal in *TECMED* v. *Mexico*: "An Act of State must be characterized as internationally wrongful if it constitutes a breach of an international obligation, even if the act does not contravene the State's internal law – even if under that law, the State was actually bound to act that way." See: Técnicas Medioambientales, TECMED S.A. v United Mexican States, Award, ICSID Case No. ARB/AF/00/2 (29 May 2003), at para. 120, citing: J. Crawford, The International Law Commission's Articles on State Responsibility (Cambridge, 2002), at p. 84.

Claimants were entitled to hold an expectation that none of the transactions made by them anywhere on Six Nations territory – including the Six Nations of the Grand Territory – would have ever been subjected to any element of the MSA regime. All sales of product produced on Haudenosaunee land are protected by the original terms of the *Jay Treaty*, which remains in force today. As provided in Article IX of the *Treaty Ghent*, all of the rights promised to the Haudenosaunee in the *Jay Treaty* were restored after the War of 1812 ended.

224. As set out below, that same provision of the *Treaty of Ghent* also restored the state of 'perpetual peace' agreed as between Respondent and the Haudenosaunee under the 1794 *Treaty of Canandaigua*:

> ***The United States of America engage*** to put an end immediately after the Ratification of the present Treaty to hostilities with all the Tribes or Nations of Indians with whom they may be at war at the time of such Ratification, and ***forthwith to restore to such Tribes or Nations respectively all the possessions, rights, and privileges which they may have enjoyed or been entitled to in one thousand eight hundred and eleven previous to such hostilities. Provided always that such Tribes or Nations shall agree to desist from all hostilities against the United States of America***, their Citizens, and Subjects upon the Ratification of the present Treaty being notified to such Tribes or Nations, ***and shall so desist accordingly***. And His Britannic Majesty engages on his part to put an end immediately after the Ratification of the present Treaty to hostilities with all the Tribes or Nations of Indians with whom He may be at war at the time of such Ratification, and forthwith to restore to such Tribes or Nations respectively all the possessions, rights, and privileges, which they may have enjoyed or been entitled to in one thousand eight hundred and eleven previous to such hostilities. Provided always that such Tribes or Nations shall agree to desist from all hostilities against His Britannic Majesty and His Subjects upon the Ratification of the present Treaty being notified to such Tribes or Nations, and shall so desist accordingly. [273]

225. Moreover, as Professors Clinton and Fletcher both explain, while it appears that under the present state of its domestic law, Respondent has unilaterally reserved to itself the right to tax and license the Haudenosaunee tobacco trade at the federal level, it has still

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[273] Treaty of Ghent (United States – United Kingdom), executed 24 December 1814; See: http://www.yale.edu/lawweb/avalon/diplomacy/britain/ghent.htm

prohibited state officials from doing the same.[274] In other words, under US Federal Indian Law, state officials are not permitted to impose any of the measures that were indeed imposed upon Native American commerce in implementation of the MSA. Whereas a line of cases has developed in respect of the states' right to tax non-Native American purchasers of tobacco and to gather information from First Nations traders for that limited purpose,[275] there is no authority under Respondent's law – today or as of the date Claimants established their US investment together in the 1990's – for the proposition that a state government can impose an obligation on a First Nations tobacco enterprise to place funds into escrow in relation to sales of their product.[276]

226. What is true for all First Nations tobacco enterprises under applicable domestic law is even more applicable when Haudenosaunee investors are involved, because they are entitled to all of the rights and privileges promised to them and other border nations under the *Jay Treaty* and *Treaty of Ghent*. It must be recalled that the *Moe* line of cases, referred to in note 28 of the Tribunal's Award on Jurisdiction, actually concerned First Nations traders who were merely importing and selling tobacco at the retail level.[277] Such business activity is a far cry from an enterprise that actually manufactures its own brand of products at a state of the art facility located on First Nations territory and distributing it at the wholesale level, which is what the investors do.

227. In summary, arising out of Respondent's good faith obligation to honor its treaty commitments for the benefit of the Haudenosaunee, Claimants were entitled to expect that they could participate, nationwide, in the US tobacco industry without any interference from state governments. They were entitled to hold this expectation both when they originally established the Seneca® brand in 1999, and marketed it exclusively on First Nations territories, and when they expanded their marketing efforts to establish

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274 Statement of Professor Robert Clinton, at pages 43-44; Statement of Professor Matthew Fletcher, at ¶¶14-15a.

275 Statement of Professor Robert Clinton, at page 45; Statement of Professor Matthew Fletcher, at ¶¶18-20.

276 Statement of Professor Robert Clinton, at page 43; Statement of Professor Matthew Fletcher, at ¶¶21-22

277 Statement of Professor Robert Clinton, at page 45.

the brand in the States of North Carolina, South Carolina, Oklahoma, Arkansas and Georgia.

228. Claimants were originally operating their investment in the United States on the expectation that as Six Nations members, state measures could not legally be applied to their business.[278] They were entitled to hold this expectation under the *Jay Treaty* and *Treaty of Ghent* and Respondent has breached its obligations under Article 1105 and customary international law whenever state officials have purported to have the authority to impose any MSA measures on Claimants, or when it has been impaired by operation of their measures. Claimants were also entitled to hold the same expectation on the basis of Respondent's own domestic law, at least with respect to all of their business activities on First Nations territories and arguably with respect to the entirety of their business.[279]

229. While Claimants ultimately decided to embrace the MSA regime in 2002, relying upon the inclusion of allocable share mechanisms in every Escrow Statute to establish their brands in regional markets, if Respondent had honored its treaty obligations to the Haudenosaunee in the first place, Claimants would have been entitled to establish their brands on a national basis, without incurring any escrow obligations at all. As the reports of Professors Clinton and Fletcher demonstrate, they were entitled to expect exactly that level of treatment. Because it was not forthcoming, Respondent failed to meet its obligations under Article 1105 and customary international law.

d. Equality and Due Process: Claimants had a Right to their Day in Court

230. Claimants' due process claim is not complicated. The Escrow Statutes establish a reserve fund into which deemed manufacturers of tobacco products must make millions of dollars in deposits, on a 25-year rolling basis, in perpetuity. The only other alternatives are going out of business or 'joining' the MSA on less favorable terms than were made available to a privileged group of Exempt SPMs in 1999. The stated purpose for enacting

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278 See, also: J. Montour Stmt. at 38; A. Montour Stmt. at 29-30;

279 Statement of Professor Robert Clinton, at page 43.

the Escrow Statutes was in order to establish a fund against which judgments obtained by a state against a NPM, for some indeterminate form of future, 'culpable conduct' on the part of that NPM.[280]

231. It has also been stated that imposition of escrow obligations on NPMs somehow "levels the playing field" as between the OPMs and any deemed 'manufacturer.'[281] The logic of this justification seems to be that it would be unfair for the OPMs to honour their obligations under the MSA if persons who were not sued by the states were not forced to bear a similar burden of compliance by force of some statutory means. The problem with this logic is that it presumes that the states would have and could have held Claimants liable in tort for any reason.

232. The basis upon which the OPMs were sued, and apparently settled, was not just that they made a product, the use of which could be proved as a proximate cause of losses to state treasuries responsible for the operation of Medicaid programs. To date, no public authority in the United States has ever succeeded in proving such a case in tort. In fact, the case against the OPMs was much worse (i.e. theoretically easier for state officials to prove). The claim was that a small cabal of multinational corporations had both conspired and succeeded together in promoting tobacco use through a campaign of intentional deceit and misrepresentation.

233. Even more importantly, there is absolutely no evidence on the record that the use of Claimants' tobacco products has caused any state to suffer any loss, in sufficient proximity, arising out of the operation of their public health insurance programs. There is also not a shred of evidence on the record that Claimants ever engaged in a conspiracy with the OPMs – or anybody else – for the purpose of promoting tobacco use through a campaign of deceit and misrepresentation. There is also no evidence on the record that any state has ever sued, or even contemplated suing, Claimants in tort for any reason related to their production and distribution of Seneca® branded cigarettes in certain

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280 Claimant's Evidentiary Stmts. Ex. 35.

281 Claimant's Evidentiary Stmts. Ex. 37.

portions of Respondent's territory – other than actions related to the operation of the MSA regime. Nonetheless, as of March 31, 2008, escrow deposits for cigarettes produced by Claimants are in excess of $28 million and an additional amount of not less than $500,000 in penalties.

234. The most rudimentary norms of equality and due process require that Claimants should not be made to pay anything to any state until after they have had their day in court. The OPMs had an opportunity to defend themselves against the accusations leveled against them and they were provided with opportunities to settle those claims on an individualized basis. Claimants have not even been accused of committing a tort by any of the states that have demanded and received millions of dollars in payments from them. It is fundamentally unfair and inequitable for Claimants to be forced to perpetually dedicate millions of dollars to a rolling fund in order to satisfy judgments for tort claims that have not even been conceived, much less proved.

235. Again, while Claimants ultimately decided to work within the MSA regime in 2002, in reliance upon the promise of being able to obtain allocable share releases, had Respondent honored its customary international law obligations to Claimants in the first place, they would have been entitled to establish the Seneca® and Opal® brands on a national basis, without incurring any escrow obligations at all. It is fundamentally unfair for Claimants to be made to make multimillion dollar payments to Respondent's states to satisfy theoretical tort claims that would likely never be launched, must less result in judgments against them.

SECTION IV RESPONDENT HAS BREACHED ITS OBLIGATIONS UNDER NAFTA ARTICLES 1102 AND 1103 OF THE NAFTA.

A. Respondent's Obligations under Articles 1102 and 1103

236. In relevant part, NAFTA Article 102 provides:

Article 102: Objectives

> 1. The objectives of this Agreement, **as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency,** are to:
>
> a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
>
> b) promote conditions of fair competition in the free trade area;
>
> c) increase substantially investment opportunities in the territories of the Parties;
>
> d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;
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> …
>
> 2. The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.
>
> [**emphasis added**]

237. NAFTA Article 102(1) provides that 'national treatment' and 'most favored nation treatment' and 'transparency' are the "principles and rules" that are to be understood as elaborating "more specifically" the objectives of the NAFTA set out in Article 102(1). Those objectives include: "the promotion of conditions of fair competition in the free trade area" and substantially increasing "investment opportunities in the territories of the Parties." It is therefore apparent that the Parties to the NAFTA wanted to ensure that these objectives would be seriously considered and employed in a broad and remedial fashion in the interpretation of specific provisions of the Agreement.

238. Articles 1102 and 1103 represent the obligations that ensure NAFTA investors enjoy national treatment and most favored nation treatment from the Parties. As such their terms could not possibly be construed in a narrow fashion. These terms must instead be construed on the basis of their plain and ordinary meaning, in light of the objectives described above. They promise 'treatment no less favorable' than that which is received by another investor or investment in like circumstances.

239. There is simply no room in the language of these provisions for reading-in the requirement for an investor to either prove that the measures according less favorable

treatment were imposed on the basis of his or her nationality; or to demonstrate that the impact of the measures fell disproportionately on investors of his or her nationality as opposed to those of the host state or another. The Investor's burden under either Article 1102 or 1103 is to prove that more favorable treatment has been granted to another investor in like circumstances, than that which has been accorded to him.

240. As the *Feldman* Tribunal noted, national treatment is a "fundamental obligation" of the NAFTA, which can be analogized to its use in other international agreements, such as Article III:4 of *GATT 1947*.[282] And as the *S.D. Myers* Tribunal has noted "Article 1102 of NAFTA addresses not only the way in which an enterprise has operated or currently operates, but also its expansion."[283] The United Nations Conference on Trade and Development has also defined the national treatment standard in the manner required under the NAFTA:

> National Treatment can be described as a principle whereby a host country extends to foreign investors treatment that is at least as favourable as the treatment it accords to national investors in like circumstances. In this way the national treatment standards seek to ensure a degree of competitive equality between national and foreign investors.[284]

241. The same can be said in respect of the MFN standard, only that the comparison of treatment to be undertaken is between the investor and an investor from another State, rather than the host State. As in all discrimination cases, there will be a class of winners and a class of losers (although each could be a class of many or a class of one). In this case, the class of winners includes both foreign enterprises and US enterprises. As such, Claimants will concentrate the remainder of their arguments primarily on national

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282 *Marvin Feldman* v. *Mexico*, Final Award, Case No. ARB(AF)/99/1 at para. 165; see, also: See, e.g.: *Pope & Talbot, Inc.* v. *Canada*, NAFTA/UNCITRAL Tribunal, Final Merits Award, UNCITRAL Arbitration (10 April 2001), at para's. 45-63.

283 *S.D. Myers, Inc.* v. *Canada*, Second Partial Merits Award, NAFTA/UNCITRAL Tribunal (21 October 2002) at para. 115

284 United Nations Conference on Trade and Development, *National Treatment* (UN Publications, New York: 1999) at 1.

treatment under Article 1102, but they apply equally to MFN treatment under Article 1103.

242. NAFTA Article 1102 provides:

> 1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 2. Each Party shall accord to investments of investors of another Party treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favourable than the most favourable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

243. Starting with the interim award of the Tribunal in *Pope & Talbot* v. *Canada*, and confirmed by other NAFTA tribunals,[285] the determination of an alleged national treatment breach under Article 1102 involves three analytical steps:

(a) Identify domestic investors and/or investments in a comparable position with the claimant;

(b) Determine whether more favorable treatment has been provided to the domestic investor/investment; and

(c) Determine whether the circumstances of the application of the measure justify the difference in treatment.

244. Subsequent tribunals have observed the same approach because the analysis is faithful to the plain and ordinary meaning of the text of Article 1102, as understood in context and in light of the explicit objectives of the NAFTA, elaborated more specifically by the

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[285] See, e.g.: *Pope & Talbot, Inc.* v. *Canada*, NAFTA/UNCITRAL Tribunal, Final Merits Award, UNCITRAL Arbitration (10 April 2001), at para's 31-81, and para. 78, in particular. For a similar BIT test with the same result, see also: *Parkerings–Compagniet AS* v *Lithuania*, Award, ICSID Case No ARB/05/8 (11 September 2007), at para. 371.

principles of non-discrimination and transparency. For example, in *Thunderbird* v. *Mexico*, the Tribunal observed:

> In construing Article 1102 of the NAFTA, the Tribunal gives effect to the plain wording of the text. The obligation of the host NAFTA Party under Article 1102 of the NAFTA is to accord non–discriminatory treatment towards the investment or investor of other NAFTA Parties. It must therefore be established that discriminatory treatment was accorded to the foreign investment or investor.
>
> The burden of proof lies with Thunderbird, pursuant to Article 24(1) of the UNCITRAL Rules. In this respect, Thunderbird must show that its investment received treatment less favourable than Mexico has accorded, in like circumstances, to investments of Mexican nationals.
>
> It is not expected from Thunderbird that it show separately that the less favorable treatment was motivated because of nationality. The text of Article 1102 of the NAFTA does not require such showing. Rather, the text contemplates the case where a foreign investor is treated less favorably than a national investor. That case is to be proven by a foreign investor, and, additionally, the reason why there was a less favorable treatment.[286]

a. Identification of Appropriate Comparators

245. Articles 1102 and 1103 are comparative standards. The scope for comparison of the investor/investment and the comparator (whether local or domestic) is based upon the treatment accorded to them – i.e. the results of the measure being applied. In cases where the measure applied is specific to a certain industry, the comparison will naturally be made between enterprises operating within that same industry (rather than all enterprises in the territory, such as under a general tax measure).[287]

246. The object of the comparison is to ensure that an equality of competitive opportunity is maintained as between the investor/investment and domestic, or other foreign, enterprises

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286 *International Thunderbird Gaming Corp. v. United Mexican States*, Award, UNCITRAL Arbitration (26 January 2006), at para's. 175-177 (emphasis added).

287 See, e.g.: *Occidental Exploration and Production Company* v. *Ecuador*, Award, LCIA Case No UN 3467, (1 July 2004), where the measure was a value added tax regime and the treatment was the receipt of refunds for taxes paid by some enterprises engaged in exporting their products but not the investor in exporting its products.

operating in like circumstances.[288] The circumstance of 'treatment' received by the comparators is to be understood within the context of the competitive relationship between enterprises affected by the measure, and the manner in which the measure impacts upon their respective ability to compete.

247. The *Pope & Talbot* Tribunal thus concluded that, "as a first step, the treatment accorded to a foreign owned investment protected by Article 1102(2) should be compared with that accorded domestic investments in the same business or economic sector…," although the Tribunal cautioned that this was but a first step. This rationale is confirmed by the OECD *Declaration on National Treatment for Foreign-Controlled Enterprises*, which provides, in part:

> As regards the expression 'in like situations,' the comparison between foreign-controlled enterprises established in a Member country and domestic enterprises in that Member country is valid only if it is made between firms operating in the same sector.[289]

248. All NAFTA tribunals have thus far undertaken the initial step of identifying comparators based upon the industry of the investor/investment in question. For example, in the *Feldman* case, the Tribunal started with a determination that the "applicable universe" of comparable investors and investments was made up of those businesses engaged in purchasing and reselling cigarettes, rather than a wider group, which would have included manufacturers. The measure at issue in the *Feldman* case was a rebate on export taxes.[290] The comparison in *UPS* v. *Canada* was between the national postal service and a privately owned courier company in respect of the impact of measures on competition between them in the expedited courier business.

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288 See, e.g.: *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Appellate Body Report, WT/DS161/AB/R (11 December 2000), at para's. 142-148.

289 Organization for Economic Co-operation and Development, *National Treatment for Foreign-Controlled Enterprises* (OECD, Paris: 1993) at 22. Mexico is an OECD Member country. As a consequence of Membership, Mexico is obliged to adhere to OECD declarations such as this one, pursuant to Article 5(b) of the 1960 *Convention on the Organization for Economic Co-operation and Development.*

290 *Marvin Feldman v United Mexican States, Award, ICSID Case No. ARB(AF)/99/1 (16 December 2002),* , at para's. 171-172.

249. The comparison in *US – Cross Border Trucking Services* involved trucking businesses operating between Mexico and the United States.[291] The measure at issue was a prohibition on most Mexican-owned carriers operating in all but a tiny fraction of the United States market. The comparison in *ADF* v *USA* was between steel products fabricated by the investor (a steel fabricator) versus steel products fabricated by domestic investors, with respect to their potential use in a highway project.[292] In *S.D. Myers, Inc.* v. *Canada*, the Tribunal held that the appropriate basis for comparison – involving a measure that banned the export of PCB wastes from Canada in comparison – was between service providers offering PCB waste destruction.[293] It found, for example:

> The concept of "like circumstances" invites an examination of whether a non-national investor complaining of less favorable treatment is in the same "sector" as the national investor. The Tribunal takes the view that the word "sector" has a wide connotation that includes the concepts of "economic sector" and "business sector." From the business perspective, it is clear that SDMI and Myers Canada were in "like circumstances" with Canadian operators such as Chem-Security and Cintec. They all were engaged in providing PCB waste remediation services...[294]

250. In summary, the guiding principle and objective of establishing the 'universe of enterprises' against which the investor and/or investment must be compared is preservation of an equality of competitive opportunity between enterprises. Accordingly, the starting point for identifying comparators receiving treatment under a measure is to determine the nature of the competitive landscape against which the measure has been applied, and treatment thereby accorded by the Party that imposed it.

b. Treatment No Less Favourable

251. Under Articles 1102 and 1103, the investors and their investment enterprise are entitled to enjoy the best treatment accorded under a measure to comparable enterprises operating

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291 *United States – In the Matter of Cross-Border Trucking Services*, Panel Report, USA-MEX-98-2008-01, 6 February 2001, at para's. 252-257 & 291-294

292 *ADF Group Inc.* v. *United States of America*, Award, 6 ICSID Reports 470, at 155.

293 *S.D. Myers, Inc. v. Canada*, NAFTA/UNCITRAL, NAFTA/UNCITRAL Tribunal, First Partial Award (13 November 2000) at 251.

294 *S.D. Myers, Inc. v. Canada*, NAFTA/UNCITRAL, NAFTA/UNCITRAL Tribunal, First Partial Award (13 November 2000) at para's 250-251.

in like circumstances. The focus of this stage of the analysis is on the impact of the measure; not on whether there is any evidence of intent to accord less favorable treatment on the basis of nationality. As the *Myers* Tribunal noted:

> Intent is important, but protectionist intent is not necessarily decisive on its own. The existence of an intent to favour nationals over non-nationals would not give rise to a breach of [Article 1102] if the measures in question were to produce no adverse effect on the non-national complainant. The word "treatment" suggests that practical impact is required to produce a breach of Article 1102, not merely a motive or intent that is a violation of Chapter 11.[295]

252. And as the *Pope & Talbot* Tribunal has noted:

> Canada contends that these [various WTO] cases are distinguishable because they involve *de jure*, rather than *de facto*, discrimination. We have already seen that it is not always clear whether a measure is a *de jure* or *de facto* case, but even if it were, Canada has presented no reasons to justify treating the two forms of disadvantage differently. Indeed, the recognition that national treatment can be denied through *de facto* measures has always been based on an unwillingness to allow circumvention of that right by skilful or evasive drafting. Applying Canada's proposed more onerous rules to *de facto* cases [which would require proof that foreigners, as a group, were proportionately disadvantaged in application of a measure] could quickly undermine that principle. That result would be inconsistent with the investment objectives of [the] NAFTA, in particular Article 102(1)(b) and (c), to promote conditions of fair competition and to increase substantially investment opportunities.[296]

253. Another example can be found in *Siemens* v. *Argentina*, where the Tribunal undertook a national treatment analysis within the context of a 'fair and equitable treatment' provision. It summarized the state of the law on national treatment as follows:

> Whether intent to discriminate is necessary and only the discriminatory effect matters is a matter of dispute. In *S.D. Myers*, the tribunal considered intent "important" but not "decisive on its own." On the other hand, the tribunal in *Occidental Exploration and Production Company* v. *Republic of Ecuador* found intent not essential and that what mattered was the result of the policy in question. The concern with the result of the discriminatory measure is shared in *S.D. Myers*: "The word 'treatment' suggests that practical impact is required to

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295 *S.D. Myers, Inc. v. Canada*, NAFTA/UNCITRAL, NAFTA/UNCITRAL Tribunal, First Partial Award (13 November 2000) at para. 254.

296 *Pope & Talbot v. Canada*, NAFTA/UNCITRAL, Award on the Merits, Phase 2, (10 April 2001), at para. 70.

> produce a breach of Article 1102, not merely a motive or intent." The discriminatory results appear determinative in *Marvin Roy Feldman Karpa* v. *United Mexican States*, where the tribunal considered different treatment on a de facto basis to be contrary to the national treatment obligation under Article 1102 of NAFTA. The Tribunal concurs that intent is not decisive or essential for a finding of discrimination, and that the impact of the measure on the investment would be the determining factor to ascertain whether it had resulted in non-discriminatory treatment.[297]

254. Because proof of intent to discriminate on the basis of nationality is not necessary for a finding that less favorable treatment has been accorded under a measure, determining whether treatment was more or less favorable does not involve a global comparison of treatment received by foreigners and domestic investors. For example, sometimes measures accord more favorable treatment to a 'national champion' enterprise, to the disadvantage of all others (domestic or foreign). Sometimes measures accord more favorable treatment to a chosen group of foreigners and/or domestic enterprises, to the disadvantage of all other competitors. When an individual investor claims 'treatment no less favorable,' the analysis is specific to the treatment being accorded to that claimant under the measure, vis-à-vis its competitors. As the *Pope & Talbot* Tribunal stated:

> The Tribunal believes that the language of Article 1102(3) was intended simply to make clear that the obligation of a state or province to provide investments of foreign investors with the best treatment it accords *any* investment of its country, not just the best treatment it accords to investments of *its* investors. Since, as noted, the treatment of states and provinces in Article 1102(3) is expressly an elucidation of the requirement placed on the NAFTA Parties by Articles 1102(1) and (2), that interpretation lends support to the conclusion that, like states and provinces, national governments cannot comply with [the] NAFTA by according foreign investments less than the most favorable treatment they accord to their own investments.
>
> … The Tribunal thus concludes that "no less favorable" means equivalent to, not better or worse than, the best treatment accorded to the comparator.[298]

255. Treatment accorded under a measure is less favorable when an investor demonstrates that a comparable enterprise, operating in like circumstances, has enjoyed a competitive economic advantage, as between it and the investor/investment. The burden rests upon a

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297 *Siemens AG* v *Argentina*, Award, ICSID Case No ARB/02/8 (06 February 2007), at para's. 320-321.

298 *Pope & Talbot v. Canada*, NAFTA/UNCITRAL, Award on the Merits, Phase 2, (10 April 2001), at para's. 41 & 42.

claimant investor to prove it has suffered loss or damage because of the treatment accorded under a given measure. It does so by demonstrating that, but for the application of the measure, the investor/investment would have performed better, economically, within the circumstances of the relevant industry, than it actually did.

c. Like Circumstances

256. Once an investor has established that *prima facie* breach of either Article 1102 or Article 1103 has occurred, the analysis turns to the question of whether the difference in treatment was justifiable in the circumstances. As the Panel in *U.S. Trucking Services* observed, differences in treatment received under a measure could be justified if the comparators did not deserve to receive the same treatment because of the circumstances in which the measure applied to them. The Tribunal also cautioned, however, that this 'like circumstances exception' must be construed so narrowly as to strip the national treatment obligation of any true meaning.[299]

257. The justification for applying what is effectively a 'like circumstances exception' in national treatment cases has been explained by various tribunals. For example, in dealing with a 'fair and equitable treatment' clause, the Tribunal in *Parkerings* v. *Lithuania* stated:

> Discrimination is to be ascertained by looking at the circumstances of the individual cases. Discrimination involves either issues of law, such as legislation affording different treatments in function of citizenship, or issues of fact where a State unduly treats differently investors who are in similar circumstances. Whether discrimination is objectionable does not in the opinion of this Tribunal depend on subjective requirements such as the bad faith or the malicious intent of the State: at least, Article IV of the Treaty does not include such requirements. However, to violate international law, discrimination must be unreasonable or lacking proportionality, for instance, it must be inapposite or excessive to achieve an otherwise legitimate objective of the State. An objective justification may justify differentiated treatments of similar cases. It would be necessary, in each case, to evaluate the exact circumstances and the context.[300]

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299 *United States – In the Matter of Cross-Border Trucking Services*, Panel Report, USA-MEX-98-2008-01, 6 February 2001, at 258-260.

300 *Parkerings–Compagniet AS* v *Lithuania*, Award, ICSID Case No ARB/05/8 (11 September 2007), at para. 368.

258. As suggested by the Awards in *Thunderbird* v. *Mexico*,[301] and *UPS* v. *Canada*,[302] an evidentiary burden rests upon the investor to make out a *prima facie* case that more favorable treatment was accorded under a measure. Once a tribunal concludes that this burden has been met, it must then consider whether the differential treatment accorded was the reasonable and proportionate outcome of a legitimate governmental policy.

259. In establishing its *prima facie* case, it is naturally impossible for an investor to address the universe of reasons that might be invoked by a Party to justify the treatment accorded under its measure. Past tribunals have accordingly looked to the respondent to provide such justification. Some have referred to this practice as a 'burden shift.' While the legal burden obviously remains with the claimant, once a *prima facie* case has been made out, it behooves the respondent to provide an explanation of how the differential treatment received under the measure was reasonable and proportionate in relation to the objectives claimed for the measure at the time it was imposed. As explained by the Tribunal in *Pope & Talbot*:

> Differences in treatment will presumptively violate Article 1102(2), unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of [the] NAFTA.
>
> In one respect, this approach echoes the suggestion by Canada that Article 1102 prohibits treatment that discriminates on the basis of the foreign investment's nationality. The other NAFTA Parties have taken the same position. However, the Tribunal believes that the approach proposed by the NAFTA Parties would tend to excuse discrimination that is not facially directed at foreign owned investments. A formulation focusing on the like circumstances question, on the other hand, will require addressing *any* difference in treatment, demanding that it be justified by showing that it bears a reasonable relationship to rational policies not motivated by preference of domestic or other foreign owned investments. That is, once a difference in treatment between a domestic and a foreign-owned investment is discerned, the question becomes, are they in like

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301 *International Thunderbird Gaming Corporation* v. *United Mexican States*, Award, UNCITRAL Arbitration (26 January 2006), at para. 176.

302 *United Parcel Service v. Canada*, UNCITRAL/NAFTA, Award (24 May 2007) at para. 84.

> circumstances? It is in answering that question that the issue of discrimination may arise.[303]

260. As such, where an investor has made out a *prima facie* claim that it has received less favorable treatment under a measure than one or more of its competitors in like circumstances, and the respondent has refused to provide a reasonable, proportionate and contemporaneous justification for the treatment received, the claim succeeds.[304] As Professor Cass stated in *UPS* v. *Canada*:

> It is possible for two investors or enterprises to be in the same sector or to be in competition and nonetheless be quite unlike in respect of some characteristic critical to a particular treatment. The most natural reading of NAFTA Article 1102, however, gives substantial weight to a showing of competition between a complaining investor and an investor of the respondent Party in respect of the matters at issue in a NAFTA dispute under Article 1102. Article 1102 focuses on protection of investors and investments against discriminatory treatment. A showing that there is a competitive relationship and that two investors or investments are similar in that respect establishes a *prima facie* case of like circumstances. Once the investor has established the competitive relationship between two investors or investments, the [strategic] burden shifts to the respondent Party to explain why two competing enterprises are not in like circumstances.[305]
>
> Although a bald discrimination on the basis of nationality cannot be salvaged by assertion of governmental policy objectives, where the claim of national treatment violation rests on the effects of decisions not expressly predicated on nationality a different standard applies… There must be limits to the reach of policy justifications offered to support national treatment discriminations – that is, of justification offered to establish the unlikeness of circumstances under Article 1102… But in my view, those limits should not be imposed through an overly critical examination of governmental policy choices by arbitral tribunals.[306]

261. Once the claimant investor and the tribunal have heard the respondent's answer to the prima facie claim of differential treatment, the strategic burden obviously returns to the

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303 *Pope & Talbot v. Canada*, NAFTA/UNCITRAL, Award on the Merits, Phase 2, (10 April 2001), at para's. 78-79.

304 *Marvin Feldman v United Mexican States, Award, ICSID Case No. ARB(AF)/99/1 (16 December 2002),* , at 177. The accompanying note provides: "*United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, Adopted 23 May 1997, WT/DS33/AB/R, p. 14. Accordingly, *Asian Agricultural Products Limited* v. *Republic of Sri Lanka*, ICSID Reports, pp. 246, 272, 1990. ("In case a party adduces some evidence which prima facie supports his allegation, the burden of proof shifts to his opponent.").

305 *United Parcel Service v. Canada*, Separate Opinion, UNCITRAL/NAFTA (24 May 2007), at para's 16-17.

306 *United Parcel Service v. Canada*, Separate Opinion, UNCITRAL/NAFTA (24 May 2007), at para's. 118-120.

claimant to rebut any justification provided. At the end of the day, the tribunal will determine, on a balance of probabilities, whether the claimant investor made out a valid claim or whether the respondent succeeded in providing a reasonable and proportionate justification for the less favorable treatment received.

B. Respondent's Breaches of Articles 1102 and 1103

262. NAFTA Articles 1102 & 1103 are designed to promote an equality of competitive opportunity for Canadian and Mexican nationals and their investments in the United States. As such, the normal starting point for a national treatment or MFN analysis is identification of the appropriate comparators who are in commercial competition with the investor and/or its investment.[307]

a. Comparators

263. In this case, the process is straightforward. Claimants have marketed two 'value' brands, Seneca® and Opal®, which were specifically designed and priced by them to appeal to a particular kind of US consumer.[308] The primary class of competitors is enterprises that market other value brands in the same territories.[309] This group includes Exempt SPMs, in addition to other SPMs and NPMs.[310] The less direct class of Claimants' competitors are the OPMs marketing premium name brands. Consumers of premium brands are generally loyal to their brand, but there will be a tipping point for each of them at which they will choose to switch to a value brand (normally whenever the price differential between value brands and premium brands is broad enough and the overall price is high enough to force a change in consumer preferences).

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307 In this case, one of the Exempt SPMs that is receiving better treatment for its brands than Claimants are for their brands is Japan Tobacco, a corporation organized under the laws of Japan. Accordingly, to the same extent that better treatment being accorded, as a result of the Allocable Share Amendments, to U.S. enterprises, such as Liggett or Premiere, constitutes evidence of a prima facie breach of Article 1102, it also constitutes an overlapping breach of Article 1103.

308 J. Montour Stmt. at 23.

309 Wesley Stmt. at 6-9; Phillips Stmt. at 14.

310 J. Montour Stmt. at 5 ; Expert Report of David Eisenstadt dated July 10, 2008 ("Eisenstadt Report").

b. Treatment No Less Favorable

264. All three of the measures primarily at issue in this case[311] were explicitly designed to restrict competition in the tobacco industry. As originally drafted, the Escrow Laws were designed to prevent NPMs operating on a national scale from taking market share away from Participating Manufacturers.[312] The Contraband Laws were designed to more effectively and immediately impose prohibitions against the distribution of the value brands marketed by NPMs. These prohibitions were attainable under the Escrow Statutes, but only after recourse to judicial procedures contemplated under them. The Allocable Share Amendments were designed to remove the rebate that had permitted smaller tobacco enterprises to operate on relative par with Exempt SPMs.[313]

265. In the years following implementation of the MSA regime, the measures worked so well that the OPMs were able to take advantage of the protection they offered to raise their prices much higher than would have been necessary to merely cover the costs of compliance with their MSA obligations.[314] They succeeded in doing so by leveraging the relative inelasticity of demand for their premium brands, thereby maximizing profits with price increases until the point at which any further increase would result in corresponding defections by their customers to a value brand.[315]

266. The OPMs could not lose in pursuing this strategy, because if their price increases finally did generate such a disparity between the price of their brands and those of value-brands offering comparable taste and quality, so as to result in customer defection, they would be entitled to attempt blaming the MSA states for their subsequent loss of market share, as contemplated under the terms of the MSA itself. In fact, over the past two years the

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311 Michigan's Equity Assessment Law similarly had the effect of reducing competition as between NPMs and OPMs and SPMs because it only applied significantly higher taxes on NPMs.

312 Claimant's Evidentiary Stmts. Ex. 34 at (d) (2)(E).

313 Claimant's Evidentiary Stmts. Ex. 37 & 50..

314 Claimant's Evidentiary Stmts. Ex. 40 & 41.

315 Claimant's Evidentiary Stmts. Ex. 13.

OPMs appear to have pursued this very strategy.[316] They have even alleged that it is a violation of the MSA for states to forbear from imposing escrow obligations on First Nations tobacco enterprises whose products are not even intended for sale in non-First Nations markets.[317]

i. The Allocable Share Amendments Have Accorded Better Treatment to Exempt SPMs

267. At the time that the lawyers who negotiated the MSA set out to convince smaller tobacco enterprises to cooperate with the OPMs and state officials, two reasonably comparable options existed to other investors in the tobacco industry. They could either join the MSA and market their brands nationally, receiving a generous exemption from escrow requirements based upon a formula applied to their sales in the previous two years; or they could chose to remain NPMs, receiving allocable share releases if they to restricted their brands to only a few states. Some chose to become exempt SPMs and others chose to take advantage of the allocable share release mechanisms, remaining as fully compliant NPMs.[318]

268. Settling States were well aware of the potential for the regime they were contemplating to accord less favorable treatment to NPMs than would be received by Participating Manufacturers. They understood that substantive equality of opportunity could not be maintained under a regime where NPMs, SPMs and OPMs were not being required to bear the same relative payment burdens. For example, as one state legislator sponsoring an Allocable Share Amendment candidly admitted:

> The original purpose of this provision [the Allocable Share Release Mechanism] was to make sure that the financial obligations on the NPMs were not more onerous than the burdens on participating manufacturers

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316 Claimant's Evidentiary Stmts. Ex. 31.

317 Claimant's Evidentiary Stmts. Ex. 51.

318 Claimant's Evidentiary Stmts. Ex. 39 Smoking Buddies.

> joining the MSA which might provide the basis for an equal protection challenge to the model escrow act.[319]

269. What motivated state officials to impose the Allocable Share Amendments – thereby abrogating the one and only option for a small NPM to compete under the MSA regime – was fear of losing any portion of the payments promised by the OPMs under the terms of the MSA.[320] These amendments were obviously supported by OPM representatives in their discussions with state officials, because removal of the allocable share release mechanisms would have the same deleterious effect on regional NPM brands as the original Escrow Statutes had on national NPM brands.[321] The object of these amendments was no less the eradication of heretofore compliant, regional NPM brands from the marketplace, by rendering them uncompetitive vis-à-vis the national value brands marketed by SPMs who chose to join the MSA in exchange for grandfathered escrow payment exemptions.

270. The new measures have succeeded, ultimately forcing Claimants to withdraw their Seneca® and Opal® brands from the market in states such as Oklahoma, Arkansas, Kansas.[322] This is because the price at which these brands attracted their customer base was not sustainable for Claimants to offer, once the allocable share releases were no longer forthcoming in each of these states.[323]

271. The impact of the Allocable Share Amendments has been as predictable as it was devastating to Claimants' investment in all of state territories in which they had expanded their brands. The Seneca® brand is now only found off-reserve in four states: Georgia, Tenessee, North Carolina and South Carolina, [redacted]

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319 Senator Jim Jensen, Chairperson, Health and Human Services Committee, Government of Nebraska, Statement of Intent for LB 944 at 1, January 23, 2004. Claimant's Evidentiary Stmts. Ex. 52.

320 Claimant's Evidentiary Stmts. Ex. 40.

321 Claimant's Evidentiary Stmts. Ex. 13.

322 J. Montour Stmt. at 62.

323 Claimant's Evidentiary Stmts. Ex. 13.

[redacted] Claimants were no longer able to price their brands competitively enough to retain their brands' customer base.[324] Once Grand River has been adjudged by state officials to be in arrears under amended Escrow Statute, injunctions have been obtained, and Contraband Laws have operated, so as to prohibit any future sales of the Seneca® or Opal® brands in each such territory.[325]

272. Without the benefit of allocable share releases, Claimants' brands have simply been rendered uncompetitive, because the consumer base for which their products were targeted do not stay loyal to the Seneca® and Opal® brand when far less expensive alternatives have been available. The products that replaced Seneca® and Opal® brands on store shelves in these various states and captured Claimant's market share are largely manufactured by exempt SPMs.[326]

273. Whereas it could have once been argued that, as between exempt SPMs and the OPMs who adopted a regional brand strategy, both were receiving effectively similar treatment in result, the Allocable Share Amendments have eliminated the possibility. In short, removal of the allocable share release mechanism does not level the playing field between these competitors; it arbitrarily tilts the field over to one side.

274. In imposing the Allocable Share Amendments, state officials have offered more favorable treatment to exempt SPMs than they were now willing to offer NPMs who had adopted regional brand strategies in reliance on the availability of allocable share releases. As Claimants had adopted the kind of regional brand strategy encouraged under the original Escrow Statutes, they received less favorable treatment than enterprises such as Liggett and others, who have continued to enjoy their escrow payment exemptions under the amended measures. That is why their brands have replaced Seneca® and Opal® branded products on store shelves in various states.

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324 Claimant's Evidentiary Stmts. Ex. 13.

325 J. Montour Stmt. at 56.

326 Eisenstadt Report; Phillips Stmt. at 14

ii. The Ongoing Regulatory Dialogue Launched With the MSA Accorded Better Treatment to OPMs

275. From a commercial standpoint, the OPMs are also in a much better position under the measures vis-à-vis Claimants. The OPMs were provided with an opportunity to co-design the Escrow Statutes with the Settling States,[327] and to consult in private on future changes such as the Allocable Share Amendments.[328] In addition, MSA membership, which has been unreasonably withheld from Claimants,[329] entitles a manufacturer to have access to more potential retail customers, as many of the larger retail chains are too risk adverse to contemplate dealing with a non-MSA supplier, much less a NPM whose brands are deemed to be contraband by one or more state governments.[330]

iii. Michigan's Equity Assessment Measure Accords Better Treatment to All Other Tobacco Enterprises, Other Than NPMs

276. With respect to Michigan's Equity Assessment Act, all OPMs and SPMs are in an obviously better position than Claimants. Claimants, by virtue of being classified as a 'NPM,' must undergo an annual certification procedure; pay any assessments previously assessed since the measure was imposed in January 2004; and pre-pay any assessment for the coming year, before they will be permitted to introduce the Seneca® brand anywhere in Michigan, including on Native American land. Only NPMs pay the assessment under this measure, which almost doubles the costs of compliance (to approximately $8 per carton, at current rates). This measure makes Michigan the most prohibitively expensive place in which Claimants could do business in the United States, in spite of the fact that its major urban centre, Detroit, is located less than three hours' drive from where Seneca® and Opal® branded products are made.

277. Claimants have accordingly been deprived of a nearby market for their brands, even on-reserve, without any reasonable grounds. They are covered by the measure simply by

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327 Claimant's Evidentiary Stmts. Ex. 31.

328 Claimant's Evidentiary Stmts. Ex. 38 Meeting Notes.

329 J. Montour Stmt. at 59-60.

330 M. Wesley Stmt at 10-14

virtue of GRE being classified as a NPM under the state's Escrow Law and Contraband Statute. This measure obviously magnifies the unfairness of the application of the MSA regime for Claimants vis-à-vis their competitors. The more favorable treatment offered under Michigan's Equity Assessment Act is obviously offered to any enterprise that escapes its application, including OPMs and SPMs, and smaller First Nations enterprises that have thus far escaped enforcement by any MSA state officials.

c. Like Circumstances

278. 'Treatment no less favorable' is only required of the NAFTA Parties where like circumstances exist amongst investors or investments. On a *prima facie* basis, all tobacco enterprises appear to operate in like circumstances. Their tobacco brands compete on the basis of successful marketing, price and blending to taste. They succeed when their brands find a clientele based upon these simple factors. They fail when their brands do not attract a customer base, or when one of these elemental factors is suddenly and dramatically altered. The measures at issue introduced exactly that kind of dramatic alteration of circumstances, without reasonable justification.

279. The original justification provided for imposing the Escrow Statutes on enterprises was that they were necessary to 'level the playing field' between OPMs and all other tobacco enterprises. The original justification provided by state officials for imposing the Allocable Share Amendments was also to ensure 'a level playing field.' However, this latter excuse was premised on the contradictory and disingenuous notion that the new measures were necessary to remove a 'loophole' from the original legislation.[331] As demonstrated below, both premises are arbitrary and discriminatory on their face.

280. There was no need for the Settling States to take legislative steps to provide a level playing field as between the OPMs and Claimants because – unlike the OPMs – Claimants were never even accused of doing the kinds of things alleged by the states in their tort case against the OPMs. In effect, the states arbitrarily deemed OPMs and other

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[331] Claimant's Evidentiary Stmts. Ex. 44.

tobacco enterprises as being no longer in like circumstances because of the obligations that would be borne by the OPMs under the MSA. There was no reason, however, for any other enterprise to be saddled with those obligations, absent evidence that it could have been somehow joined to the civil cases brought against the OPMs. It makes no sense to argue that an economic playing field needs to be leveled if the players were not playing by the same rules in the first place.

281. No government in the United States has ever collected damages in a tort action against a member of the tobacco industry, large or small, on the grounds that tobacco use was the proximate cause of Medicaid costs.[332] There is no reason to suspect that the OPMs would have sought any kind of settlement with any state if those were the only kind of tort claim at issue. The OPMs did not settle when the United States Federal Government brought exactly that kind of tort claim against them, and they prevailed.[333] If the grounds were the same in these cases, why would the OPMs have settled with the states when but not with the Federal Government? The fact is that the OPMs settled because there were other claims pending against them and their senior management, and a decision was obviously made to reduce their risk of financial exposure. Claimants have never borne the same risks because they have never engaged in the kind of conduct that was alleged against the OPMs and were never sued for such conduct by any state.

282. The OPMs, have skillfully used the regime they co-designed with state officials as an excuse to raise prices and maximize their own profits.[334] Each Settling State has shared directly in these profits by agreeing to shield the OPMs' brands from competition with value brands marketed by much smaller competitors, including Claimants.[335] They co-opted a group of smaller industry members by offering them escrow exemptions based upon a formula that essentially grandfathered their existing market share, as of the date

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332 See fn. 60 *United States v. Philip Morris, Inc.*.

333 Ibid.

334 Claimant's Evidentiary Stmts. Ex. 41.

335 Claimant's Evidentiary Stmts. Ex. 34 at (d)(2)(E).

they 'joined' the MSA. They bought peace from other industry members, including new entrants, by providing a strong incentive for them to only establish regional brands, in exchange for a *de facto* refund of escrow payments that allowed them to compete on a reasonably fair footing with SPMs.

283. There is no evidence on the record to suggest that these allocable share release mechanisms operated in anyway otherwise than exactly as intended. They generated strong incentives for NPMs not to introduce any value brands at the national level, as they would have competed directly with the brands of OPMs, potentially reducing their market share and ultimately threatening the size of the portion of the OPM's profits that had been promised to each state under the MSA. Respondent and its state officials are disingenuous to claim, after the fact, that use of the allocable share release mechanism was "unintended and unforeseen" and that it "undermined the intent of the escrow statutes."[336]

284. More to the point, Respondent can no more justify imposition of the Allocable Share Amendments, on the basis of alleged equality of circumstances between NPMs and OPMs, than it can for imposition of the original escrow statutes. The OPMs settled tort claims for conduct that no one has ever alleged against Claimants, now or then. Why should Claimants be made to bear what is alleged by Respondent to be roughly the same burden as these multinational corporations bear, even though Claimants have not even been accused of the same conduct that led the OPMs to settle with state officials?

285. Further, how does forcing Claimants to place significant funds into escrow level the so-called playing field as between them and the OPMs, who were forced into the MSA because of civil suits arising out of their own conduct? Every single dollar in escrow payments thus far made by every single NPM has allegedly been dedicated towards

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336 Statement of Defense to the Allocable Share Claim, at para's. 6 to 8. The evidence on the record demonstrates that if anything was unintended or unforeseen by the MSA states, it was that their erstwhile partners, the OPMs, would take advantage of them so blatantly as to reap incredible profits from price gouging consumers while leaving it to the states to adopt further means to safeguard their market share, lest they risk losing out on their promised cut of the proceeds of this arrangement.

nothing more than a theoretical fund for what can only be most charitably characterized as phantom civil claims. How then does the removal of Claimants' entitlement to an allocable share release actually level the playing field as between them and exempt SPMs, who were also never subject to these phantom civil suits but who have nonetheless enjoyed a substantial exemption from making escrow payments, in perpetuity?

286. It is obvious that the real goal behind introduction of the Allocable Share Amendments was to protect the Settling States' entitlement to their cut of the profits being enjoyed by the OPMs and SPMs under the measures they agreed to implement under the MSA. In any event, regardless of whether one accepts the 'level playing field' theory or the obvious reason for the Settling States' decision to impose the Allocable Share Amendments, the bottom line is that there is no justification for their having accorded more favorable treatment to exempt SPMs than was provided to Claimants.

287. The Allocable Share Amendments violate Respondent's national treatment obligation because they were not introduced under the same circumstances as the original Escrow Statutes had been introduced. Introduction of the original measures included an offer to industry members to join the MSA in return for receiving a payment exemption that effectively grandfathered their existing market share based upon a simple, two-year formula. There is no reason why the same offer could not be made to the Investors in this case. Had the Settling States done so, they would have actually leveled the playing field as between NPMs with regionally based brands, including Claimants, and exempt SPMs.

288. Moreover, as described above, under applicable international law Respondent also bears a special obligation towards Claimants, as First Nations Investors, in respect of the development and implementation of the Allocable Share Amendments. The terms of Article 1102 must be construed consistently with applicable rules of international law. Respondent's obligation to avoid discrimination against indigenous peoples required its state officials to take proactive steps to consult Claimants and to take steps to ameliorate discriminatory measures such as the Allocable Share Amendments. Within this context, Respondent's claim that its officials were only trying to 'level the playing field' with these measures rings even more hollow.

289. Instead, state officials have arbitrarily decided not to make the same offer to industry members with demonstrable track records, even though they have radically changed the regulatory regime under which all had been operating. The last time they radically altered the regulatory landscape, with introduction of the Escrow Statutes, state officials offered to grandfather those enterprises with vested interests in the exploitation of one or more brands. This time they chose not to do so, without any reasonable justification.

SECTION V EXPROPRIATION

A. Respondent's Obligations Under Article 1110

290. NAFTA Article 1110 requires Respondent to pay compensation equivalent to the fair market value (FMV) of an 'investment' taken through the imposition of a governmental measure. As specified in Article 1110(1), compensation must be paid regardless of whether the taking is for a public purpose, non-discriminatory or otherwise in accordance with due process and the minimum standard of treatment.[337]

291. Article 1110 states, in relevant part:

> 1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
>
> (a) for a public purpose;
>
> (b) on a non-discriminatory basis;
>
> (c) in accordance with due process of law and Article 1105(1); **and**
>
> (d) on payment of compensation in accordance with paragraphs 2 through 6.
>
> 2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall

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[337] *Marvin Feldman* v *United Mexican States*, Award, ICSID Case No. ARB(AF)/99/1 (16 December 2002) at 98.

> include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.
>
> 3. Compensation shall be paid without delay and be fully realizable.
>
> 4. If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.
>
> 5. If a Party elects to pay in a currency other than a G7 currency, the amount paid on the date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment.
>
> 6. On payment, compensation shall be freely transferable as provided in Article 1109. [**Emphasis added.**]

292. Article 1110 specifies that the focus of an expropriation analysis should be on the extent of deprivation of the investor's ability to derive benefits from an 'investment,' as defined under Article 1139. On its face, Article 1110 is not restricted to takings of real property or, alternatively, the formal expropriation of an entire investment enterprise.[338] The obligation requires compensation to be paid by Respondent for the imposition of a measure that directly or indirectly nationalizes or expropriates 'an investment' of an investor of another Party in its territory.

293. Impairment caused by regulatory action rises to the level of an indirect expropriation under Article 1110 when it results in a substantial deprivation of the investor's ability to enjoy the reasonably expected benefits of that investment.[339] The Tribunal in *S.D. Myers* v. *Canada* referred to the required level of impairment as amounting "… to a lasting removal of the ability of an owner to make use of its economic rights" in that

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338 *Pope & Talbot, Inc.* v. *Canada*, Interim Merits Award, NAFTA/UNCITRAL Tribunal, 26 June 2000, at para's. 95 & 96-98.

339 *Pope & Talbot, Inc.* v. *Canada*, Interim Merits Award, NAFTA/UNCITRAL Tribunal, 26 June 2000, at 102.

investment.[340] Likewise, the Tribunal in *Metalclad* v. *Mexico* described regulatory expropriation as taking place under Article 1110 when imposition of the measure "has the effect of depriving the owner, in whole or in significant part, of the use or reasonably to be expected economic benefit of property even if not necessarily to the obvious benefit of the host State."[341]

294. Another way of describing the level of impairment required under Article 1110 is to use the "merely ephemeral" standard adopted in cases such as *Tippets, Abbett, McCarthy, Stratton v. TAMS-AFFA* and *Wena Hotels*:

> [W]hile assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner has been deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral.[342]

295. The line between legitimate acts of governmental regulation and compensable takings under international law was also described in commentary (g) to Section 712 of the *Third U.S. Restatement on International Law*, as follows:

> A state is responsible as for an expropriation of property under Subsection (1) when it subjects alien property to taxation, regulation, or other action that is confiscatory, or that prevents, unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property or its removal from the state's territory... A state is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation, regulation, forfeiture for crime, or other action of the kind that is

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340 *S.D. Myers, Inc. v. Canada*, NAFTA/UNCITRAL, NAFTA/UNCITRAL Tribunal, First Partial Award (13 November 2000) at 283 & 287.

341 *Metalclad Corp.* v. *Mexico*, Final Award, UNCITRAL Arbitration (2 September 2000), at para. 103; cited by: *CME Czech Republic BV* v *Czech Republic*, Partial Award, UNCITRAL Arbitration (13 September 2001), at para. 606.

342 *Tippets, Abbett, McCarthy, Stratton* v. *TAMS-AFFA Consenting Engineers of Iran et al*., Iran-U.S. Claims Tribunal, Award No. 141-7-2, June 22, 1984, at para. 225; *Wena Hotels Limited* v *Egypt*, Award, ICSID Case No ARB/98/4 (8 December 2000), at para. 99.

> commonly accepted as within the police power of states, if it is not discriminatory....[343]

296. 'Investment" is defined broadly in the NAFTA, and therefore it is defined broadly for purposes of Article 1110. As Professor Loewenfeld observed:

> It seems clear from the cases here excerpted and others that expropriation as governed by the BITs is defined by the deprivation to the investor, not by the gain to the host state. Thus destruction of the investor's property may come within the definition of expropriation if the actions are attributable to the host state, even if the state does not acquire the property in question. Further, intangible rights, such as the right to import or export a given product or to participate in a given industry, may be subject to the constraints on expropriation set out in the BITs. However, a regulation of temporary duration, or a regulation that reduces the profitability of an investment but does not shut it down completely and leaves the investor in control, will generally not be seen as expropriation, even when it gives rise to liability on the part of the host state for violation of national treatment and fair and equitable treatment clauses.[344]

297. Under Article 1139(g), 'investment' includes intangible "property… used for the purpose of economic benefit or other business purposes." As previously shown, other investment treaty tribunals have found that goodwill is an intangible form of property capable of protection as an investment. In industries such as tobacco, goodwill is represented in an investor's ability to establish and profit from the brands upon which its business has been based. When a measure substantially interferes with the intellectual property rights supporting use of the brand, a direct taking has occurred. When a measure substantially interferes with the investor's ability to generate profits from the business venture it has based upon a brand, an indirect taking has occurred. In either case, the goodwill built up in the brand will have been depleted by the measure and the investor's ability to enjoy the income stream previously produced by its investment will have been effectively destroyed.

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343 *Marvin Feldman* v *United Mexican States*, Award, ICSID Case No. ARB(AF)/99/1 (16 December 2002) at 105.

344 Andreas F. Lowenfeld, *International Economic Law* (Oxford, Cambridge: 2002) at 479-480.

298. Recognizing the relationship between modern regulatory takings and the value of geographically delimited markets, the Tribunal in *Pope & Talbot* v *Canada* has observed that effectively depriving an investor of its access to a regional market may constitute an indirect expropriation of the economic value of the enterprise that depends upon such access.[345] The *Pope & Talbot* Tribunal's analysis provides an indication of when and why access to a market should be relevant in determining whether a regulatory taking has occurred. As it explained: "terminology should not mask the fact that the true interests at stake are the Investment's asset base, the value of which is largely dependent on its export business."

299. In summary, indirect or expropriation occurs where an investor is "radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto – such as the income or benefits related to the [investment] or to its exploitation – had ceased to exist. In other words, if due to the actions of the Respondent, the assets involved have lost their value or economic use for their holder and the extent of the loss."[346] As demonstrated in the *TECMED* case:

> … it is understood that the measures adopted by a State, whether regulatory or not, are an indirect de facto expropriation if they are irreversible and permanent and if the assets or rights subject to such measure have been affected in such a way that "…any form of exploitation thereof…" has disappeared; i.e. the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed.134 Under international law, the owner is also deprived of property where the use or enjoyment of benefits related thereto is exacted or interfered with to a similar extent, even where legal ownership over the assets in question is not affected, and so long as the deprivation is not temporary. The government's intention is less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measures; and the form of the deprivation measure is less important than its actual effects.[347]

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345 *Pope & Talbot, Inc.* v. *Canada*, Interim Merits Award, NAFTA/UNCITRAL Tribunal, 26 June 2000, at para. 98.

346 Técnicas Medioambientales, *TECMED S.A. v United Mexican States*, Award, ICSID Case No. ARB/AF/00/2 (29 May 2003), at para. 113.

347 Técnicas Medioambientales, *TECMED S.A. v United Mexican States*, Award, ICSID Case No. ARB/AF/00/2 (29 May 2003), at para. 116.

B. Respondent's Breaches of Article 1110

300. Claimants invested significant capital and other resources into establishing the Seneca and Opal brands in of North Carolina, South Carolina, Oklahoma, Arkansas and Georgia. The goodwill that these investors developed in their brands over the years, as well as the intellectual property rights that underlie them, constitute the 'investment' that has been taken in this case. As explained by the *Sola Tiles* Tribunal:

> Goodwill can best be defined, at least for the purposes of the present case, as that part of a company's value attributable to its business reputation and the relationship it has established with its suppliers and customers.[348]

301. When measures are implemented that prohibit sales and distribution on the basis of one's brand, the value of the enterprise dependent upon use of the now-proscribed brand can be destroyed. This is because the prohibitions obtained under Escrow Statute court actions and maintained under Contraband Laws effectively deter all industry members (i.e. manufacturers, importers, distributors, wholesalers and retailers) from trading in products bearing the trademark of a product deemed to be contraband. Once a tobacco brand is eliminated from a market, it is extremely difficult – if not impossible – to re-establish it again,[349] because consumers and distributors will have lost faith in its quality and its future availability, and because they will have found substitutes immediately after the brand becomes unavailable.[350] As evidenced by the reports of Claimant's experts, but for imposition of the Allocable Share Amendments, Claimants would have been enjoying a steady cash flow and increasing penetration of their brand at the retail level of North Carolina, South Carolina, Oklahoma, Arkansas and Georgia.

[redacted]

348 *Sola Tiles Inc.* v. *Iran*, Partial Award, 14 IRAN-U.S.C.T.R. 223 (1987), at para. 62. For lost profits analysis, see para's. 161-164. See, also: *Asian Agricultural Products* v. *Sri Lanka*, (1996) 4 ICSID Rep. 246 at 292.

349 M. Wesley Stmt. at 10-14; Phillips Stmt. at 14.

350 M. Wesley Stmt. at 10-14.

[redacted]

303. Under the new measures, Claimants have been obliged to raise their prices dramatically in order to meet the new escrow demands from each amended measure. Exempt SPMs – whose brands compete with Claimants in the affected states – know this too. They can now take advantage of their permanent payment exemptions to offer their brands at a price just low enough to eliminate Seneca and Opal from each market. Under the new measures their brands will immediately become more profitable [redacted], with the promise of even greater profits, after Claimants' brands have been eliminated from the market and they are then able to raise their prices further. There is only so much retail shelf space for competing tobacco brands, and wherever Claimants have been forced to raise their prices, the Seneca brand has lost its place on store shelves.[351]

304. The record demonstrates the substantial deprivation that has been suffered by Claimants, as a result of being unable to exploit the goodwill they had established in their brands. The Allocable Share Amendments have rendered their brands useless because they can no longer be offered at a competitive price point – which is an essential element of any brand marketing strategy.

305. As evidenced in the reasons given by state officials for imposition of the Allocable Share Amendments,[352] the measures are aimed at a specific group: NPMs marketing regional value brands. As the Tribunal in *Sempa Energy* v. *Argentina* has noted, a measure that effectively destroys the value of the investment of a particular group, which has either been singled out for harsher treatment or excluded from receiving better treatment,

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351 Phillips Stmt. at 14

352 Claimant's Evidentiary Stmts. Ex. 50.

constitutes an illegal taking under international law, because it is discriminatory in application.[353]

306. The Allocable Share Amendments were clearly not the product of extensive consultation with the stakeholders who would be most affected by them – i.e. NPMs with regional brand strategies such as the Investors. The amendments also reversed an allocation policy that satisfied basic principles of fairness as between competing tobacco enterprises. Claimants, and others like them, should not have been forced to bear the costs of escrow payments made for the benefit of all 46 state governments if they were not marketing their brands in more than a handful of states. That is why the Escrow Statutes included the allocable share release mechanism in the first place. In *Eastern Sugar*, when the Czech Government amended its sugar quota regime to benefit certain manufacturers at the expense of others, in violation of their reasonable expectations to the contrary, such conduct was also found to constitute a breach of the fair and equitable treatment standard, which is prohibited under Article 1110.[354]

307. Before determining whether a measure results in substantial impairment of an investment, however, the principle of territorial sovereignty must be applied. The same is true for its domestic analogue: territorial jurisdiction. This principle applies so as to limit the scope of application for any given measure to the territory of the political body responsible for its imposition, unless the measure explicitly provides otherwise.[355] In its submissions before another NAFTA Tribunal, Respondent has itself recognized presumption against extra-territoriality in international law, going further to add that the same principle is embedded in its own constitutional law. In the United States, absent explicit language to

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[353] *Sempra Energy International* v *Argentina*, Award and partial dissenting opinion, ICSID Case No ARB/02/16 (28 September 2007), at para. 319

[354] *Eastern Sugar B.V. (Netherlands)* v. *Czech Republic*, Partial Award, 27 March 2007, UNCITRAL Arbitration, SCC No. 088/2004, at ¶¶ 313-314, 332 & 335.

[355] See, e.g.: I. Brownlie, *Principles of Public International Law*, 5th ed., (Oxford: 1998), at pp. 105-107 & 113-114; *R. v. Keyn L. R.*, 2 Ex. Div. 63; or *U. S. v. Bowman*, 260 U. S. 94, 98.

the contrary, legislation is not presumed to have effect beyond the jurisdiction of the body that enacted it (territorial or otherwise).[356]

308. This territoriality principle is also reflected in Article 29 of the *Vienna Convention on the Law of Treaties*, which applies the same limits of territorial jurisdiction to treaties. The NAFTA Parties are all federal States, and accordingly they have provided for application of the obligations they have undertaken at the sub-State level of provincial and state governments, particularly under Article 105. As such, the federal level of government answers all claims under NAFTA Chapter 11, even when a state or provincial government is responsible for the measure in question. When a lower level of government imposes a measure, however, the principle of territorial sovereignty applies to the effect that the measure is not presumed to have effect – or to have been intended to have any application – beyond the territorial jurisdiction of the government responsible for it.

309. The amended Escrow Statutes and the Contraband Laws impose economic sanctions on the basis of each MSA state's territorial jurisdiction. No state purports to ban the distribution of a tobacco brand beyond its territorial jurisdiction by means of either measure.[357] Similarly, while the Settling States have wrongfully attempted to extend the personal jurisdiction of their courts to impose obligations on non-residents with no ties to their territory, each state nonetheless purports to be imposing its escrow obligations and penalties solely on the basis of tobacco products sold in its respective territory. Collectively these measures impose what amounts to a nation-wide oligopoly, by imposing identical restrictions on access to each state's territorially delineated marketplace. The only alternative currently provided under these measures is for an enterprise to attempt to join the oligopoly on less favorable terms than the original

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356 Re: *Consolidated Canadian Cattle Cases* [United States], NAFTA/UNCITRAL Tribunal, Submissions of the Respondent: 1 December 2006, at note 35; and 1 May 2007 at pp. 9-11.

357 The issue of whether these measures actually do have extra-territorial effect is one of the issues in Claimants' Federal Court action. Claimants state that the cumulative effect of these measures is to collectively establish a national regulatory scheme that exceeds the jurisdiction of each state under US constitutional law.

members. Clearly the Settling States are acting in common cause, in contravention of US constitutional law, but they are purporting to do so on a state-by-state basis.

310. As described above, before their removal each allocable share mechanism provided incentives for an NPM to restrict marketing and distribution of their brands to a regional market composed of only a handful of states. The commercial activity thus encouraged by the Settling States, working in concert, was dictated by the territorial jurisdiction of each measure. For example, had Claimants recognized an opportunity to extend distribution of the Seneca brand into a neighbouring county in a state adjacent to one in which they were active (e.g. expanding into Kentucky or Virginia), they would have had to be prepared to receive a significantly reduced allocable share rebate. This is because Claimants would have been deemed to intend their products to be sale throughout the entire state, rather than in a small portion of it.

311. In other words, by specific operation of the measures, the Settling States shaped the markets within which Claimants' brand could be economically promoted outside of First Nations territories. In order to assess what has been indirectly taken by amendment of the Escrow Statutes and application of the Contraband Laws thereafter, the Article 1110 analysis should be focused on the territories in which Claimants intended for the Seneca brand to be established, as well as those states in which it had managed to satisfy escrow demands, using cash flow from the allocable share releases (i.e. Tennessee, Louisiana, Kansas and Nebraska).

312. As demonstrated in both the Wilson Report and the Eisenstadt Report, amendments to the Escrow Statutes were designed, and had the effect, of substantially interfering with Claimants' ability to exploit the establishment of their Seneca and Opal brands in North Carolina, South Carolina, Oklahoma, Arkansas and Georgia. As amended, each state's Escrow Statute requires Claimants to raising prices so unsustainably high – just in order to pay the escrow demands – that they can no longer make use of the goodwill they built up in these brands.

313. As amended, the Escrow Statutes effectively destroy the value – and indeed the very utility – of the Seneca brand as a basis for marketing tobacco products in Georgia, North Carolina, South Carolina, Oklahoma and Arkansas. As such, each amended Escrow Statute results in an indirect, uncompensated expropriation of Claimants investment in the territory of each relevant state.

SECTION VI DAMAGES

314. The MSA measures, as originally imposed and enforced collectively by each state government, damaged Claimants' sales on First Nations land. The Amendments later made to those measures also foreclosed on Claimants' ability to profit from sales made beyond reservation territories. Ultimately, these measures provided Claimants with a stark choice: pay millions of dollars into escrow for 25 years, rendering the Seneca brand uncompetitive; or pay even more directly into a fund established by state officials under the MSA – a private litigation settlement agreement to which Claimants were never, nor should ever have been, a party. By wrongfully imposing these measures upon Claimants business activities, Respondent has destroyed the value of their investment in the United States, violating its obligations under the NAFTA and applicable international law.

315. NAFTA Article 1135 provides that when a finding of State responsibility under Part A of Chapter 11 has been established, reparation may be awarded either in monetary damages or restitution, or a combination thereof. This provision reflects the customary international law principle of restitution that reparations must place the wronged party back into the position it would have occupied, but for the act or omission from which the State's responsibility arose. As observed by the PCIJ in the *Chorzów Factory* case:

> [Reparation] must, so far as possible wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear.[358]

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[358] Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland) ("Factory at Chorzów"), Permanent Court of International Justice Proceeding, Merits 1928, P.C.I.J. Series A. No. 17, 21 at 47.

316. The quantum of monetary damages ordered must be "commensurate with the loss, so that the injured party may be made whole."[359] This approach to damages has been codified in Article 35 of the *International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts*, which constitute an authoritative statement on the applicable law of damages for reparation in investment treaty arbitrations. Article 36(2) of the Draft Articles on State Responsibility also affirms: "[the] State is under an obligation to compensate for the damage caused thereby… [and that compensation] … shall cover all financially assessable damage including loss of profits insofar as it is established."

317. And as observed by the Tribunal in *Siemens* v. *Argentina*:

> The key difference between compensation under the *Draft Articles* and the *Factory at Chorzów* case formula, and Article 4(2) of the Treaty is that under the former, compensation must take into account "all financially assessable damage" or "wipe out all the consequences of the illegal act" as opposed to compensation "equivalent to the value of the expropriated investment" under the Treaty. Under customary international law, Siemens is entitled not just to the value of its enterprise as of May 18, 2001, the date of expropriation, but also to any greater value that enterprise has gained up to the date of this Award, plus any consequential damages.[360]

318. As per Article 1131(1) of the NAFTA, the applicable rules of international law in determining the extent of damages in this case can be found in the *Draft Articles on State Responsibility*. In addition, the NAFTA provides explicit direction as to how expropriations should be compensated, under Article 1110(2). Tribunals have thus determined that compensation for any NAFTA breach must place a claimant back into the same position that it would have been 'but for' the occurrence of the international wrongful act that constitutes the breach. Damages can therefore include the present value of the investment as reflected in the cash flows that would have achieved through its operation, but for the breach.[361] The same approach has been followed by ICSID

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359 Lusitania Cases, UNRIAA, vol. VII, at 39.

360 *Siemens AG* v *Argentina*, Award, ICSID Case No ARB/02/8 (06 February 2007), at para. 352.

361 *See* also *S.D. Myers, Inc. v. Canada*, NAFTA/UNCITRAL, NAFTA/UNCITRAL Tribunal, First Partial Award (13 November 2000) at para. 315 "This Tribunal has recognized that the *Chorzow Factory* case (continued…)

tribunals, such as *Amco Asia Corp.* v. *Indonesia*, which also adopted the *Chorzow Factory* case as a precedent for the law of compensation in international claims.[362]

319. NAFTA Article 1116 provides that an investor is entitled to damages for a breach of Chapter 11 without territorial restriction. "To be recoverable, a loss must [only] be linked causally to interference with an investment located in a host state. There is no provision that requires that all of the investor's losses must be sustained within the host state in order to be recoverable. The test is that the loss to the (foreign) investor must be suffered as a result of the interference with its investment in the host state."[363] As indicated by the *S.D. Myers* Tribunal:

> The purpose of virtually any investment in a host state is to produce revenues for the investor in its own state. The investor may recover losses it sustains when, as a proximate cause of a Chapter 11 breach, there is interference with the investment and the financial benefit to the investor is diminished. The Tribunal concludes that compensation should be awarded for the overall economic losses sustained by SDMI that are a proximate result of CANADA's measure, not only those that appear on the balance sheet of its investment.[364]

320. Regardless of which NAFTA provision is breached, full restitution value should be adopted as the standard by which all loss adequately connected to the breach is measured.[365] Full restitution for a breach of international law will normally include compensation for lost profits on the grounds that:

(…continued)

supports the principle that '*compensation should undo the material harm inflicted by a breach of an international obligation*"'.

362 *Amco Asia Corp.* v. *Indonesia*, Merits Award, 1 ICSID Rep. 377, at 500.

363 *S.D. Myers, Inc.* v. *Canada*, Second Partial Merits Award, NAFTA/UNCITRAL Tribunal (21 October 2002) at para. 118.

364 *S.D. Myers, Inc.* v. *Canada*, Second Partial Merits Award, NAFTA/UNCITRAL Tribunal (21 October 2002) at para. 121.

365 *Marvin Feldman* v *United Mexican States*, Award, ICSID Case No. ARB(AF)/99/1 (16 December 2002) at 194; cited by *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1 Decision on Liability, (25 July 2007) at para. 44. See, also: *Petrobart Limited v. Kyrgyz Republic*, Arb. No. 126/2003, Arbitration Institute of the Stockholm Chamber of Commerce, (Energy Charter Treaty), pp. 77-78 (29 March 2005);

> Just compensation implies a complete restitution of the status quo ante, based, not upon future gains of the United States or other powers, but upon the loss of profits of the Norwegian owners as compared with the other owners of similar property.[366]

321. As acknowledged by the Governing Council of the United Nations Compensation Commission:

> In principle, the economic value of a business may include loss of future earnings and profits where they can be ascertained with reasonable certainty. In the case of the loss of businesses and their earning capacity resulting from the invasion and occupation of Kuwait, it can be expected that a number of such businesses can be or could have been rebuilt and resumed. The method of a valuation should therefore be one that focuses on past performance rather than on forecasts and projections into the future. Compensation should be provided if the loss can be ascertained with reasonable certainty based on prior earnings or profits. For example, the loss of any earnings or profits during the relevant time period could be calculated by a multiple of past earnings and profits corresponding to that time period.[367]

322. Although it determined that an expropriation had not occurred in that case, the *S.D. Myers* Tribunal nonetheless determined that the appropriate measure of compensation for markets lost to the investor because of the imposition of a discriminatory measure should reflect all net income streams that would have been generated from the investment. The Tribunal stated:

> The quantification of loss of future profits claims can present special challenges. On the one hand, a claimant who has succeeded on liability must establish the quantum of his claims to the relevant standard of proof; and, to be awarded, the sums in question must be neither speculative nor too remote. On the other hand, fairness to the claimant requires that the court or tribunal should approach the task both realistically and rationally. The challenges become more acute in start up situations where there is little or no relevant track record. The Tribunal has taken due notice of SDMI's successful experience of seizing market opportunities in the USA, but at the same time acknowledges that the Canadian market has certain distinctive features.

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366 Norwegian Shipowners' Claims (Nor. v. U.S.), 1 R.I.A.A. 307 at 338 (Perm. Ct. Arb. 1922). Accordingly the compensation awarded for the seizure of ships under construction in US dockyards by US authorities, and the concordant assumption of the Norwegians' rights in the contracts for their construction, included the high value of shipping contracts in the open market as of the date of requisition, rather than the end of the First World War, when economic circumstances had irrevocably changed.

367 Decision 9, Proposition and Conclusions on Compensation for Business Losses: Types of Damages and Their Valuation; S/AC/.26/1992/9 (March 1992).

> As stated above, the Tribunal has determined that the appropriate primary measure of compensation is the value of SDMI's lost net income stream.[368]

323. The *S.D. Myers* Tribunal also included an award of compound interest in that case. It did so because an award of interest must recognise the fact that the injured party cannot use or invest the amounts of money due, from the date of the illegal act or omission to the date of that a damages award has been satisfied. Otherwise the investor would not receive 'full' reparation, as required under customary international law. Recent practice supports an award that includes compound interest to a victorious claimant, in order to adequately reflect modern economic realities.[369]

A. Damages for the Loss of Off-Reserve Sales in Five State Markets Because of the Allocable Share Amendments

324. Claimants are entitled to receive the full restitution value for that which has been effectively lost to them because of the imposition of the Allocable Share Amendments. In this case, the same essential compensation analysis applies regardless of whether liability is established under Articles 1102, 1105 or 1110. As the Tribunal in *Sempra Energy* observed:

> Although there is some discussion about the appropriate standard applicable in such a situation, several awards of arbitral tribunals dealing with similar treaty clauses have considered that compensation is the appropriate standard of reparation in respect of breaches other than expropriation, particularly if such breaches cause significant disruption to the investment made. In such cases it might be very difficult to distinguish the breach of fair and equitable treatment from indirect expropriation or other forms of taking and it is thus reasonable that the standard of reparation might be the same.[370]

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368 *S.D. Myers, Inc.* v. *Canada*, Second Partial Merits Award, NAFTA/UNCITRAL Tribunal (21 October 2002) at paras. 173-174.

369 *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1 Decision on Liability, (25 July 2007) at para. 55; *MTD* v. *Chile* at para. 251; *Compania del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica,* Case No. ARB/96/1 (February 17, 2000). at para's. 101-106; *Siemens AG* v *Argentina*, Award, ICSID Case No ARB/02/8 (06 February 2007), at para's. 395-400.

370 *Sempra Energy International* v *Argentina*, Award and partial dissenting opinion, ICSID Case No ARB/02/16 (28 September 2007), at para. 403.

325. Claimants have lost their ability to enjoy the increasing revenue streams they had been generating by their investment, which they had been experiencing since 2002, when they established and began promoting their Seneca and Opal brands in five state markets: North Carolina, South Carolina, Oklahoma, Arkansas and Georgia. In order to place Claimants back into the position they would have been in, but for the imposition of the Allocable Share Amendments, they should be awarded damages equivalent to an exemption from the Allocable Share Amendments, which is effectively what they would have been entitled to enjoy had these measures never been imposed upon them.

The costs of impairment suffered by Claimants under the Allocable Share Amendments can be regarded as the value of an exemption withheld from Claimants. The value of an exemption withheld from Claimants may be determined by application of the same formula used by the Settling States to assign exemptions to SPMs in 1999, as applied to the previous two years of performance by Claimants' Seneca and Opal brands in North Carolina, South Carolina, Oklahoma, Arkansas and Georgia (i.e. a 'formula' analysis) under the original escrow statutes. That is to say, an appropriate measure of damages is the value of a volumetric exemption from the Allocable Share Amendments (but not the original escrow statutes). The Wilson Report calculates a range of values for such an exemption. The Wilson Report also calculates a range of values for the loss sustained in this regard by reference to foregone sales as a measure of lost markets.

327. Prior to imposition of the Allocable Share Amendments in each of these markets, Claimants were enjoying significant cash flows from the successful deployment of their Seneca and Opal brands in these states. Had Claimants at least been provided with the same type of exemption enjoyed by the SPMs against whom their brands had been successfully competing, Claimants would still be generating the same kinds of cash flows from sales of their Seneca® and Opal® brands today. This is the standard of compensation owed – to be placed back in the position in which the Claimants would have been but for the breach.

B. Impairment of On-Reserve Sales

328. In addition to the above, Claimants are also entitled to compensation for the manner in which performance of their brands marketed exclusively on First Nations territory has been impaired.

329. Claimants' on-reserve marketing and distribution activities have been increasingly impaired by the enforcement of the amended Escrow Statutes and the Contraband Laws. Tribes and First Nations wholesalers on territories located in various states have either suffered unlawful seizures by state officials, purportedly on the authority of MSA measures, or have chosen to refrain from dealing with Claimants' brands to avoid such misfortune.[371]

330. Claimants have also been forced to defend against enforcement activities targeted directly at on-reserve distribution of their brands, such as the most recent demand letter sent by the Attorney General of California to NWS.[i] They have also been subjected to escrow demands and penalties in respect of sales of their brands in cases where state officials have refused to disclose whether the products in question were originally sold by Claimants on First Nations territories to other First Nations persons and organizations.

331. As Professors Clinton and Fletcher have opined, in the entirety of their expert reports, both under United States Federal Indian Law and under the *Jay Treaty*, Claimants were entitled to expect that none of their business activities would ever be subjected to the Escrow Statutes, the Allocable Share Amendments, the Contraband Laws or any Equity Assessment Legislation. That these measures were ever imposed upon Claimants' investment accordingly constitutes a breach of Article 1105 because Respondent was bound to respect and uphold Claimants' legitimate expectations that the rule of law would properly govern the conduct of state officials, preventing them from seeking to regulate First Nations investment for which they have no legitimate rights to regulate.

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[371] Statement of Professor Matthew Fletcher, at ¶17; A. Montour Stmt. at 22-28.

332. Article 1105 was also breached in this case by the very imposition of the Escrow Statutes, both original and amended. Claimants were forced to make millions of dollars in payments to the Settling States ostensibly to satisfy unspecified, phantom liabilities under Respondent's tort laws. While it would therefore appear that Respondent's officials were never entitled to employ any of these measures against Claimants' business, regardless of where its brands were sold, the Tribunal has determined that Claimants are time-barred from seeking damages in respect of application of the original Escrow Statutes to sales of its brands off-reservation.[372]

333. It is accordingly essential to know exactly what the basis was for each of the demands made of the Investors by any state official under the authority of an original Escrow Statute. Unfortunately, Claimants remain unaware of the full extent to which Respondent's state government officials were including on-reserve sales in their calculation of Claimants' alleged obligations under their original Escrow Statutes. Claimants adopted a practice of requesting that information whenever they learned of an escrow demand made, or default judgment obtained, against them. They requested the same information in discovery in the Federal Court case; and they sought this information again in this arbitration. Although given every opportunity, however, Respondent has failed to produce evidence that would allow Claimants to identify exactly which states have recorded Seneca products sold on-reserve as requiring escrow payments under these measures.

334. Claimants know where their products were originally sold and to whom, both on-reserve and off-reserve. Claimants know the compliance costs they have borne, including escrow payments and penalties paid. Only Respondent knows, however, which of its states have illegally imposed their measures on sales of Claimants' brands on First Nations territories. As such, Claimants submit that all of their compliance costs, save and except for those incurred with respect to Claimants' off-reserve sales in North Carolina, South Carolina, Oklahoma, Arkansas and Georgia, must be compensated by Respondent unless and until

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[372] Decision on Jurisdiction, at ¶ 103.

it reveals exactly which of the states that have imposed their measures on Claimants have failed to exclude all on-reserve sales from their enforcement activities.

[redacted]The Wilson Report also calculates damages sustained as a result of impairments to on-reserve sales under two different discounted cash flow models. [redacted]

C. Professional Fees

336. In addition to the foregoing, claimants have spent well in excess of $2 million over the last 6 or more years contesting the wrongful application of the measures to their Investment. These costs include, but are not limited to, fees for attorneys and expert witnesses in connection with various litigated matters. These damages continue to accrue on a daily basis and Claimants shall make a fuller accounting of these damages at the time of the hearing.

PART III:
RELIEF REQUESTED

337. As set out above, Claimants seek the following:

i. Damages of not less than US$175 million for imposition of the Allocable Share Amendments contrary to the NAFTA;

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

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

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

v. Such further relief as counsel may advise and that the Tribunal deems appropriate.

All of which is respectfully submitted.

All of which is respectfully submitted.

Dated: July 10, 2008

By: _____

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Table 1-1

Chronology of Claimants Investments in the U.S.

Date	Jerry Montour and Kenneth Hill	Arthur Montour	Grand River
Pre – 1990	Involved in wholesale and retail distribution of proprietary and non-proprietary brands on Indian land in Canada and U.S. as sole proprietors; contract with manufacturer headquartered in Virginia to manufacture proprietary brands	Construction worker for company owned by Lawrence Skidders	
1990	Five partners invested a total $1,000,000 into a venture with Lawrence Skidders to construct a cigarette manufacturing facility on a Mohawk Reservation in New York; Racket Pointe begins manufacture of proprietary brands that are distributed on Indian land in U.S.	Becomes sales agent for Racket Pointe facility and investors' proprietary brands	
January 1991	Lawrence Skidders dies and parties continue business with Skidders Estate	Continues as sales agent for Racket Pointe under management of Skidders wife	
1993	Investors terminate relationship with Skidders Estate	Continues distribution of proprietary and non-proprietary brands on Indian land in U.S. as sole proprietor	
1994	Invest $100,000 each along with 8 other investors to form Grand River Enterprises partnership	Continues distribution of proprietary and non-proprietary brands on Indian land in U.S. as sole proprietor	Formed as partnership to manufacture proprietary brands
1996	Enter into joint venture with Omaha Tribe of Nebraska to construct and operate cigarette manufacturing facility	Enters into agreement with Jerry Montour and Kenneth Hill to be exclusive distributor in	Converted from partnership to corporation

Date	Jerry Montour and Kenneth Hill	Arthur Montour	Grand River
		U.S.	
1997 -1998	Jerry Montour moves to Nebraska to oversee venture and initial operations; guarantees payment of refurbishing costs for venture's machinery; Kenneth Hill remains in Canada to oversee Grand River	Continues to distribute tobacco products supplied by Omaha Tribe venture and other Native American manufacturers	Continues manufacturing operations in Canada
1999	Enter into venture with Arthur Montour and Ross John to manufacture and distribute proprietary Seneca ® brand on Indian land in U.S.; causes Grand River to extend long term credit on receivables for startup of venture	Incorporates Native Tobacco Direct and obtains U.S. ATF tobacco importer permit; obtains federal trademark for Seneca® brand	Enters into exclusive manufacturing and trademark cross-licensing agreement with Arthur Montour and Native Tobacco Direct
2000	Terminate relationship with Ross John and assist Arthur Montour with financing buyout of Ross John from venture; continue to receive compensation from venture as shareholder of Grand River and consultant to Native Tobacco Direct	Buys out Ross John from venture and establishes Native Wholesale Supply to continue venture	Continues venture with Native Wholesale Supply and subordinates right to receivables
2001-2004	Continues venture relationship with Arthur Montour; agrees with Arthur Montour to license use of Seneca® trademark to Tobaccoville USA, Inc. for sales off of Indian land in U.S.; causes Opal® trademark to be filed by Grand River; continue receiving compensation from venture as shareholder of Grand River and consultant to Native Wholesale	Continues distribution of Seneca® brand on Indian land in the U.S.; agrees to license brand for sales off Indian land in return for payment of license fee	Begins production of Seneca® and Opal® brands for Tobaccoville and production of non-proprietary brands for other importers on limited basis
2004 – Present	Experience increasing harm caused by amended measures that Respondent seeks to apply to Seneca® brand sales on and off Indian land; direct Grand River to cease production of non-proprietary brands	License fees substantially reduced by amended measures' effect on Seneca® brand sales off reservation; harmed by Respondent's	Adoption of amended measures causes substantial reduction in production and sales of Seneca® and Opal® brands for

Date	Jerry Montour and Kenneth Hill	Arthur Montour	Grand River
		application of measures on Indian land	Native Wholesale Supply and Tobaccoville

CHRONOLOGY OF STATES MEASURES

Date	Conduct of Respondent's States	Conduct of Respondent
1994	States' private trial lawyers obtain stolen documents from Brown & Williamson Tobacco Co.; begin filing lawsuits against major tobacco companies	Respondent's Congress launches investigation against major tobacco companies based on information revealed in stolen documents
1994-1996	Additional States represented principally by personal injury lawyers and former partners or friends of Attorneys General file lawsuits against major tobacco companies	Mississippi trial lawyer and brother of Senate Majority Leader requests President Clinton's participation in lawsuits against tobacco companies
1997	Mississippi settles lawsuit with tobacco companies; remaining states seek approval of Federal Proposal to settle all litigation; additional States settle lawsuits on individual basis	Federal Proposal presented to Congress for review and approval; Respondent's Federal Trade Commission considers Federal Proposal to be anticompetitive
April 1998		Federal Proposal ultimately rejected by Congress
May 1998	Remaining States continue settlement negotiations despite rejection by Federal Government; major tobacco companies demand protection from competition from smaller manufacturers as condition to settlement	
November 1998	Master Settlement Agreement entered into by major tobacco companies and 46 Settling States and 6 U.S. territories	
1999	States' private attorneys negotiate with select group of manufacturers to join MSA within 90 days to receive payment exemptions under MSA; States are briefed on inapplicability of Escrow Statutes to foreign manufacturers and Indian land; States begin to adopt Escrow Statutes	
2001	States begin notifying Claimants regarding Escrow Statute requirements	

Date	Conduct of Respondent's States	Conduct of Respondent
2002	State representatives admit that decrease in MSA payments not due to unfair advantage of NPMs but, rather, unprecedented price increases of Participating Manufactures; States and MSA's Participating Manufacturers take part in non-public meetings and communications relating to (i) enforcement of Escrow Statutes against NPMs; (ii) adoption of Contraband Laws; and (iii) possibility of terminating refunds so as to increase burdens on NPM under Escrow Statutes; Participating Manufacturers' market share decreases from 98% (pre-MSA) to 92%; States begin filing lawsuits against Claimants under Escrow Statutes	
2002-2004	State representatives circulate memo saying that States must reduce NPM sales because of their effect and MSA payments; Participating Manufacturers and States draft Contraband Laws and Allocable Share Amendment to Escrow Statute; Attorneys General enlist aid of Participating Manufacturers and their lobbyists to lobby State Legislatures to pass Contraband Laws and Allocable Share Amendment; NAAG slide show shows dramatic decline in NPM sales where Allocable Share Amendment adopted	
2004 – present	All Settling States (except Missouri) adopt Contraband Laws and Allocable Share Amendment; some States adopt NPM tax legislation, which imposes fee on NPMs in addition to escrow payment requirements.	