

NAFTA/UNCITRAL ARBITRATION RULES PROCEEDING

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 In the Matter of Arbitration :
 Between: :
 :
 GRAND RIVER ENTERPRISES SIX NATIONS LTD., :
 et al., :
 :
 Claimants/Investors, :
 :
 and :
 :
 UNITED STATES OF AMERICA, :
 :
 Respondent/Party. :
 :
 - - - - - x Volume 2

HEARING ON THE MERITS

Tuesday, February 2, 2010

The World Bank
 1818 H Street, N.W.
 Conference Room MC 13-121
 Washington, D.C.

The hearing in the above-entitled matter
 came on, pursuant to notice, at 9:06 a.m. before:

- MR. FALI S. NARIMAN, President
- PROF. JAMES ANAYA, Arbitrator
- MR. JOHN R. CROOK, Arbitrator

Also Present:

MS. KATIA YANNACA-SMALL,
Secretary to the Tribunal

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1 P R O C E E D I N G S
2 PRESIDENT NARIMAN: Shall we begin?
3 MICHAEL G. HERING, RESPONDENT'S WITNESS, CONTINUED
4 PRESIDENT NARIMAN: Mr. Luddy, the witness
5 is yours.
6 MR. LUDDY: Thank you, Mr. Chairman.
7 I'm going to have a few more--
8 PRESIDENT NARIMAN: Just one more minute.
9 Sorry to interrupt.
10 There is an administrative announcement to
11 be made by Ms. Katia.
12 SECRETARY YANNACA-SMALL: Yes, good
13 morning.
14 Yesterday, Mexico asked for the transcript,
15 to have access to the transcripts of the hearing,
16 and the parties in principle agreed on the condition
17 of confidentiality of the contents of the
18 transcript, and we would like to have this on the
19 record.
20 MR. LUDDY: No objection.
21 PRESIDENT NARIMAN: Is that all right?
22 MR. FELDMAN: That's fine.

09:06:48 1 PRESIDENT NARIMAN: Yes, please.
2 MR. LUDDY: Here is what I think is
3 the--going to be the schedule this morning,
4 Mr. Chairman, so we're all on the same page.
5 I have a few more questions for Mr. Eckhart
6 that Mr. Violi is going to
7 have--Mr. Hering--Mr. Violi is going to have a few
8 questions for Mr. Hering. We will conclude him.
9 At that point, Mr. Weiler is going to come
10 back on and present the portion of his opening that
11 was not--that we didn't reach yesterday, and then I
12 believe the State Department is going to question
13 Mr. Wilson, who is our damages expert, and that will
14 bring us probably through the morning, and then this
15 afternoon we will deal with when we get there.
16 PRESIDENT NARIMAN: Okay. Let's go.
17 CONTINUED CROSS-EXAMINATION
18 BY MR. LUDDY:
19 Q. Mr. Hering, could I ask you to go to
20 Exhibit 10, please.
21 I'm sorry if I called you Mr. Eckhart.
22 PRESIDENT NARIMAN: What's that?

09:08:05 1 MR. LUDDY: I was apologizing to Michael
2 for calling him Mr. Eckhart a while ago.
3 BY MR. LUDDY:
4 Q. Have you seen this document before,
5 Mr. Hering?
6 A. Only in relation to this proceeding. It's
7 well before I joined NAAG.
8 Q. When did you join?
9 A. I believe it was around June of--is it June
10 of '02, I think?
11 Q. June '02, okay.
12 Let's look at the last page of this
13 document.
14 Who were the signatories to this document?
15 I will read them off and then I'll give you
16 a question on them.
17 Liggett Group, Commonwealth Brands, Inc.,
18 The Medallion Company, Inc., King Marketing--King
19 Maker Marketing, Lignum-2, Inc., and Top Tobacco
20 L.P.
21 Do you see that?
22 A. Yes.

09:09:22 1 Q. And what class of manufacturers are all of
2 those entities under the MSA?

3 A. These are each subsequent Participating
4 Manufacturers or SPMs, and they are also SPMs that
5 joined at the beginning--that is, within the first
6 90 days--so, they are grandfathered NPMs.

7 Q. They each have a grandfather share?

8 A. That is correct.

9 Q. Now this, the first paragraph, records a
10 meeting between the Attorneys General and these
11 manufacturers and perhaps other SPMs recently in
12 Washington.

13 I recognize you weren't a part--associated
14 with NAAG at the time, but over the course of your
15 involvement with NAAG, does NAAG meet periodically
16 with SPMs?

17 A. Yes. Actually we meet with all the
18 Participating Manufacturers. The Master Settlement
19 Agreement calls for two types of meetings to be held
20 per the terms of the MSA. One of these meetings is
21 the so-called "industry meeting" which is a meeting
22 between the signatories to the MSA; that is, the

09:11:54 1 A. I haven't read it.

2 Q. You could take a minute to read it if you
3 want.

4 A. I haven't read the letter, so...

5 Q. Go ahead.

6 (Witness reviews document.)

7 A. No, I do not.

8 Q. Okay.

9 And when you met with the SPM--it's not
10 your suggestion to the Tribunal, is it, Mr. Hering,
11 that the SPMs or the exempt SPMs care whether or not
12 the states do things that are in the interests of
13 the public health, is it?

14 A. Well, I don't speak for the SPMs, but I
15 have heard from time to time them talk about the
16 public health and suggest that certain things should
17 be done not only for the same reasons, reasons along
18 the lines of this letter, but also for the public
19 health perhaps in an effort to persuade us.

20 Q. In this letter, though, they're trying to
21 give you his help on how to throttle NPM competition
22 through the model act, aren't they?

09:10:45 1 Settling States on the one hand, and the
2 Participating Manufacturers on the other hand, and
3 there are two industry meetings each year. Most
4 recently, we have held them telephonically, but in
5 past years they have from time to time been in
6 person.

7 And I do not know, but I would--it's really
8 a guess that this was an industry meeting since it
9 mentions other Participating Manufacturers.

10 The other sort of meeting that we have is
11 what is known as a triennial meeting; and, as the
12 name suggests, it's held once every three years, and
13 this is a meetings that held with a specific focus
14 on issues regarding public health. That meeting is
15 often attended by not only the Participating
16 Manufacturers in the states, but a variety of
17 experts and other interested parties on tobacco and
18 public health and the effects of the MSA. It's
19 fairly broad ranging.

20 Q. Yeah.

21 Do you see you any reference to public
22 health concerns in this letter?

09:14:37 1 A. Well, no, I wouldn't characterize--

2 MR. FELDMAN: Mr. Hering is not here to
3 testify on behalf of the SPMs.

4 MR. LUDDY: I wasn't asking him a question
5 in that regard, sir.

6 BY MR. LUDDY:

7 Q. Go ahead.

8 A. I wouldn't characterize it that way,
9 certainly.

10 Q. Let's use your language. I will read it to
11 you. The fourth paragraph on the first page, second
12 line: "It is imperative that the states engage in
13 prompt and vigorous enforcement of the model act--"
14 And the model act is the escrow act; correct?

15 A. That is correct.

16 Q. --"the Model Act in order to prevent NPMs
17 from continuing to evade their obligations to make
18 appropriate escrow statements."

19 And then if you look on Page 3, they make a
20 number of suggestions that NAAG undertake that all
21 of which would make more difficult for the NPMs to
22 compete.

09:15:33 1 Isn't that true, sir?

2 A. No, not at all. What those suggestions
3 would do is make it more difficult for the NPMs to
4 evade their responsibilities under the model acts.
5 That is State law. That is why I would object to
6 your characterization of it as throttling the NPMs.
7 What we are talking about here is simply
8 dealing with the NPMs that had been and, in some
9 cases, continued to be evading the requirements of
10 State law.

11 As I explained yesterday, one of the issues
12 that we faced in the early years of the MSA was
13 scofflaw NPMs, NPMs that simply made no effort, not
14 even a token gesture towards following the
15 requirements of the various state Escrow Statutes
16 which are State law.

17 Q. Look at number six, "Elimination or
18 modification of the requirement that escrow
19 liability be limited to payments such NPM would make
20 as a Participating Manufacturer."
21 What is that a reference to, sir? Is that
22 the type of suggestion that ultimately led to

09:17:55 1 as important an issue at that time perhaps, and that
2 was, to some degree, speculation on my part, since I
3 wasn't there and I did not draft the letter.

4 Q. I will read your testimony on that. I
5 believe it was: "I'm sorry, this letter does not
6 highlight the allocable share because it may not
7 have been kind of a front-burner issue at that
8 time."

9 A. Yes.

10 Q. But in June of 2001, 10 months earlier, it
11 was already a front issue burner for the SPMs, and
12 they included it in a letter to Attorney General
13 Edmondson.

14 A. For the SPMs.

15 Q. Well, they wrote to Mr. Edmondson in his
16 capacity as Chair of the Tobacco Committee; correct?
17 The same position Mr. Sorrell when he wrote the
18 letter 10 months later; correct?

19 A. Correct.

20 Q. So, the issue was an issue before the
21 Tobacco Committee far before Mr. Sorrell wrote a
22 letter 10 months later claiming that the rise in NPM

09:16:47 1 allocable share repeal?

2 A. I don't know. It looks like a reference to
3 the Allocable Share Release.

4 Q. Okay. Now, the date of this letter is
5 June 18th of 2001.

6 Do you remember when we were talking
7 yesterday about the letter from Attorney General
8 Sorrell of April 2002, where he said that the reason
9 that NPM market share had risen so much was because
10 the OPMs had raised their prices enormously to
11 capture additional profit margin? Do you recall
12 that discussion?

13 A. Yes.

14 Q. And at the time yesterday you mentioned
15 that the reason that may have been different from
16 the explanation given subsequently by NAAG as a
17 reason for the allocable share appeal was that maybe
18 Mr. Sorrell at that time wasn't really aware of the
19 possibility of allocable share repeal or even
20 Allocable Share Release; correct?

21 A. Not exactly what I think I said, and I'm
22 sure the transcript will reflect, is that it wasn't

09:19:00 1 market share was attributable to only the OPMs'
2 decision to raise prices and grab profit margin;
3 correct?

4 A. That is apparently the case, but I
5 don't--and you read my transcript, but--

6 MR. FELDMAN: Counsel, again, this document
7 predates Mr. Hering's--

8 MR. LUDDY: Do you have an objection,
9 Counsel?

10 MR. FELDMAN: Yes, I do.

11 MR. LUDDY: Direct it to the Tribunal,
12 please.

13 PRESIDENT NARIMAN: The point is,
14 Mr. Feldman, that he's answering the question
15 because if he says that I don't know anything about
16 it, that would be perfectly all right, but he
17 volunteers to answer it, so he's entitled to ask
18 him.

19 THE WITNESS: I was simply going to repeat
20 what I said yesterday, that calling it not a
21 front-burner issue, let me elaborate on that.
22 It wasn't until in my experience in the

09:19:52 1 later years that the SPMs--I'm sorry, the
2 NPMs--began to fully exploit the allocable share
3 loophole.
4 As I said, I think, yesterday, it took some
5 time for the SPMs to, number one, discover this and
6 then to exploit it, and I don't think I said
7 yesterday that it wasn't an issue at all prior to
8 the letter to Governor Glendening. It, as I said,
9 was perhaps was not the front-burner issue that it
10 became.
11 BY MR. LUDDY:
12 Q. Now, in Item 5 of that same bullet point
13 list, it says, "allow third party cause of action to
14 enforce the Act."
15 Now, there this is the exempt SPM
16 suggesting to NAAG that they should be given a
17 private right of action so that they themselves can
18 go sue for injunctive relief against NPMs; correct?
19 A. It appears to be so.
20 Q. Now, these are exempt SPMs who themselves
21 have an advantage under the payment schemes set out
22 in the MSA; correct?

09:22:03 1 Q. And you don't dispute that statement, do
2 you, sir?
3 A. No.
4 Q. Above the bullet points--
5 A. Okay--well, let me, if I could go back for
6 just a moment, let me say no, but--and I'm not sure
7 this came up yesterday, so I will just say it now,
8 and I think you will get more into this with
9 Professor Gruber's testimony. I'd just like to
10 explain that the advantage is that they do not pay
11 for any sales up to their grandfathered share; they
12 make no payment under the MSA. Once they reach
13 their grandfathered share limit, they make the same
14 payment on every carton of cigarettes after that
15 grandfathered share that any other SPM would make.
16 And, as I said yesterday, 62--in 2008,
17 about 62--I believe it was 62 percent of the sales
18 made by all of the SPMs were made either by
19 nongrandfathered SPMs or grandfathered SPMs above
20 their grandfathered share, in which case they're
21 making the same marginal payment that everybody else
22 does.

09:21:10 1 A. These are SPMs that have grandfathered
2 shares.
3 Q. And they have an advantage because of that
4 grandfathered share; correct?
5 A. They do not make payments on their
6 cigarettes up to their grandfathered share.
7 Q. You're not going to use the term
8 "advantage"?
9 A. Yes, it's an advantage for those sales.
10 Q. In fact, NAAG, and the Attorney General of
11 Kentucky alleged in the brief that Mr. Violi
12 displayed for the Tribunal yesterday on the screen,
13 NAAG saying that exempt SPMs have an advantage in
14 the marketplace because of their grandfathered
15 share; correct?
16 A. That's correct.
17 Q. And you have seen the Liggett 10(k) where
18 Liggett has said for its Investors and the SEC that
19 they have a sustainable cost advantage against their
20 competition because of the exempt market share;
21 isn't that correct?
22 A. I have seen that, yes.

09:23:12 1 Q. So, how does the--how does the SPM--I think
2 back in the period of '06 or '07, SPM--exempt SPMs
3 in the aggregate were selling volume about twice the
4 amount of their exempt SPM share. Is that fair?
5 A. It's a little more than twice I think.
6 Q. A little bit more than twice, all right.
7 Which means if they had an exempt share of
8 a million sticks and they sold 2 million sticks,
9 that would mean that they were on a per-stick basis
10 paying about half what an NPM would have to pay on a
11 per-stick basis; correct?
12 A. Well, what you are focusing on is the
13 average cost of a grandfathered SPM.
14 Q. I am, and that's what I said, per-stick
15 basis. That is true, isn't it?
16 A. Correct. It is true, and again I think
17 this will come up in Dr. Gruber's testimony; in our
18 opinion, the relevant question is what the marginal
19 cost is.
20 Q. Are you competent to speak to that issue as
21 an economist?
22 A. I'll leave it to Dr. Gruber.

09:24:26 1 Q. Thank you.
 2 Let's look at the fourth paragraph on
 3 Page 3 of the Edmon--the letter to Edmondson. It
 4 reads as follows: "The SPMs also object to the
 5 practice of allowing an NPM to execute the agreement
 6 and list only a single brand of cigarettes. These
 7 new limited SPMs can hold themselves out as
 8 Participating Manufacturers while marketing NPM
 9 brands."
 10 Do you see that?
 11 A. I do.
 12 Q. Now, that seems to suggest that the
 13 SPMs--that the SPMs at least perceive a marketing
 14 advantage as SPMs over NPMs; is that correct?
 15 A. Honestly, I don't know what they're talking
 16 about there.
 17 Q. Could you look at CD--Claimants' Core
 18 Document Number 45 and specifically the last three
 19 pages of that. It's a NAAG memo titled "Why Join
 20 the Tobacco Master Settlement Agreement?"
 21 Do you see that?
 22 A. Yes, I do.

09:27:19 1 that--
 2 PRESIDENT NARIMAN: I didn't see it.
 3 MR. LUDDY: Bottom right-hand corner, very
 4 small font, Mr. Chairman.
 5 BY MR. LUDDY:
 6 Q. Now, we were talking about--I had asked you
 7 whether or not the comment in the letter to
 8 Edmondson suggested that the SPMs perceived a
 9 marketing advantage over NPMs, and your response was
 10 you didn't know what they were talking about. Can
 11 you look at Page 2 under the heading Initial or
 12 Additional Considerations. Can you read the first
 13 sentence.
 14 A. Wait, wait.
 15 Q. Can you read the first sentence first.
 16 A. Could you go back to the Edmondson because
 17 when I said I didn't know what they were talking
 18 about, your question wasn't simply about a marketing
 19 advantage. They had a specific--do you recall what
 20 that was? Was it 12, 10? Because when you said
 21 that, they were talking specifically about--
 22 Q. Holding themselves out as Participating

09:26:08 1 Q. Okay, let's look at Page--
 2 PRESIDENT NARIMAN: Just one moment. 45?
 3 I have--
 4 MR. LUDDY: I'm sorry, it's a rebuttal
 5 report of Dr. Eisenstadt, and the last three pages--
 6 PRESIDENT NARIMAN: That's what you're
 7 asking about?
 8 MR. LUDDY: Correct. Thank you.
 9 ARBITRATOR CROOK: Mr. Luddy, could you
 10 indicate the date of this.
 11 MR. LUDDY: I can't, but from context, I
 12 would, and frankly I'll also defer to Mr. Hering on
 13 this, by context I am--no, that was the report.
 14 BY MR. LUDDY:
 15 Q. Michael, can you discern from context the
 16 date? And can I suggest that you guys date your
 17 memos?
 18 I have a date stamp in the bottom
 19 right-hand corner that looks like a revision date of
 20 12/15/03.
 21 A. I was going to say that I saw that date. I
 22 don't know whether that was our date or a date

09:28:30 1 Manufacturers.
 2 A. Well, no, they said the practice of
 3 allowing an NPM to execute the agreement and list
 4 only a single brand of cigarettes, these new,
 5 "limited SPMs can hold themselves out as
 6 Participating Manufacturers while marketing NPM
 7 brands."
 8 I don't know what they're talking about
 9 there. I don't know what practice that is.
 10 Q. Okay. Can you now read the first
 11 question--the first sentence of--under additional
 12 considerations.
 13 A. I'm sorry, where are we on this document?
 14 Q. Page 2, additional considerations.
 15 (Question off microphone.)
 16 A. SPMs have the marketing advantage over
 17 NPMs.
 18 Q. Okay. And you agree with that, don't you?
 19 Well, it's a NAAG document.
 20 A. It is a NAAG document. I didn't write this
 21 one.
 22 I would like to--yes, I would agree with it

09:29:30 1 in the context in which this is written, which is
2 that, again, this appears to be from late '03. At
3 that time we had a great number of, as I've
4 described them, scofflaw NPMs, NPMs that sold for a
5 year, oftentimes more than a year; they could sell
6 for 15 months, even two years, without making escrow
7 deposits because it took some--the annual escrow
8 deposits were made on April 15th of the following
9 year. So, you could sell for a year then default on
10 April 15th to the following year. Then it would
11 take some time for the state to bring an action
12 against the company in question, obtain an
13 injunction, et cetera, the company would go out of
14 business.

15 And typically some of these companies would
16 start up the next day as a new company.

17 What this paragraph says is that, "SPMs
18 that have complied with the MSA can provide
19 assurance to distributors, retailers, and others
20 that it is part of the MSA. Some wholesalers and
21 distributors have advised they do not wish to deal
22 with NPMs due to compliance concerns and potential

09:31:53 1 MSA, some states sued in addition to the
2 manufacturers of the cigarettes. Some states
3 brought actions against wholesalers and included
4 them in the actions.

5 Potentially, a wholesaler by selling
6 cigarettes that are not those of a Participating
7 Manufacturer under the MSA, potentially they open
8 themselves up to risk.

9 Q. Can you look at your testimony from your
10 appearance before the--

11 A. Nevada?

12 Q. Nevada.

13 This is one of the two documents that I
14 handed up yesterday that was not in the Core
15 Documents, Minutes of Meeting of the Assembly
16 Committee on Commerce and Labor.

17 MR. LUDDY: This is, for purposes of the
18 record--

19 (Question off microphone.)

20 MR. LUDDY: I do.

21 For the purposes of the record, it is
22 Appendix 181 to the Legal Authorities that

09:30:47 1 risk involved."

2 What this is talking about is essentially
3 the idea that when the SPMs--I'm sorry, when the
4 NPMs default on their escrow obligations, an
5 injunction is entered against them. They are no
6 longer legal for sale in a particular state, and at
7 that point the retailer or wholesaler is left
8 holding a whole bunch of cigarettes that it can't
9 legally sell, cigarettes that in some states may be
10 subject to seizure, et cetera, although I think this
11 is before many states had such statutes.

12 There are retailers and wholesalers that
13 don't want to deal with that possibility, and that
14 is the marketing advantage that this document is
15 referring to.

16 Q. Well, it also refers to an advantage
17 because the wholesalers have a release when they're
18 dealing with NPMs; correct? That has nothing to do
19 with the issue that you're talking about.

20 A. That is correct.

21 A release of liability. Under the cases
22 that were originally brought that resulted in the

09:33:05 1 accompanied the Counter-Memorial of the Respondents.

2 (Comments off microphone.)

3 MR. LUDDY: Just one?

4 ARBITRATOR CROOK: And give one to the
5 Secretary.

6 (Comments off the microphone.)

7 MR. LUDDY: I don't have additional copies
8 now. I handed a bunch out yesterday, but they're
9 gone. I will get a copy at the break for the
10 Secretary.

11 BY MR. LUDDY:

12 Q. Look at Page 13, Page 13.

13 And we have heard you refer a number of
14 times to scofflaws. And I will read this particular
15 here. It's quote, Page 13, first full paragraph,
16 "Turning back to the actual legislation, the first
17 part of the legislation is meant to deal with
18 scofflaws, the companies that do not abide by the
19 bill that I just described."

20 PRESIDENT NARIMAN: Where is this?

21 MR. LUDDY: Page 13, first full paragraph.
22 Or continued.

09:35:07 1 THE WITNESS: Actually, it's not the right
2 name.
3 BY MR. LUDDY:
4 Q. Mr. Hering's brother.
5 A. It's not. He's kidding. It's meant to be
6 me. They got the name wrong.
7 Q. And then in the next paragraph it begins,
8 "When it comes to chasing these companies down," we
9 are talking about companies that are foreign.
10 Correct?
11 A. It says often foreign.
12 Q. That are often foreign, I'm sorry.
13 And you're calling these companies that are
14 foreign, to use your term, that don't pay the escrow
15 bills scofflaws; right?
16 A. That is correct. They are among them.
17 Some of them were domestic as well.
18 Q. Now, if you could look at Core Document
19 Number 9, Claimants' Core Documents Number 9--Core
20 Document Number 9--this was a model NPM statute,
21 frequently asked questions that NAAG distributed.
22 That looks like there is a typed line on it, looks

09:37:56 1 have known themselves, that they could not require
2 companies over whom they do not have personal
3 jurisdiction to make escrow payments; correct?
4 A. Well, they could require. They had no
5 effective enforcement mechanism.
6 Q. That's not quite what this says.
7 PRESIDENT NARIMAN: That's not the
8 question. Just please be careful. Answer the
9 question directly.
10 THE WITNESS: Well, I'm differing with his
11 description of what this says because I think that
12 what this is meaning that because of a lack of
13 personal jurisdiction, there is no ability to
14 collect the escrow.
15 The statute still makes the manufacturer
16 responsible. It simply means that the states have
17 no ability to collect.
18 Q. Let me read it for you again: "If the
19 manufacturer is out of state, we may not have
20 jurisdiction over the company and may not be able to
21 require it to make escrow payments." That's
22 different from what you just said, isn't it, sir?

09:36:48 1 like New York got it back in 1999, which would have
2 been at about the time of the initial Escrow
3 Statutes; right?
4 A. Yes.
5 Q. Or close to it.
6 A. Yes.
7 Q. Look on Page 13, Question 39(b), and I will
8 read it. It's the Q&A on this. And again, I will
9 read it. "If the manufacturer is out of state, we
10 may not have jurisdiction over the company and may
11 not be able to require it to make escrow payments.
12 Likewise, if an importer is out of state and sells
13 imported product through an out of state
14 intermediary, e.g., an offshore corporation, to an
15 out of state wholesaler, we may not have
16 jurisdiction over the importer and could not require
17 it to make escrow payments.
18 "ANSWER: Correct."
19 Do you see that?
20 A. Yes, I do.
21 Q. So, as early as 1999, your constituent
22 Attorneys General were on notice and knew or should

09:39:01 1 Is it different, or not?
2 A. I don't know. I would have to have it read
3 back.
4 Q. Read it back, please.
5 A. Well, let me just--let me just try to
6 clarify what I'm saying. I don't disagree with you
7 regarding that this appears to be addressing the
8 issue of lack of personal jurisdiction in certain
9 circumstances. Certainly not for every foreign
10 manufacturer, but for some of them who do not meet
11 the standards of personal jurisdiction.
12 What I suppose--maybe I'm jumping to is the
13 conclusion, and maybe you're not suggesting this, so
14 I apologize if you're not, that that means that the
15 statute then holds somebody else responsible.
16 Q. There is a central point here, though, and
17 that is under our system, states and the Attorneys
18 General of those states, there are limitations on
19 their powers to require people beyond their
20 jurisdiction to do things, aren't there?
21 A. Yes.
22 Q. Okay. And this is one of the examples, was

09:40:04 1 pointed out here in 1999 to your Attorneys General:
 2 You don't have the power to require someone over
 3 whom you do not have personal jurisdiction to make
 4 escrow payments--
 5 A. Yes.
 6 Q. --period; correct? Right?
 7 A. Yes.
 8 Q. Thank you.
 9 PRESIDENT NARIMAN: One minute. So, this
 10 is a correct--the answer which reads correct,
 11 according to you, is correct.
 12 THE WITNESS: Yes.
 13 PRESIDENT NARIMAN: There is no ambiguity
 14 about it?
 15 MR. FELDMAN: I object to Mr. Luddy's
 16 characterization of the document in that last
 17 statement.
 18 PRESIDENT NARIMAN: I'm asking him. I want
 19 to know.
 20 THE WITNESS: Yes, President Nariman, yes,
 21 I was trying to provide context.
 22 PRESIDENT NARIMAN: That's all right. But

09:41:48 1 what they're not doing because they're not obliged
 2 to make the payments, what they're not doing is
 3 cooperating with NAAG's efforts to protect the
 4 profit margins of the OPMs; isn't that true, sir?
 5 A. Now, well, here is where we depart because
 6 I will not agree with your statement that we do not
 7 have jurisdiction over any foreign Tobacco Product
 8 Manufacturer. There are circumstances where the
 9 states will have jurisdiction, and there are
 10 circumstances where they do not. It's a question of
 11 whether they meet the standards for personal
 12 jurisdiction.
 13 Q. Has South Dakota made a determination as to
 14 whether that state has jurisdiction over GRE?
 15 A. Yes.
 16 Q. And what was that determination?
 17 A. South Dakota determined that it did not
 18 have the jurisdiction over GRE.
 19 Q. Wisconsin, has that state made a
 20 determination as to whether it has jurisdiction?
 21 A. I don't know.
 22 Q. How about California? Has California

09:40:45 1 it's correct otherwise.
 2 THE WITNESS: In certain circumstance, the
 3 states may not have personal jurisdiction and
 4 therefore may not have an ability to enforce, that's
 5 correct, yes.
 6 BY MR. LUDDY:
 7 Q. Which is again different from what we just
 8 agreed to. It's not ability to enforce. It's the
 9 ability to require them to do it. There is a
 10 difference, and you've made that distinction, have
 11 you not, Mr. Hering?
 12 A. Require. I'm trying to think about the
 13 difference between require and ability. I'm not
 14 sure how much of a difference there is, so I will
 15 agree with you.
 16 Q. Well, let's go back and look at your
 17 statement where you're calling these foreign
 18 companies over whom the states have no jurisdiction,
 19 you're calling them--for the past day and a half
 20 here you have been calling them scofflaws, and in an
 21 open hearing in Nevada you're calling them scofflaws
 22 for not making these escrow payments when, in fact,

09:42:41 1 recently made a determination over whether
 2 California had jurisdiction over GRE?
 3 A. I don't know.
 4 Q. Okay. And if a state doesn't have
 5 jurisdiction under these provisions that we just
 6 talked about, that state cannot make someone pay
 7 escrow; correct?
 8 A. Correct.
 9 PRESIDENT NARIMAN: I would just like to
 10 interrupt. Is this model NPM statute frequently
 11 asked questions, is it a NAAG document? Where does
 12 it emanate from.
 13 THE WITNESS: President Nariman, I don't
 14 know. It predates my time at NAAG. From the fax
 15 number, it appears to have been faxed by NAAG.
 16 PRESIDENT NARIMAN: So, it's a NAAG
 17 document?
 18 THE WITNESS: Well, I'm not sure. I have
 19 heard--I will tell you that I have heard that it was
 20 put together at the beginning of the MSA by persons
 21 at NAAG in conjunction with some of the
 22 Participating Manufacturers. This was--again, as

09:43:48 1 Mr. Luddy said, at the very beginning of the MSA,
2 when the statutes were just beginning to be enacted,
3 and I believe this document was directed at the tax
4 authorities in each of the states; that is, the
5 departments of revenue, the heads of the departments
6 of revenue in the various states.

7 PRESIDENT NARIMAN: And to your knowledge,
8 was this question--was this answer corrected in some
9 later document of NAAG?

10 THE WITNESS: I'm sorry? I didn't
11 understand--

12 PRESIDENT NARIMAN: The question is that we
13 may not have jurisdiction, and the answer is
14 correct. You just said it was correct.

15 THE WITNESS: Yes, yes.

16 PRESIDENT NARIMAN: Now, is there any later
17 NAAG document which puts a gloss over it and says,
18 no, it may not be quite correct? I just want to
19 know.

20 THE WITNESS: I don't know the answer to
21 that question.

22 As I said earlier, though, I think it

09:46:11 1 A. An Assistant Attorney General with the
2 State of Pennsylvania.

3 Q. Okay.

4 A. Bill Lieblich, Peter Levin, Michael Hering,
5 Mark Greenwald, Tony Ogden--I'm sorry, they're
6 listed here in the document, but--Bill Lieblich of
7 NAAG, Peter Levin of NAAG, Michael Hering, that's
8 me, of NAAG, Mark Greenwald of NAAG, Tony Ogden of
9 NAAG.

10 And this says Greg Wilson, but I believe
11 it's a reference to Gary Wilson, a consultant with
12 NAAG. The industry representative--let's see.

13 For the SPMs they simply say Latham. It's
14 a law firm Latham & Watkins. RJR, Lorillard, B&W,
15 PMUSA, Legal and Government Affairs.

16 Q. So, that means there was Legal and
17 Government Affairs representatives for those other
18 tobacco--major tobacco manufacturers; correct?

19 A. Well, my recollection--I do recall
20 Government Affairs being there for some of these
21 companies. I'm not sure it was for all of them.

22 Certainly there was somebody in the room for each of

09:44:37 1 depends upon the circumstances of the foreign
2 manufacturer exactly what they're doing in this
3 country as to whether there is personal jurisdiction
4 or not.

5 BY MR. LUDDY:

6 Q. Can you look at Core Document 28, please.
7 Have you seen this document before,
8 Mr. Hering?

9 A. Yes, I have.

10 Q. And this is a--well, can you identify it?

11 A. It's the notes of Virginia Murphy, who is a
12 lawyer at Philip Morris, from a meeting held in D.C.
13 on January 20th of 2004.

14 Q. And you attended that meeting; right?

15 A. I did.

16 Q. Okay. And who were the other attendees at
17 that meeting?

18 A. Well, they're listed here. I don't--I
19 don't know that I could remember, but they're listed
20 here as Joel Ressler of Pennsylvania, Bill
21 Lieblich--

22 Q. Who is Joe Ressler?

09:47:22 1 these.

2 Q. Okay. And then who is David? You're going
3 to have to help me?

4 A. David Reams is a lawyer at Covington &
5 Burling or he was--he's not there any
6 longer--representing RJR and B&W. I think this was
7 at the time that RJR and B&W were merging.

8 Q. And there were no NPMs at this meeting;
9 correct?

10 A. That's correct.

11 Q. And the purpose of this meeting was to
12 discuss various legislative proposals that dealt
13 directly with NPMs; correct?

14 A. That's correct.

15 Q. What are the equity assessments that's
16 referenced there?

17 A. The equity assessments in this context were
18 bills that, as far as we could tell, were being
19 pushed by RJR in some of the MSA States to enact a
20 fee termed an "equity assessment" against NPMs.

21 Q. And in this meeting, the NAAG
22 representatives were making clear how committed they

09:48:36 1 were to allocable share appeal; correct?
 2 A. Well, certainly we were and have been
 3 committed. I don't--I haven't read this recently,
 4 so I don't know.
 5 PRESIDENT NARIMAN: Who is Mark Greenwald?
 6 THE WITNESS: Mark Greenwald is the--my
 7 former boss.
 8 PRESIDENT NARIMAN: He's part of NAAG.
 9 THE WITNESS: Former Chief Counsel of NAAG,
 10 of the NAAG Tobacco Project, not of NAAG, but of the
 11 NAAG Tobacco Project.
 12 BY MR. LUDDY:
 13 Q. Now, read down to the third to last bullet
 14 on the first page: "States are in favor of
 15 balancing but uncomfortable with legislation that
 16 would side them too closely with Participating
 17 Manufacturers."
 18 Do you see that?
 19 A. Yes.
 20 Q. Do you remember that being discussed?
 21 A. Not in those terms. What I remember being
 22 discussed is that we were not in favor of the equity

09:51:27 1 that?
 2 Mark, do you have that? Does your copy
 3 have the document, the language that I was reading,
 4 the second page? It's the four, five lines down on
 5 the second page. The media is reporting.
 6 Mark, can you show that to Mr. Hering.
 7 THE WITNESS: Yes, now I see it.
 8 Q. Okay. And that's why the public guys NAAG
 9 likes to distance itself from the OPMs, does it not?
 10 A. I agree with you that as we discussed
 11 yesterday, the AGs are certainly not enamored of the
 12 perspective of some of the media that we are in bed
 13 with the Participating Manufacturers and the OPMs in
 14 particular.
 15 However, I would like to point out that
 16 this was said in the context of the equity fee which
 17 I explained earlier was why we were there in large
 18 part to speak with them; that RJR was at that time
 19 pushing the equity fee, which again is a fee in
 20 addition to the escrow in a number of the Settling
 21 States, and we had nothing to do with this. In
 22 fact, we were against it. If you read through this

09:49:36 1 assessment, and we tried to impress that upon RJR.
 2 Q. But NAAG is concerned with how they are
 3 perceived by the media when they're dealing with the
 4 OPMs, are they not? I think you talked about this--
 5 A. Yes, we did talk about it yesterday.
 6 Q. And look at the second bullet on the second
 7 page: Media is reporting that AGs and PMs are
 8 conspiring to hurt the little guy.
 9 A. Yes.
 10 Q. And this is why you were trying to distance
 11 yourselves from the OPMs; correct?
 12 A. I'm looking for the statement, actually.
 13 Where is it?
 14 Q. Second bullet point.
 15 A. Maybe I'm on the wrong page.
 16 Q. Second page, I'm sorry. Second page. Do
 17 you have second page, second bullet?
 18 A. I'm missing the second page.
 19 Q. Oddly enough. This is missing the second
 20 page, too. Why is it in mine? One second. I'm
 21 sorry.
 22 MR. LUDDY: Does the Tribunal's copy have

09:53:04 1 memo, you see several points where we said we didn't
 2 want them to be doing this.
 3 And because they were attaching it to bills
 4 together with the Allocable Share Amendment and
 5 together with complementary legislation, the
 6 perception was that we were pushing it, and we were
 7 pushing, of course, allocable share and
 8 complementary, but we have never been pushing the
 9 equity assessment.
 10 Q. But the same notion that NAAG doesn't want
 11 to be perceived by the media as too close to the
 12 OPMs would also explain why NAAG could not go to a
 13 legislature and say we need allocable share appeal
 14 because we need to protect the OPMs' elevated
 15 margins because they raised their prices; right?
 16 A. That's true, and that's also not why we
 17 do it.
 18 Q. But that's not exactly what Mr. Sorrell's
 19 letter claimed, is it?
 20 A. Well--
 21 Q. And he was essentially--he was the head of
 22 the entity for which you now work; correct?

09:54:11 1 A. He was, and I'm not sure I agree with your
2 characterization of Mr. Sorrell's letter.
3 Q. This meeting was in January, and again this
4 is a private meeting, no media at this meeting, SPMS
5 at this meeting, lobbyists at this meeting, OPMS at
6 this meeting, and no NPMs at this meeting; correct?
7 A. That's correct.
8 Q. And this was in January, and on Page 3 it
9 refers to the most recent gathering of these people
10 had been in November only, two months earlier.
11 How often did you meet with the OPMS on
12 these issues?
13 A. Can I find the reference first, if you tell
14 me where it is.
15 Q. It's the top line of Page 3, Mazinga during
16 our November meeting.
17 A. I don't recall. I'm trying to recall that
18 meeting. I don't recall that specific meeting.
19 We meet, as I said, with the participating
20 manufacturers twice a year per the MSA.
21 Occasionally they will also show up to one of the
22 NAAG meetings that we have, and by NAAG meetings, I

09:58:28 1 Department for production in this matter?
2 A. I don't know.
3 Q. Were any of the notes from meetings with
4 the OPMS in NAAG concerning the allocable share
5 appeal produced to the State Department for
6 production in this matter?
7 A. I don't know.
8 Q. Were any of the documents at NAAG
9 contained--has in its possession concerning the GRE
10 Working Group produced to the State Department for
11 production in this matter?
12 A. I don't know.
13 Q. Were they--did the State Department even
14 ask for them?
15 A. I don't know.
16 Q. Who would they have asked?
17 A. Who at NAAG?
18 Q. Yes.
19 A. Most likely Bill Lieblich.
20 PRESIDENT NARIMAN: May I just ask one
21 question. I just want to know one thing. Why
22 weren't the NPMs requested to attend this or any

09:55:29 1 mean a meeting that's held by NAAG, the larger
2 umbrella organization for any number of topics.
3 At the time that we were attempting to pass
4 allocable share and complementary, we met a number
5 of times. I don't recall how many.
6 Q. Could you--now, this was--this was a
7 private meeting, so there weren't any legislatures
8 around or Tribunal Members around.
9 Can you tell me--can you see if there is
10 any references to healthcare in that memo.
11 (Witness reviews document.)
12 A. No, I don't see any reference.
13 Q. Now, there were seven people--six, seven--I
14 don't know how many people from NAAG. One, two,
15 three, four, five, six. Did any of the NAAG
16 representatives make notes of this meeting,
17 presumably?
18 A. I don't know.
19 Q. You're a conscientious guy. I assume you
20 had notes of this meeting?
21 A. Presumably I did.
22 Q. Were these notes produced to the State

09:59:18 1 other meeting? Is there any particular reason?
2 They could have been told that, yes, we could do
3 this. Now, what do you want to say about it? Or
4 were they purposefully kept out? I mean, was that
5 the intention?
6 THE WITNESS: The NPMs had no interest in
7 passing this legislation as I've explained earlier.
8 PRESIDENT NARIMAN: Yes, but they had an
9 interest in it, I mean, ultimately when passed.
10 THE WITNESS: I suppose that's correct,
11 but, President Nariman, we were very much in favor
12 of this legislation for all the reasons I've
13 described.
14 PRESIDENT NARIMAN: Therefore you can't
15 explain why the NPMs were not present. That's all.
16 THE WITNESS: Well, I suppose what I'm
17 trying to say is there's no reason to invite the
18 persons that are attempting to--I'm looking for the
19 right word--perpetuate the loophole, to maintain it.
20 As I say--well, in my affidavit, I think
21 I'm not sure I said it here. I testified--well, in
22 sum, I think I said 13 states and in some states

10:00:28 1 multiple times. In every state that I went to, I
 2 was--well, nearly every state--I was opposed by
 3 Non-Participating Manufacturers. NPMs had
 4 absolutely no interest in having this statute,
 5 either one of them, passed. They were quite happy
 6 with the situation whereby they could either avoid
 7 the escrow simply by not paying and remain
 8 scofflaws, as I've said earlier, or having the
 9 Allocable Share Amendment--I'm sorry, the original
 10 Allocable Share Release in place.

11 I'm not sure we saw the point of inviting
 12 the people that had no interest in passing the
 13 statute to a meeting where we were discussing ways
 14 on getting the statute passed. However, as I said
 15 earlier, I note that if you look at this document
 16 you will see that we opposed the efforts of the OPMS
 17 to impose additional fees above the escrow amounts
 18 known as the equity assessment against the NPMs.

19 PRESIDENT NARIMAN: There is one sentence
 20 at Page 2, Hering, that's you, I suppose.

21 THE WITNESS: It is.

22 PRESIDENT NARIMAN: Notes media tie

10:02:21 1 of the one allocable share and complementary, which
 2 was sometimes part of the package, too. We were
 3 opposed to the equity assessment.

4 However, when they were tied together
 5 by--at the efforts of, we believe, RJR, we were
 6 tarred. We, the states, were tarred with the same
 7 brush. The media perceived us as not only trying to
 8 level the playing field by passing the Allocable
 9 Share Amendment, but also trying to do more by
 10 passing the equity assessment. That is what I'm
 11 referring to here.

12 PRESIDENT NARIMAN: What is this passing
 13 the equity assessment? I want to make sure we
 14 understand what is the equity assessment.

15 THE WITNESS: The escrow statute, as I
 16 explained yesterday, its purpose was to impose the
 17 requirement of putting money into escrow that was
 18 roughly equal to, but always a little bit less than
 19 the amount that you would pay as a Participating
 20 Manufacturer. The equity assessment was a fee on
 21 top of that, and it wasn't money into escrow. It
 22 was a fee that went to the state along the lines of

10:01:37 1 Attorneys General to the equity assessment.
 2 What does that mean?

3 THE WITNESS: Let me--that was what I was
 4 referring to--

5 PRESIDENT NARIMAN: What does this exactly
 6 mean? I mean, this is all cryptic sort of notes.
 7 After all they are notes.

8 THE WITNESS: They're not my notes.
 9 Remember, they're not my notes.

10 PRESIDENT NARIMAN: But you attended it.
 11 That's why I say.

12 THE WITNESS: Yes.

13 PRESIDENT NARIMAN: This is attributed to
 14 you.

15 THE WITNESS: Yes.

16 What I was saying earlier, and I will try
 17 to say it again, our concern regarding the media
 18 ties was that the two pieces of legislation, the one
 19 that we endorsed and supported and the one that we
 20 were opposed to were being tied together to the
 21 same--they were being sold to the legislature as a
 22 package. And as I said, we were very much in favor

10:03:33 1 a tax, and the amounts varied, but it was a fee.
 2 Ultimately, it was, I think, passed in a handful of
 3 states, and it was a fee in addition to the escrow
 4 amount.

5 Does that make sense?

6 PRESIDENT NARIMAN: Yes.

7 MR. LUDDY: I have no more questions.
 8 I believe Mr. Violi has a few questions on
 9 a different area for Mr. Hering.

10 BY MR. VIOLI:

11 Q. Good morning, Mr. Hering.

12 A. Good morning.

13 Q. I just want to follow up on a couple of
 14 questions that the President raised regarding the
 15 equity assessment fees.

16 Currently the equity assessment fees exist
 17 in Michigan, Alaska, and Utah, is that right?

18 A. And in two of the previously settled
 19 states, although I suppose we wouldn't call it--we
 20 call those something different, but yes.

21 Q. And the position of NAAG in that document
 22 was that the equity assessment fee would be hard to

10:04:55 1 defend. In fact, would give the appearance of
2 disfavoring or disadvantaging NPMs as far as NAAG
3 saw it in those MSA States; correct?
4 A. That's correct.
5 Q. Can you give--let's take Michigan, for
6 example.
7 What is currently the NPM payment or escrow
8 payment in Michigan under the Escrow Statute,
9 approximately?
10 A. Approximately, it was--for sales in '08, it
11 was 517 a carton. For sales in '09 it's likely to
12 be on the order of \$5.35 a carton.
13 Q. And the equity assessment fee in Michigan?
14 A. I'm not sure.
15 Q. \$2.50 sound right?
16 A. It could be.
17 Q. Okay.
18 And for cigarettes sold by a Participating
19 Manufacturer, leaving aside the previously Settling
20 States deduction for OPMS which reduces their
21 payment, what is the marginal or average cost to a
22 Participating Manufacturer for a carton of

10:07:10 1 Q. And that's the reason for the basis for the
2 conclusion and the report that Ms. Virginia Murphy
3 makes in that document for NAAG's--relating or
4 conveying NAAG's position as to why NAAG is not in
5 support of the NPM assessment fee; right?
6 A. I'm not Virginia Murphy, so I'm not sure I
7 can say what she was saying.
8 Can I clarify, though, one thing. You said
9 payment. Just to be clear, the escrow amount is a
10 deposit into escrow, whereas the equity assessment
11 is a payment.
12 Q. But it's a payment by NPMs; correct? It's
13 a deposit, but it's a payment, is it not?
14 A. It's a payment into escrow.
15 Q. Okay, that's fair enough.
16 ARBITRATOR CROOK: At some point, will you
17 tell us where we go in the record to find the figure
18 you were using of 2.50.
19 THE WITNESS: I will get that for you.
20 It's in the expert reports.
21 And it's also a matter of public law under
22 the Michigan statutes which we could pull also.

10:06:01 1 cigarettes sold in Michigan, approximately?
2 A. It's, as I say, a bit larger. I think last
3 year, again for '08, it was 5.17 for
4 Non-Participating Manufacturers, and 5.36 for
5 participants. That would be for sales in '08. For
6 sales in '09, we don't know the numbers yet. My
7 best estimate would be on the order of 5.30, 5.33
8 for nonparticipants and somewhere around 5.50 for
9 participants.
10 Q. But the numbers in the reports between the
11 NPMs and the SPMs, their payments are just a few
12 pennies per carton; isn't that right?
13 A. I'm sorry? I'm sorry, I don't think I
14 understood the question.
15 Q. In the reports, the expert reports, in
16 these proceedings. Have you seen them?
17 A. Actually I haven't, no.
18 Q. Okay. So, with the addition of 2.50 per
19 carton in Michigan under the NPM assessment fee, you
20 will have a per-carton cost to an NPM that's over \$2
21 greater than that of an SPM; is that right?
22 A. Yes.

10:08:14 1 It's in the Michigan Code, Tax Code.
2 ARBITRATOR CROOK: I understand, Mr. Violi,
3 but the Tribunal has to write an award at some
4 point.
5 MR. VIOLI: I apologize.
6 BY MR. VIOLI:
7 Q. Now, Mr. Hering, are you aware of any
8 recent attempts by R.J. Reynolds, for example, to
9 reinstate efforts to have the equity assessment
10 fees passed or proposed in the MSA States?
11 A. No, I'm not.
12 Q. When was the last time NAAG has received
13 any communication regarding a Participating
14 Manufacturer's proposal to initiate efforts again to
15 have the equity assessment fees passed in any state?
16 A. Honestly I don't recall. It may have been
17 around the time of the Virginia Murphy memo.
18 Q. Okay. Now, I would like to speak to you a
19 little bit about the Master Settlement Agreement
20 history and the history of its negotiations.
21 You were employed by the Massachusetts
22 Attorney General; is that right?

10:09:32 1 A. Yes, I was.
 2 Q. And what years were you employed with the
 3 Attorney General there?
 4 A. Roughly '94 through '99. Then I came back
 5 briefly in 2001.
 6 Q. And that was under General Harshbarger; is
 7 that right?
 8 A. Originally under General Harshbarger.
 9 Q. Was General Harshbarger involved, his
 10 office involved in the negotiations of the MSA?
 11 A. He was for a time. I think it was
 12 primarily his Chief deputy. However, he pulled out
 13 of the negotiations towards the end.
 14 Q. Towards the end.
 15 But was it his office or another office
 16 that has a principal focus, the health initiatives
 17 of the MSA?
 18 A. General Harshbarger--principal focus. I
 19 think all of them were focused on public health, but
 20 certainly I think my General was, yes.
 21 Q. Wasn't he selected to focus or concentrate
 22 on the health initiatives?

10:11:46 1 effects, and the anticipated consequences of the
 2 Escrow Statutes? Do you know those documents were
 3 produced?
 4 A. I do know that I have here a copy of the
 5 MSA.
 6 I mean, the purposes are set forth--
 7 (Comment off the microphone.)
 8 A. I understand that the MSA has the model
 9 Escrow Statute attached to it as Exhibit T to the
 10 MSA, and the purposes, findings and purposes are set
 11 forth in the first part of the Model T Escrow
 12 Statute.
 13 Q. But those are not the purposes of the
 14 legislature; right? Those are draft model purposes
 15 that the Attorneys General with the tobacco
 16 companies drafted; right?
 17 A. These are the purposes set forth in the
 18 Model Escrow Statute, and some of the legislatures
 19 adopted these.
 20 Q. Okay. Where are the documents relating to
 21 the negotiation, the meeting minutes, the
 22 discussions of the MSA and its various provisions,

10:10:46 1 A. I don't know.
 2 Q. Were you involved at all with that office
 3 in the context of the settlement negotiations?
 4 A. I was not involved in the settlement
 5 negotiations, no.
 6 Q. And he pulled out before the end; correct?
 7 A. Yes.
 8 Q. Do you know why he pulled out?
 9 A. He was not as satisfied as the others with
 10 the public health provisions.
 11 Q. He was not satisfied or as satisfied with
 12 the others with respect to the public health
 13 provisions; right? Is that what you just said?
 14 A. That's correct.
 15 Q. Now, has the Respondent in this case
 16 produced any documents relating to or
 17 contemporaneous with the negotiation of the MSA?
 18 A. I don't know.
 19 Q. How about the Escrow Statute, in drafting
 20 the Escrow Statute? Any documents produced by
 21 Respondent in connection with the purposes--and I'm
 22 talking about the negotiations--the purposes, the

10:12:43 1 including the Escrow Statute and the health
 2 initiatives?
 3 A. I--I have no idea.
 4 Q. Are you familiar with the prior Federal
 5 proposal that predated or preceded the MSA in which
 6 the states had made a Federal proposal to settle
 7 their lawsuits in about June of 2007?
 8 A. Only very generally.
 9 Q. Only generally?
 10 A. Yes.
 11 Q. May I hand you what's in the Claimants'
 12 Memorial, factual materials in support of the first
 13 Memorial at Tab 27, and it's an abridged version.
 14 PRESIDENT NARIMAN: Core Document?
 15 MR. VIOLI: It's not in the Core Document.
 16 It's in the caches to the Memorial, Claimants'
 17 Memorial, First Memorial, Tab 27.
 18 I will provide you, Mr. President, with the
 19 excerpted version. It's lengthy, and I just wanted
 20 to focus on a couple of provisions.
 21 THE WITNESS: I have a copy of it.
 22 I'm sorry.

10:14:02 1 BY MR. VIOLI:
 2 Q. It's Exhibit 27 in the Claimants' Memorial.
 3 It's a lengthy document, so I have excerpted the
 4 relevant provisions with the first page there. It
 5 may be easier than pulling up Exhibit 27.
 6 PRESIDENT NARIMAN: What is this a copy of?
 7 MR. VIOLI: This is the Federal proposal
 8 that predated the MSA. It was an earlier draft, a
 9 precursor to the MSA that the states drafted,
 10 Mr. President.
 11 BY MR. VIOLI:
 12 Q. Do you recognize this document that I have
 13 put before you, the excerpted version?
 14 A. No, I don't know that I have ever seen it
 15 before.
 16 Q. Okay. Are you aware that the prior Federal
 17 proposal had something called a Youth Look-Back
 18 provision in it?
 19 A. I have heard that.
 20 Q. And I refer you to Page 35 of 47, which is
 21 the third page in. 35 of 47. Do you see towards
 22 the middle of the page where it says Appendix 5,

10:15:57 1 smoking, and there would be a financial incentive or
 2 penalty, depending upon what the reductions were or
 3 were not in youth smoking.
 4 Q. Now, if I could, direct you to Page 37 of
 5 47?
 6 A. Thirty-seven?
 7 Q. Of 47, right, at the top.
 8 And I will refer the Tribunal to the
 9 heading B "Surcharge," the surcharge.
 10 Is that the surcharge that is imposed on
 11 manufacturers in connection with the Youth Look-Back
 12 provisions?
 13 A. Well, again, I'm seeing this for the first
 14 time, but it appears to be, yes.
 15 Q. Okay. And then were there Look-Back
 16 provisions for states who failed to attain certain
 17 reductions in consumption?
 18 A. I don't know.
 19 Q. You don't recall that in connection with
 20 the Federal proposal?
 21 A. No, I don't.
 22 Q. Could I turn you to Page 41 of 47, and ask

10:15:05 1 Look-Back?
 2 A. Yes.
 3 Q. And in the next page that follows, does
 4 this not describe a Look-Back provision whereby
 5 manufacturers were given requirements to attain
 6 certain reductions in youth smoking?
 7 A. I haven't read this before, so give me a
 8 moment.
 9 Q. I will give you a moment. I just want to
 10 ask you, from your memory--you recall that there was
 11 a proposal; correct? A Federal proposal.
 12 A. Yes.
 13 Q. Do you recall that it had Youth Look-Back
 14 provisions in it?
 15 A. Yes, I recall vaguely--
 16 Q. Why don't you describe first before reading
 17 that because you just said you saw it for the first
 18 time today what your understanding was of the Youth
 19 Look-Back provisions of the Federal proposal.
 20 A. My general understanding is that the
 21 Look-Back portion is the idea that you would see
 22 what the reductions were or were not in youth

10:17:04 1 you if that would refresh your recollection in any
 2 regard with respect to the Look-Back provisions that
 3 apply to states, towards the top third, required
 4 attainment goals for state enforcement?
 5 MR. FELDMAN: Mr. President, we would have
 6 to object at this point. This is well beyond the
 7 scope of Mr. Hering's statement.
 8 MR. VIOLI: Not at all. This has to do
 9 with the MSA, health provisions of the MSA.
 10 MR. FELDMAN: Doesn't this have to deal
 11 with the Federal side of that?
 12 MR. VIOLI: Indeed, and I had mentioned it
 13 in the opening, and it's been the subject of our
 14 Memorials. This is clearly, clearly within the
 15 scope.
 16 PRESIDENT NARIMAN: He can say he doesn't
 17 know, he cannot answer, because he's entitled to ask
 18 him the question.
 19 ARBITRATOR CROOK: Mr. Violi, I would ask
 20 you to please slow down a little bit because I can't
 21 follow you, and I would like to be able to read the
 22 documents that are being discussed.

10:17:52 1 MR. VIOLI: Okay.
 2 ARBITRATOR CROOK: We are on Page 41 of 47?
 3 MR. VIOLI: I was were on 41 of 47.
 4 ARBITRATOR CROOK: Okay. And could you
 5 tell the Tribunal what is the language that you were
 6 just asking about, please.
 7 MR. VIOLI: Well, I was asking him if this
 8 refreshed his recollection and so--
 9 THE WITNESS: The answer is no because I
 10 have no recollection of this.
 11 MR. VIOLI: All right.
 12 BY MR. VIOLI:
 13 Q. So, you don't have any recollection that
 14 there were terms in the proposed Federal legislation
 15 that predated the MSA that contained Look-Back
 16 provisions for the states themselves as well as the
 17 manufacturers?
 18 A. No, this is the first time I have seen
 19 this.
 20 Q. Do you recall whether or not the proposed
 21 Federal legislation had provisions in it that
 22 applied to Native Americans?

10:19:49 1 population of the state in which the Tribe is
 2 located. The funds to be distributed to the
 3 Indian--to Indian Tribes shall be used for the same
 4 purposes as those funds are to be used by the states
 5 and be subject to the same compliance requirements
 6 for retail sales to minors as are the states under
 7 the Act."
 8 Q. Now, this indicates, does it not, that at
 9 last when the states were proposing the Federal
 10 legislation, what I would call the Federal MSA,
 11 there was specific mention and treatment of Indian
 12 tribes, does it not?
 13 A. I don't know.
 14 Q. Do you dispute that that's not the case?
 15 A. I don't know.
 16 Q. Okay.
 17 PRESIDENT NARIMAN: I just want to know,
 18 Mr. Violi, was this--according to this document, was
 19 this compensation to be paid out of what fund?
 20 THE WITNESS: The MSA.
 21 MR. VIOLI: The MSA settlement payments.
 22 PRESIDENT NARIMAN: The entire fund?

10:18:40 1 A. No, I have no idea.
 2 Q. I would ask you to turn to Page 33 of 47,
 3 and I ask you to look at--or if you would read
 4 Paragraph C-1 there, please, into the record.
 5 A. I don't see a C-1. I see a 1, 2--
 6 Q. Paragraph 33 of 47, C-1.
 7 A. Oh, I'm sorry. Okay. Now I see it.
 8 Q. The heading says "Tobacco compensation and
 9 public health threats." You see that?
 10 A. Yes.
 11 Q. Could you read the first paragraph there?
 12 A. One: A portion of the settlement funds to
 13 which a state is otherwise entitled may be paid to
 14 HHS for distribution to--
 15 Q. May be or shall be?
 16 A. I'm sorry, shall be. Did I say may?
 17 "Shall be paid to HHS for distribution to the Indian
 18 tribes which have been certified by FDA for
 19 treatment as states. The funds to be paid for such
 20 purposes on behalf of Indian tribes shall be
 21 determined by the proportion of registered tribal
 22 members resident on the Reservation to the total

10:20:47 1 MR. VIOLI: Out of the fund of the MSA.
 2 PRESIDENT NARIMAN: For the Tribes?
 3 MR. VIOLI: They would pay for the Indian
 4 Tribes, yes.
 5 MR. FELDMAN: Mr. President, this is a
 6 proposed Federal settlement completely separate from
 7 the MSA.
 8 PRESIDENT NARIMAN: Okay.
 9 MR. VIOLI: This was proposed by--
 10 BY MR. VIOLI:
 11 Q. Well, let me ask you, Mr. Hering. Did the
 12 MSA States propose a Federal settlement of their MSA
 13 claims?
 14 A. As I said earlier, I wasn't involved in the
 15 settlement negotiations. I don't know who proposed
 16 this.
 17 Q. Does NAAG have--does anyone at NAAG have
 18 knowledge of the Federal proposal?
 19 A. I don't know.
 20 Q. Does NAAG have any documents relating to
 21 the Federal proposal?
 22 A. I don't know.

10:21:27 1 Q. Are you denying that the states made a
2 proposal, a Federal proposal, to settle their MSA
3 claims?
4 A. I don't know. I simply wasn't involved in
5 that chapter of the tobacco litigation.
6 Q. I'm not asking if you were involved. I'm
7 asking you if you are denying--
8 A. I'm not stating or denying anything. I'm
9 saying I have no knowledge.
10 Q. Of a Federal proposal that was made by the
11 states?
12 A. I know there was a Federal proposal made.
13 I don't know who made it.
14 Q. Okay.
15 MR. FELDMAN: Mr. President, we are so far
16 afield from the witness's declaration at this point
17 we would request that this line of questioning just
18 end at this point.
19 MR. VIOLI: I just have a few more
20 questions, and it does relate to something that was
21 in the opening, it's in the Memorial, and it relates
22 to the applicability of the Escrow Statutes and the

10:23:19 1 So, let me repeat the question.
2 Do you know whether or not any Attorneys
3 General of any Indian Tribe or Native American
4 Nation was invited to the negotiations for the MSA?
5 A. I don't know.
6 Q. Now, in the MSA--
7 PRESIDENT NARIMAN: Do you know that
8 Attorneys General for the Tribes or Nations,
9 sovereign Nations?
10 THE WITNESS: Did I know that they had
11 Attorneys General for--
12 PRESIDENT NARIMAN: Some of them have or
13 they don't?
14 THE WITNESS: No, I did not know that.
15 BY MR. VIOLI:
16 Q. Do you know that now?
17 A. Well, you've just told me that.
18 Q. So, you haven't known until this day that
19 there are Native American Nations in this country or
20 within the geographic borders of the United States
21 that have their own Attorneys General?
22 A. No.

10:22:15 1 MSA to Indian Tribes.
2 BY MR. VIOLI:
3 Q. Now, were the persons who negotiated the
4 MSA were Attorneys General from the various states;
5 right?
6 A. Yes, some Attorneys General. Some
7 Attorneys General, not all of them were involved,
8 and obviously Tobacco Companies.
9 Q. Were any Attorneys General of any Native
10 sovereign American--Native American Indian Tribe
11 invited to negotiations to your knowledge?
12 A. One of the Chief negotiators was Attorney
13 General Christine Gregoire, now Governor of
14 Washington State, and Washington I know has a number
15 of federally recognized Indian Tribes.
16 Q. I'm sorry, I should have made that clearer.
17 I meant an Attorney General of the sovereign--do you
18 know that sovereign Native American Indian Tribes
19 and Nations have their own Attorneys General? Some
20 do. Do you know that?
21 A. No.
22 Q. You don't know that.

10:24:08 1 Q. Now, when the MS--the Federal proposal you
2 know was rejected--correct?--by Congress. It never
3 was passed.
4 A. Yes.
5 Q. And then the MSA States proceeded
6 thereafter to negotiate the MSA apart from and after
7 that rejection by Congress; correct?
8 A. Yes.
9 Q. Now, the MSA specifically excludes the
10 rights of tribes to bring their own claims in
11 connection with tobacco and tobacco manufacturers;
12 correct?
13 A. I don't specifically recall. What section
14 are you referring to there?
15 Q. I'm going to give you an excerpted version.
16 It's Exhibit 3 to the Claimants' Main Memorial. I
17 have an excerpted version for the Tribunal and for
18 our friends.
19 PRESIDENT NARIMAN: What exhibit?
20 MR. VIOLI: It's Exhibit 33 to the main
21 Memorial, the first Memorial. Just one page. It's
22 one page extra, and I have a copy for you so that

10:25:25 1 you could just refer to that page.
 2 BY MR. VIOLI:
 3 Q. And if you would like to look at your
 4 little handbook, it's 12(a)(6), Mr. Hering.
 5 A. Okay. I just want to be sure I know where
 6 it is.
 7 Q. And when you find it in your manual, can
 8 you please read that into the record, Section
 9 12(a)(6) of the MSA.
 10 A. The Settling States do not purport to waive
 11 or release any claims on behalf of Indian tribes.
 12 PRESIDENT NARIMAN: I didn't find it.
 13 MR. VIOLI: It's Number 6.
 14 THE WITNESS: It's the bottom of this
 15 excerpt. It's Section 12(a)(6) of the MSA.
 16 BY MR. VIOLI:
 17 Q. And it says, "The Settling States do not
 18 purport to waive or release any claims on behalf of
 19 Indian tribes."
 20 Do you see that?
 21 A. Yes.
 22 Q. So, at some point, the MSA States at least

10:28:02 1 MSA?
 2 MR. VIOLI: It was omitted in the MSA
 3 except for this one little--
 4 PRESIDENT NARIMAN: But you're not
 5 challenging the MSA.
 6 MR. VIOLI: That's correct.
 7 The Escrow Statutes are also attached to
 8 the MSA, which I was going to ask him.
 9 BY MR. VIOLI:
 10 Q. My next question was: Is there any mention
 11 of Indians or Indian Tribes in the Escrow Statute to
 12 which are attached as a model statute to the MSA?
 13 Let the record reflect the witness is
 14 turning to model statute Exhibit T.
 15 A. I would have to read it because it's again
 16 a lengthy--
 17 PRESIDENT NARIMAN: He could do whatever he
 18 wants.
 19 MR. VIOLI: Do you deny that there is no
 20 mention of Indian Tribes or Indian Country in the
 21 Escrow Statutes?
 22 THE WITNESS: I don't know. If you'll give

10:27:00 1 considered or had in their minds in drafting this
 2 MSA the concerns, the rights of Indian Tribes; is
 3 that correct? Is that fair to say?
 4 A. Apparently, yes.
 5 Q. Apparently.
 6 But that's the only thing we see in the MSA
 7 in connection with Indian Tribes as far as releases
 8 of claims; correct?
 9 A. I don't know. It's a lengthy document.
 10 Q. It's a lengthy document.
 11 PRESIDENT NARIMAN: Sorry, Mr. Violi, but
 12 this line of questioning, I just want to know, and
 13 the Tribunal would like to be--we don't want to shut
 14 you out at all, but we would like to know--I mean,
 15 what are you driving at at the moment, if you could
 16 tell us without--
 17 MR. VIOLI: Sure. Attached to the MSA is
 18 the Escrow Statute. In the MSA, we know the prior
 19 Federal proposal of the MSA the same states that
 20 negotiated had a very lengthy provision for Indians,
 21 Indian tribes.
 22 PRESIDENT NARIMAN: It was omitted in the

10:28:44 1 me a moment, I'll take a quick look.
 2 BY MR. VIOLI:
 3 Q. It's only three pages long, I believe or
 4 maybe four.
 5 A. It's five, actually, I think.
 6 Q. Beyond the Preamble. Sorry.
 7 ARBITRATOR CROOK: Mr. Violi, I would
 8 invite you not to ask--put words in the witness's
 9 mouth. He's indicated he does not know. You ask
 10 him the question, do you deny, but he has indicated
 11 he did not know.
 12 MR. VIOLI: I guess my difficulty is,
 13 Mr. Crook, that do you deny, the response saying I
 14 don't know is generally not responsive to do you
 15 deny. It's either yes or no. That's why I'm trying
 16 to help the witness out, but I will refrain from
 17 that.
 18 ARBITRATOR CROOK: So, you're inviting him
 19 to say either yes or no when he does not know. You
 20 are inviting him to misrepresent to the Tribunal?
 21 MR. VIOLI: No, the response is yes or no
 22 whether or not he denies the fact. That's all.

10:29:32 1 He could say I don't know if it contains
 2 it. That's different than saying I don't know if
 3 I'm denying it. That's my point, but I will make it
 4 clear. I will pose the question in a different way.
 5 PRESIDENT NARIMAN: Is it your case that
 6 the Escrow Statutes and the amendments are
 7 inapplicable to Indian Tribes?
 8 MR. VIOLI: Yes, that's where I'm going.
 9 PRESIDENT NARIMAN: There's your case.
 10 That's what I want to know. That's your case.
 11 MR. VIOLI: The whole history.
 12 PRESIDENT NARIMAN: I just want to know.
 13 MR. VIOLI: I just needed a foundation for
 14 it from the beginning until the end.
 15 THE WITNESS: I have read it very quickly
 16 once again, and I don't see any reference.
 17 BY MR. VIOLI:
 18 Q. Okay. And I gather, I take it from your
 19 not having a familiarity with the Federal proposal
 20 that you couldn't testify today whether or not the
 21 Federal proposal had any compensation or reward for
 22 Participating Manufacturers if they lost market

10:31:59 1 opening.
 2 A. Yeah, there is a definition of units sold.
 3 Exactly what it means is a matter of dispute.
 4 Q. And the FAQ memorandum that Mr. Luddy
 5 showed you this morning, which was drafted just
 6 after the MSA was executed, that mentioned Indians
 7 and Indian Tribes; correct?
 8 A. Yes, it did.
 9 Q. And do you recall it saying that if the
 10 state does not collect excise taxes in Indian
 11 Country, that it would not constitute the sale, and
 12 the cigarettes sold would not execute constitute the
 13 units sold under the definition of the Escrow
 14 Statute?
 15 A. I think it said something slightly
 16 different. I think it referred to taxable sales;
 17 that is, that if they weren't taxable, they weren't
 18 units sold. But if they were taxable, they could be
 19 units sold.
 20 Q. And it depended on whether or not--the
 21 units sold depended on whether the state collected
 22 the tax; correct?

10:30:53 1 share; is that right?
 2 A. Are you suggest something akin to the NPM
 3 adjustment?
 4 Q. Indeed.
 5 A. No, I don't, but my understanding was that
 6 under the Federal proposal everyone would, by
 7 definition, be participating, so there would
 8 be--there could not be any loss of market share.
 9 Q. Correct.
 10 And there also were no exemptions,
 11 grandfathered exemptions, for any Participating
 12 Manufacturers under that scenario you just
 13 presented; correct?
 14 A. My, again, vague understanding is, yes. I
 15 mean, it was legislation. It wasn't a settlement.
 16 Q. And it applied equally across the board to
 17 all manufacturers; correct?
 18 A. I don't know the details.
 19 Q. Okay. And the definition of units sold in
 20 the Escrow Statute is one that is computed based on
 21 the measure of excise taxes collected by the state;
 22 correct? We saw that in the slide during the

10:33:11 1 A. Again, that's a point of dispute.
 2 Q. Well, is it a point of dispute or is it a
 3 point of dispute in the document?
 4 A. It's a point of dispute as to what the
 5 document means.
 6 Q. Okay, why don't we refer to the document.
 7 Do you have it there?
 8 A. Which document?
 9 Q. The FAQ.
 10 A. Oh. Can you remind me where it is.
 11 MR. VIOLI: He's asking about the--
 12 MR. LUDDY: Document 9.
 13 THE WITNESS: It's not 10.
 14 MR. VIOLI: It's Document 9. Sorry, Core
 15 Document 9. FAQ, sorry, frequently asked questions.
 16 BY MR. VIOLI:
 17 Q. And you have seen this document before
 18 today; correct?
 19 A. I have.
 20 Q. And the reference you made is to Item
 21 Number 11, and I will quote it into the record:
 22 "There are NPMs located on Indian Reservations. Are

10:34:23 1 these manufacturers liable under the model statute
 2 or qualifying statute to remit escrow payments?"
 3 The answer is: "They are if they make
 4 taxable sales."
 5 Correct?
 6 A. Yes.
 7 Q. And in selling--are you familiar with the
 8 operations of Grand River by some chance?
 9 A. To a degree, yes.
 10 Q. Grand River sells to Native Wholesale
 11 Supply and to Tobaccoville; correct?
 12 A. Yes.
 13 Q. Do you know if any of those sales are
 14 taxable under any state, state law, for purposes of
 15 excise taxes?
 16 A. Yes. Well, certainly the sales made
 17 through Tobaccoville are.
 18 Q. I didn't say going through. I said the
 19 sales to, to Tobaccoville or Native Wholesale
 20 Supply.
 21 A. Are taxable?
 22 Q. Yes.

10:36:34 1 Wholesale Supply, some of those sales are taxable
 2 and some are not. Some of the on-Reservation sales
 3 are clearly not taxable. However, some of the sales
 4 made by the cigarettes brought in by Native
 5 Wholesale ultimately are sold in a way that they
 6 could be taxable.
 7 New York, I suppose is the best example; is
 8 a state whereby a number of the sales made through
 9 Native Wholesale Supply could be taxable, but New
 10 York engages in a policy of forbearance and does not
 11 collect tax on the sales.
 12 Q. Just New York?
 13 A. No, I think there are some other States.
 14 They're, as I say, the most prominent example.
 15 PRESIDENT NARIMAN: So, they would be,
 16 according to you, not taxable sales, or they would
 17 still be taxable sales.
 18 THE WITNESS: Some are taxable.
 19 PRESIDENT NARIMAN: In this answer to this
 20 FAQ.
 21 THE WITNESS: Some are taxable--for the
 22 Native Wholesale Supply cigarettes, some are

10:35:27 1 A. Well, you're talking about when they import
 2 them before they are sold in a state to consumers?
 3 Q. What are the taxes referred to in number 11
 4 there? They're state cigarette excise taxes;
 5 correct?
 6 A. These--well, there are two levels of
 7 taxation in the U.S. There is Federal excise tax
 8 and there's state excise tax. When the cigarettes
 9 come in from Canada or any other country to the
 10 importer and they are entered into the United States
 11 for consumption, Federal excise tax is due.
 12 Therefore, both Tobaccoville and Native Wholesale
 13 Supply pay Federal excise tax. At that point, of
 14 course, they haven't made it to the consumer. When
 15 they are then in turn sold to a consumer, in some
 16 instances those sales are taxable. In others they
 17 are not.
 18 For instance, if I could just finish, in
 19 Tobaccoville, I believe all of them are sold in the
 20 way that that state excise taxes are due because
 21 they are sold off Reservation in South Carolina and
 22 other states. They pay SET. In the case of Native

10:37:34 1 taxable, some are not.
 2 PRESIDENT NARIMAN: No, I'm saying for New
 3 York as a matter of policy does not enforce its
 4 taxing statute. The answer would be that they are
 5 taxable sales or not?
 6 THE WITNESS: Some of them are taxable,
 7 yes.
 8 PRESIDENT NARIMAN: Even in New York.
 9 THE WITNESS: Yes.
 10 PRESIDENT NARIMAN: We are talking only of
 11 New York.
 12 THE WITNESS: Yes.
 13 BY MR. VIOLI:
 14 Q. Which sales are taxable that Grand River
 15 makes to NWS, and I'm talking about just between
 16 Grand River and NWS, because the Escrow Statute
 17 applies to Grand River, does it not, according to
 18 the states?
 19 A. The Tobacco Product Manufacturer, which is
 20 Grand River.
 21 Q. Okay. And Grand River doesn't sell to any
 22 consumer itself, does it?

10:38:18 1 A. To my knowledge, no, they don't sell
2 directly.
3 Q. To a consumer. They sell to, as I said
4 before, NWS or Tobaccoville.
5 So, my question was, number 11, we are
6 talking about taxable sales, state excise taxes;
7 correct? The preceding discussion--can I finish my
8 question?
9 A. Okay.
10 Q. The preceding discussion talks about fixing
11 a stamp, a state tax stamp, and calling it a unit
12 sold. Under the Escrow Statute, a unit sold is
13 defined not by reference to the Federal excise tax,
14 but to the state excise tax; correct?
15 A. I'm sorry, I lost you. Say the last part
16 again, please?
17 Q. The Federal excise tax is not an issue
18 under the Escrow Statute. It's the state excise
19 tax.
20 A. Yes.
21 Q. And Number 11 speaks to taxable sale with
22 reference to the Escrow Statute; correct?

10:40:14 1 Grand River engages in, those sales to NWS and
2 Tobaccoville, they do not result in units sold under
3 the Escrow Statute; correct?
4 A. I think we are talking apples and oranges
5 here. The Escrow Statute doesn't address sales, the
6 FET sales. Again, it is FET sales, as you pointed
7 out.
8 ARBITRATOR ANAYA: So, in light of this
9 number 11 as to Grand River cigarettes that are--end
10 up being sold on a Reservation, are those or are
11 those not taxable sales for the purpose of the
12 Escrow Statute?
13 THE WITNESS: They are clearly some--
14 ARBITRATOR ANAYA: Which ones?
15 THE WITNESS: You're wading into an area of
16 Indian law that I'm not the expert on, but there are
17 clearly some sales under U.S. Federal law that are
18 not taxable by the states, and those would not be
19 units sold under the escrow. Then there are some
20 that clearly are. And then there are some that--
21 ARBITRATOR ANAYA: Which? Give me an
22 example, please, of those that clearly are, as you

10:39:04 1 A. Yes.
2 Q. Therefore, it refers to the state excise
3 tax; correct?
4 A. Right, yes.
5 Q. Okay.
6 A. But what I was trying to say was that 11
7 doesn't apply to Grand River. Grand River is not a
8 manufacturer located on an Indian Reservation within
9 the United States, which is what this is directed
10 at.
11 Q. It may be directed at that, but Grand River
12 does not make a taxable sale when it makes its only
13 sale to NWS; correct? Under number 11.
14 A. That would be true for any cigarettes
15 coming in from any country to an importer or, for
16 that matter, cigarettes made by a domestic--sales
17 made by domestic participating or non-Participating
18 Manufacturer to a wholesaler.
19 The incidence of state excise tax doesn't
20 arrive at the manufacturer to wholesale level. It
21 arises when the cigarettes are sold at retail.
22 Q. So, at least with respect to the sales that

10:41:32 1 said.
2 THE WITNESS: Even by Native Wholesale
3 Supply or by--I mean, clearly the Tobaccoville ones
4 are, I guess is what I'm saying, and then some of
5 the Native Wholesale Supply ones are. I--
6 ARBITRATOR ANAYA: The ones that are sold
7 on the Reservation?
8 THE WITNESS: Oh.
9 My understanding is, and I know you,
10 Professor Anaya, are an expert on this.
11 ARBITRATOR ANAYA: I'm trying to understand
12 for the purposes of the Escrow Statute. That's what
13 I'm trying to figure out, and not just in the--under
14 Federal law what the incidence of the taxes, the
15 taxability of sales for cigarettes generally are.
16 But for the purposes of the Escrow Statute, how do
17 you view that or how do the states view it?
18 THE WITNESS: This is a matter of dispute,
19 first of all--
20 PRESIDENT NARIMAN: How do you view it?
21 He's asking you, how do you view it?
22 ARBITRATOR ANAYA: I mean, if you don't

10:42:27 1 know, that's fine. But who knows? I mean, someone
 2 has got to be making a determination, right?
 3 THE WITNESS: Well, it's an individual
 4 state determination.
 5 ARBITRATOR ANAYA: Okay.
 6 THE WITNESS: And I'm struggling a little
 7 bit because I'm a little bit out of my depth, but
 8 also because we--and when I say there is some
 9 disagreement on this, there is not universal
 10 agreement among the states.
 11 ARBITRATOR ANAYA: Okay. But--
 12 THE WITNESS: Let me give you an example.
 13 In Oklahoma, for instance. Oklahoma has state
 14 stamps that are the "normal non-Reservation" state
 15 stamps. It also has compacts with a number of its
 16 tribes. And under those compacts, a version of the
 17 state tax stamp is applied to those sales and at a
 18 different rate usually and with the Tribe retaining
 19 a portion or in some cases I think all of the funds,
 20 and those are considered by Oklahoma to be units
 21 sold.
 22 ARBITRATOR ANAYA: Okay. Thanks.

10:44:44 1 transaction, that transaction is absolutely not
 2 taxable by the states. I understand that.
 3 PRESIDENT NARIMAN: Now, even though--but
 4 this is an on-Reservation sale because I'm not quite
 5 sure of this.
 6 THE WITNESS: Yeah. The concept of
 7 on-Reservation also becomes fuzzy. I mean, in
 8 Oklahoma, there is no Reservation, there is just
 9 Indian lands. Not every state even has a defined--
 10 PRESIDENT NARIMAN: It all depends on state
 11 to state?
 12 THE WITNESS: It depends very much, and
 13 that's why I'm struggling and also because as I
 14 said, I'm a bit out of my depth.
 15 BY MR. VIOLI:
 16 Q. Other than Oklahoma, are you aware of any
 17 states' enforcement of the Escrow Statutes prior to
 18 2006 with respect to on-Reservation sales of an
 19 NPM's cigarettes?
 20 A. No, not offhand.
 21 Q. Not offhand.
 22 Did something in 2006 that changed in the

10:43:32 1 PRESIDENT NARIMAN: I just want to ask you
 2 one thing. Do you happen to know, if you don't,
 3 please tell us you don't, what is the portion of
 4 on-Reservation sales regarding the Claimants to the
 5 off-Reservation sales? Do you happen to know?
 6 THE WITNESS: No. It's very hard to
 7 measure because so many of them occur through
 8 channels that we have no way of measuring. For
 9 instance, Internet sales. There are a great number
 10 of sales made on-line. I'm aware of this because I
 11 work with folks in, for instance, Upstate New York
 12 who are working to curb what are oftentimes illegal
 13 Internet sales, and I know that there's a huge
 14 number of cigarettes moving through the Buffalo Post
 15 Office.
 16 PRESIDENT NARIMAN: No, but genuine
 17 on-Reservation sales, I just want to know. Would
 18 they be exempt or not exempt from the statute?
 19 THE WITNESS: What I know is exempt is that
 20 if you and I are members--here is what I know is at
 21 the absolute core of what has to be exempt, if you
 22 and I are member was the same Tribe, we have a

10:45:43 1 law with respect to the Escrow Statutes such that
 2 they would require enforcement of the Escrow
 3 Statutes with respect to on-Reservation sales?
 4 A. I know there were changes in New York. I
 5 know that at one time New York was prohibited from
 6 collecting taxes against certain Native American
 7 sales because there was no mechanism for ensuring
 8 that the genuine Native American-to-Native American
 9 sales were not taxed and until that I believe it
 10 was--it might have been the Court of Appeals of New
 11 York, which is the highest court in New York, said
 12 that you couldn't tax these sales until you figured
 13 out or you established a mechanism for providing a
 14 refund to tribal members or ensuring that the tribal
 15 members were not taxed on those sales, and New York
 16 didn't have that in place until later.
 17 PRESIDENT NARIMAN: How long will you take?
 18 There is a coffee break. Do you want to take a
 19 break now?
 20 MR. VIOLI: Yeah. One quick on this, and
 21 then we could take a break.
 22 BY MR. VIOLI:

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10:46:57 1 Q. So, the question was prior to 2006, are you
2 aware of any enforcement actions with respect to
3 on-Reservation sales of cigarettes under the Escrow
4 Statutes.

5 A. I don't know. I didn't go and review that.

6 Q. All right. Are you aware whether or not
7 any of the states brought enforcement actions
8 against Grand River with respect to sales of the
9 Seneca cigarette on-Reservation?

10 A. Well, here is what I do know, and this
11 is--again, you would have to ask the states, and I
12 know that you have some state witnesses coming up,
13 but prior to 2006, there were a number of state
14 judgments against Grand River for--under the Escrow
15 Statutes for sales of cigarettes that were made
16 through Native Wholesale Supply, not Tobaccolville.
17 And so, I do know that the states were enforcing
18 prior to '06 against the Grand River sales.

19 How the circumstances of those sales that
20 led to the liability under the Escrow Statute I
21 don't know the details of.

22 Q. We will pick up on that when we come back

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11:05:48 1 under the Escrow Statutes.

2 A. Again, no, not that I'm aware of. The
3 states did bring and obtain judgments against GRE,
4 among others, prior to 2006. I think we had a dozen
5 or more judgments against GRE. However, as I said,
6 I do not--and I do know, and I'm not speaking here
7 about the sales through tobacco. I'm speaking about
8 the sales through Native Wholesale. However, I do
9 not know the details of the circumstances of the
10 sales in the various states that is as to why the
11 states determined that those gave rise to liability
12 for deposit of escrow under the State Escrow
13 Statutes.

14 Q. There is nothing in the record that says,
15 prior to 2006, the State of Nevada, for example,
16 sued Grand River for escrow deposits due in light of
17 sales that took place on Indian Reservations in
18 Nevada; right?

19 A. I don't know the full record.

20 Q. Okay. And with respect to the NWS sales
21 that you just mentioned, there is nothing in the
22 record that says that those sales reflect sales of

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10:48:09 1 from the break.

2 PRESIDENT NARIMAN: Okay. 15-minute break.
3 (Brief recess.)

4 PRESIDENT NARIMAN: Before you resume,
5 there is a little announcement by the Secretary
6 about the time already taken. She tells me it's
7 about four hours with this witness. Now, it's all
8 right, you can take all day or all night with him,
9 but the problem is so far as I'm concerned--but the
10 problem is that we have to accommodate it into the
11 schedule. So there are also other witnesses, so you
12 will have to ration time in such way as you feel is
13 appropriate. I don't want to shut you up.

14 MR. VIOLI: Okay.

15 PRESIDENT NARIMAN: But please consider
16 that and bear that in mind.

17 MR. VIOLI: I will, Mr. President. Thank
18 you. I will wrap up, I think, in 10 or 15 minutes.

19 BY MR. VIOLI:

20 Q. Just before the break, Mr. Hering, I asked
21 you if there was a change in the enforcement
22 conceptually with respect to on-Reservation sales

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11:07:22 1 Seneca cigarettes on Reservation land, do they?

2 A. Well actually, there might be, because I
3 think that I've heard, and I don't know in what
4 context but I think it--

5 Q. I'm asking in the context of what's in the
6 record--

7 A. I understand that, but I think that there
8 are things in the record most likely where I have
9 always heard it said from GRE that all of their
10 sales through Native Wholesale Supply are made on
11 the Reservation, that they say okay, our channel for
12 sales off the Reservation is Tobaccolville. Our
13 channel for sales on the Reservation is Native
14 Wholesale Supply, and those are all made on the
15 Reservation.

16 So, yes, I think there is something most
17 likely in the record that says these are sales on
18 the reservation. However, as I have said, some
19 states did bring actions against Native Wholesale
20 Supply--I'm sorry, against GRE for cigarettes that
21 were sold through Native Wholesale Supply.

22 I do not know the individual circumstances

11:08:17 1 on each of those sales as to why they gave rise to
2 escrow liability.
3 Q. So, you don't know if they were sales to
4 consumers on Reservations?
5 A. I don't know the circumstances.
6 Q. Okay. I would like to move on, if I may.
7 Is there a mechanism in the MSA that
8 provides for a compensation or a form of rebate to
9 the Participating Manufacturers in the MSA if they
10 lose market share?
11 A. I take it you're referring to the
12 non-Participating Manufacturer adjustment which we
13 covered yesterday briefly. Again, this is the
14 adjustment, that it's a potential adjustment that
15 may apply when Participating Manufacturers' market
16 share declines below a certain point. It doesn't
17 necessarily apply. There are certain circumstances
18 that must take place first.
19 Q. And the circumstances are if the
20 Participating Manufacturers lose more than 2 percent
21 and a state--and the 2 percent loss of market share
22 is caused by the MSA, determined by an economics

11:10:16 1 applies.
2 Q. Now, to get that reduction, these
3 Participating Manufacturers under the MSA have to
4 engage the states in an arbitration proceeding which
5 is variously known as an NPM proceeding, adjustment
6 proceeding; correct?
7 A. Umm.
8 Q. The adjustment is not automatic.
9 A. It's not automatic.
10 Q. Right.
11 A. I suppose what we are engaged in currently
12 is a proceeding in arbitration over diligent
13 enforcement, yes.
14 Q. Diligent enforcement.
15 And diligent enforcement, the reason why
16 you're engage in the latter, the last aspect at this
17 point, whether or not the states diligently enforced
18 it, is because an economics firm has already
19 determined that there is an NPM adjustment. There
20 was a market share loss to Participating
21 Manufacturers above 2 percent that resulted in or
22 that was caused by the MSA; correct?

11:09:23 1 firm, and the state is also found not to diligently
2 enforce the Escrow Statute, then there would be a
3 reduction in NPM adjustment in the form of a credit
4 or a payback to the Participating Manufacturers;
5 correct?
6 A. I think there is one more circumstance, but
7 yes, that's essentially it.
8 Q. And it's for less than 16-percent loss in
9 market share, it's 3-percent reduction in the MSA
10 payment for every 1-percent loss in market share;
11 correct?
12 A. Above the--
13 Q. After the 2 percent.
14 A. After the 2 percent, above the 2 percent,
15 yes.
16 Q. So, PMS--excuse me.
17 PMS lose 1 percent, assuming other all the
18 other conditions apply, they get a 3-percent credit
19 or reduction, and the states consequently get a
20 3-percent reduction in their MSA payments under that
21 circumstance we just described; right?
22 A. Yes, that's correct assuming it all

11:11:07 1 A. Not quite. It's the mechanical aspect of
2 determining what the market share loss is done by
3 the independent auditor which is
4 PricewaterhouseCoopers. At that point, the
5 significant factor test, the test to determine
6 whether the MSA was a significant factor
7 contributing to the market share loss is done by the
8 economics firm, and now, yes, we are at the stage
9 where we are determining whether or not the states
10 diligently enforced the statutes because diligent
11 enforcement of the model Escrow Statutes is
12 essentially a safe harbor. It gives the states the
13 ability to avoid the negative adjustment.
14 Q. And the proceedings that--the first
15 proceeding before the independent--or the consulting
16 firm, the economics consulting firm for the
17 determination of calculation of the adjustment, NPMs
18 were not invited to participate in that proceeding;
19 correct?
20 A. That's correct.
21 Q. And none of those documents that were
22 exchanged or submitted in those proceedings had been

11:12:15 1 produced to this Tribunal; is that correct?
 2 A. I don't know.
 3 MR. FELDMAN: Mr. President, Mr. Hering has
 4 been asked several questions about document
 5 production. He's testified repeatedly that he was
 6 not involved in that, and I think that should be an
 7 end to that line of questioning.
 8 MR. VIOLI: I asked him a question if he
 9 knows it's in the record. That's a fair question.
 10 THE WITNESS: Yeah, I said I don't. Some--
 11 MR. VIOLI: That's fine. Okay.
 12 PRESIDENT NARIMAN: Let's move on.
 13 BY MR. VIOLI:
 14 Q. Now, and in the arbitration for diligent
 15 enforcement that's currently underway, have NPMs
 16 been invited to participate in those proceedings?
 17 A. No.
 18 Q. Now, in connection with this diligent
 19 enforcement, the second part, and the causation
 20 factor, the first part, those proceedings--in either
 21 of those proceedings did the Participating
 22 Manufacturers make the argument or take the position

11:14:19 1 A. Well, what you're referring--
 2 Q. --as a matter of public policy, are you
 3 saying that was not done in connection with or to
 4 obtain a determination the Escrow Statutes don't
 5 apply for purposes of the NPM adjustment?
 6 A. Well, what you're referring to is the units
 7 sold dispute, which I referred to earlier. The
 8 question of what is a unit sold is a matter of
 9 dispute between the states on the one hand and the
 10 Participating Manufacturers on the other.
 11 It's also not a matter of complete
 12 agreement among the states, and it depends somewhat,
 13 as I explained earlier, on state law.
 14 And I'm not entirely--I am somewhat
 15 familiar with the lawsuit that you're referring to,
 16 but I don't know the details. What I--but I think
 17 you're mischaracterizing it because I think that it
 18 wasn't a question of sales on-Reservation. It was
 19 again a question of whether New York had to collect
 20 escrow for the sales that were clearly taxable.
 21 The PMs--that is, Philip Morris and the
 22 other Participating Manufacturers--have from time to

11:13:18 1 that the states have to give the PMs a credit, a
 2 rebate or a return of their payments because the
 3 states were not diligently enforcing these Escrow
 4 Statutes by enforcing them on Indian Reservations or
 5 tribal land?
 6 A. If I understand your question correctly,
 7 no, they haven't made that argument.
 8 Q. They haven't made it? So when Philip
 9 Morris brought the lawsuit against NWS and every
 10 tribe and nation in New York State for a declaration
 11 about the applicability of the Escrow Statutes on
 12 Indian land or Indian country in New York, that was
 13 not for the purposes of obtaining a judgment to show
 14 that the Escrow Statutes don't apply as a matter of
 15 public policy in New York?
 16 A. I'm not familiar with that suit. You're
 17 saying Philip Morris brought a lawsuit in New York?
 18 Q. No. Excuse me. When the State of New York
 19 brought the lawsuit against Philip Morris and all
 20 the Indian Nations and Tribes in New York for a
 21 declaration that the Escrow Statute does not apply
 22 on Indian Country in New York--

11:15:33 1 time maintained that the states should be collecting
 2 taxes on the sales that are taxable or, in the
 3 alternative, if they aren't collecting taxes on
 4 those sales, at least collect the escrow.
 5 And again, this is sales that they believe
 6 are taxable, not the sales that occur on-Reservation
 7 that are clearly not taxable.
 8 Q. Is there a dispute among Philip Morris and
 9 the various states on what is a taxable sale on the
 10 Reservations?
 11 A. I don't know.
 12 Q. Okay.
 13 A. I don't think we've reached the point where
 14 I have a clear understanding of what their position
 15 is or exactly what our position is. We haven't
 16 reached that point.
 17 Q. And you don't know if the Tribunal or if
 18 Claimants have been provided with copies of those
 19 documents which reflect the positions taken by the
 20 states and the positions taken by the manufacturers
 21 vis-à-vis sales on Indian land.
 22 A. Aside from the documents which you've just

11:16:35 1 referred to, that is the one in New York, the case
 2 in New York; there are no documents. We haven't
 3 reached the stage in our proceeding where any
 4 documents have been filed.
 5 Q. I didn't say proceeding.
 6 A. Or discovered.
 7 Q. I didn't say proceeding.
 8 What about letters? Has Philip Morris or
 9 any of the PMs written letters to the states at
 10 various times discussing the aspects or terms of
 11 enforcement of the Escrow Statutes, like the letter
 12 that Mr. Luddy referred to this morning of June 18
 13 of 2001?
 14 A. I'm sorry. The June 18 letter--which one
 15 are you referring to?
 16 Q. The one from the exempt SPMs, saying that
 17 the states are not doing enough to enforce the
 18 Escrow Statutes.
 19 A. No, there is not a whole lot of
 20 correspondence along those lines. There might be a
 21 handful of other documents, but that isn't something
 22 that regularly happens.

11:18:09 1 MR. VIOLI: That's right.
 2 ARBITRATOR CROOK: I was reminding
 3 Mr. Luddy that under Rule 3 of the IBA Rules, the
 4 requirement is to identify documents and make a
 5 showing as to their materiality. Did you do that?
 6 MR. VIOLI: I believe we identified what
 7 documents we were specifically aware of, and we
 8 identified generally other documents that we could
 9 not be aware of because we had never gotten a list.
 10 We just know about their general existence, and
 11 that's from general knowledge in the business and in
 12 the public documents.
 13 ARBITRATOR CROOK: And, in your view, that
 14 conforms to Rule 3 of the IBA Rules.
 15 MR. VIOLI: To the best of our abilities,
 16 yes, and whether they would produce them separately.
 17 PRESIDENT NARIMAN: No, no, we only have 45
 18 minutes until lunch.
 19 MR. FELDMAN: Mr. President, I would just
 20 note that the Tribunal has already ruled in this
 21 case. The document request submitted by the
 22 Claimants were inconsistent with the IBA Rules, and

11:17:28 1 Q. And--but we don't have--we didn't have the
 2 opportunity to see them nor has the Tribunal--
 3 ARBITRATOR CROOK: Mr. Luddy, did you make
 4 a request for those as identifiable documents under
 5 Rule 3 of the IBA Rules?
 6 MR. VIOLI: We made a document request that
 7 encompassed all of these.
 8 ARBITRATOR CROOK: I understand that, but
 9 did you ever make a request that conformed to the
 10 requirements of Rule 3 of the IBA Rules?
 11 MR. VIOLI: I'll leave it to the NAFTA
 12 counsel, but I know that we requested it and we
 13 requested these documents specifically.
 14 ARBITRATOR CROOK: You specifically
 15 requested these documents.
 16 MR. VIOLI: We specifically requested
 17 documents dealing with this issue.
 18 ARBITRATOR CROOK: You know that under Rule
 19 3 of the IBA Rules--
 20 MR. VIOLI: We have to--
 21 ARBITRATOR CROOK: --the requirement is to
 22 identify a document.

11:19:03 1 so the one question after another about document
 2 production is simply irrelevant at this point,
 3 particularly given this witness.
 4 MR. VIOLI: I'll allow Mr. Weiler to
 5 address the issue on whether or not the request--we
 6 respectfully disagree with our friends here, but
 7 whether the requests deal with this issue, but apart
 8 from whether we have requested it, if it's relevant
 9 to a factual issue, the question was whether or
 10 not--
 11 PRESIDENT NARIMAN: Okay. Try to wind up
 12 now, if you can.
 13 BY MR. VIOLI:
 14 Q. Now, just prior to the execution of the
 15 MSA, the states were in discussions with Liggett and
 16 Commonwealth regarding joining the MSA with an
 17 exemption; right?
 18 A. Again, I wasn't involved. That was a
 19 chapter in my life where I was not involved with the
 20 MSA, and I wasn't part of the settlement
 21 negotiations.
 22 Q. Have you seen the Press Release of the--or,

11:19:53 1 excuse me--the transcript of the press conference
 2 that the negotiating Attorneys General provided in
 3 connection with the announcement of the MSA on
 4 November 18 of 2008--I mean, excuse me, 1998?
 5 PRESIDENT NARIMAN: What date?
 6 MR. VIOLI: 1998, I'm sorry, press
 7 conference announcing the MSA.
 8 THE WITNESS: Probably sometime in my life
 9 I have seen that. But if I have, it hasn't been for
 10 years.
 11 BY MR. VIOLI:
 12 Q. Okay. And the exemption or grandfather,
 13 you call it, was based on the two years prior to the
 14 Grandfathered SPMs joining the MSA; correct? That
 15 was--they joined in 1999 and the exemption was based
 16 on '97 and '98 market share.
 17 A. The offer was if you were to become a
 18 Participating Manufacturer to the MSA within 60, and
 19 then it was later amended to 90 days of the MSA--I'm
 20 sorry, of the MSA execution date and submit
 21 yourselves to the public health restrictions and the
 22 payment provisions, those companies would not have

11:21:58 1 Q. Now, during the opening yesterday, there
 2 was a slide that talked about equal choice, that the
 3 manufacturers--the Claimants here are given the same
 4 choice to join the MSA as the manufactures--what we
 5 called the grandfathered manufacturers,
 6 Grandfathered SPMs; right? We saw the slide
 7 yesterday that discussed that they both have a
 8 choice and the choice was an equal choice--or the
 9 same choice.
 10 A. I'm really not sure which side you're
 11 referring to, but I get the concept, I think.
 12 Q. Okay. And that was an incentive to join
 13 the MSA, we said.
 14 A. You're talking about the grandfathered
 15 share?
 16 Q. Right.
 17 A. Yes, it was.
 18 Q. So, and there was a consultation with
 19 Liggett and Commonwealth prior to their execution of
 20 the MSA and prior to the MSA's execution by the OPMs
 21 to come in to get a grandfather, to live by the
 22 requirements of the MSA, and we'll give you this

11:21:02 1 to make payments on the greater of their '98 market
 2 share or 125 percent of their '97 market share.
 3 Q. And that was the two years prior to the
 4 execution of the MSA by them; correct?
 5 A. Yes.
 6 Q. Okay. And it was originally 60 days, but
 7 the signatories to the MSA agreed to extend it to 90
 8 days; correct?
 9 A. That's correct.
 10 Q. All right. So, it was something that could
 11 be changed. It wasn't fixed in stone at the time of
 12 first signing of the MSA; correct?
 13 A. Well, there is an amendment to the MSA. In
 14 theory, any part of the MSA can be amended--
 15 Q. And that was amended to go from 60 days to
 16 90 days, the part that allowed people to join with
 17 an exemption; correct?
 18 A. That's correct.
 19 Q. All right. And that grandfathered
 20 exemption, grandfathered share, that was part of an
 21 incentive to join; correct?
 22 A. Yes, it was.

11:23:05 1 grandfather as an incentive to join; correct? Is
 2 that generally the concept?
 3 A. I have no knowledge of any consultation
 4 with any companies in regards to this.
 5 Q. Okay. And given that the basis for the
 6 incentive to join the MSA was the two years prior to
 7 joining the MSA for those exempt SPMs currently,
 8 wouldn't it seem reasonable to you to have that same
 9 offer provided to the Claimants here--that is, join
 10 the MSA today and you can join with two year--with
 11 your prior two years' market share as an exemption.
 12 Wouldn't that be the way to look at it as a same
 13 offer to those that were made the offer in 1998 or
 14 1999?
 15 A. No. And--
 16 Q. Would your testimony change--
 17 A. No. Can I--can I--
 18 Q. Okay, let me follow up and then you can
 19 explain.
 20 A. Can I answer? Or--
 21 Q. Yeah, but I want--
 22 A. All right. You want to follow up first and

11:23:53 1 then I can answer.

2 Q. And would your answer change if they
3 offered this exemption even prior to the execution
4 of the MSA by the OPMS? In other words, if they
5 negotiated with them, if they consulted with them
6 outside the public purview, said we're going to
7 enter into the agreement with the OPMS but we want
8 you to join within 90 days thereafter, we just
9 haven't signed it yet, we haven't inked a deal, but
10 we want to know if you'll go along with it. Would
11 your testimony change that the offer made to them
12 based on a two year--prior two years' market share
13 not be the same as should be offered the Claimants
14 in this case?

15 A. No, I really don't think so, if I
16 understand what you're saying.

17 And if I could now give my complete answer.

18 Q. Yes, please.

19 A. This is an argument that has been made from
20 time to time by a number of NPMs who have not been
21 pleased with the grandfathered share. They've said,
22 well I want the same deal, and the deal I want is

11:26:19 1 share in 1997 or 1998. I suppose if we had extended
2 the grandfathered deal to today, if we enacted an
3 amendment as Mr. Violi has suggested and extended it
4 to today, if Grand River accepted that, it would
5 have a zero grandfathered share because in 1997 and
6 '98 it had no market share in the United States.

7 So, that's not the deal they want. They
8 want the deal to be able to build up the market
9 share as an NPM with the advantages of an NPM and
10 then, as I say, switch at the point that is
11 advantageous to become a PM.

12 And if I understood the opening from the
13 Claimants in this case yesterday, they're also
14 asking or really asking for a different deal. They
15 would like a grandfather essentially as an NPM.
16 They don't wish to become--or really to become a
17 Participating Manufacturer and make the payments for
18 all the cigarettes on which they pay FET because as
19 I explained yesterday, that is the basis for your
20 payments under the MSA. The FET, not the SET. What
21 they wished to do is to remain an NPM and to argue
22 that the Allocable Share Release is akin to the

11:24:52 1 that I can be an NPM, I can build up my market share
2 through use of either sales in the previously
3 settled states where no escrows do because of course
4 they are not part of the MSA. I'm not sure I made
5 that clear. But there are no Escrow Statutes in the
6 previously settled states. So, in those states you
7 can sell currently at about a \$6-per-carton
8 advantage to a company that has to make settlement
9 payments under the MSA.

10 (Technical interference.)

11 A. Okay. So the--as I was saying, the deal
12 that the NPMs are looking for from our perspective
13 is the ability to build up your market share through
14 sales in the PSS, staying out of the MSA, and
15 through, as I have said earlier, exploitation of the
16 allocable share loophole; and then at the time when
17 they determine that's advantage to become a
18 Participating Manufacturer, to demand that they
19 receive an exemption for the year that--prior to
20 when they join rather than 1999--I'm sorry, 1997 or
21 1998. And in most instances, like with Grand River
22 Enterprises, these are companies that had no market

11:27:32 1 grandfathered share. That is, they don't want to
2 make payments, they don't want to submit to the
3 public health provisions of the MSA, and yet they
4 want to be able to get a release of nearly all of
5 their escrow under the allocable share provision,
6 arguing that that is essentially the same deal that
7 the SPMs got.

8 So, no, I don't agree.

9 Q. But you testified yesterday also that there
10 is no evidence in the record of Grand River engaging
11 in any conduct that's not--excuse me, that's
12 prohibited under the MSA.

13 PRESIDENT NARIMAN: That's argument.

14 BY MR. VIOLI:

15 Q. You said that yesterday or--

16 A. I'm not sure I said that, but let--the
17 transcript will speak for that.

18 Q. Okay. One last question. You mentioned
19 the four previously settled states.

20 A. Yes.

21 Q. They don't have an Escrow Statute.

22 A. That's correct.

11:28:21 1 Q. But they have an agreement similar to the
2 MSA. It has conduct restrictions in it.
3 A. Yes.
4 Q. It has payments based on national market
5 share; right?
6 (No response.)
7 Q. And there's one state that hasn't passed
8 the allocable share. That's Missouri; right?
9 A. That's correct.
10 Q. And with respect to just the record in this
11 case, because that's all I have and that's all I've
12 been provided, is there anything in the record in
13 this case that indicates that the MSA world, the MSA
14 agreement falls apart from Missouri or in the
15 previously Settling States because A) they either
16 don't have an Escrow Statute in the case of
17 previously Settling States or that Missouri didn't
18 pass the Allocable Share Amendment? I'm talking
19 about the record and the evidence in this case.
20 A. I um--
21 Q. You're not familiar with the--
22 A. I don't know enough about the record or

11:30:11 1 Q. And you were also asked several questions
2 about the proposed 1997 Federal tobacco settlement.
3 A. Yes.
4 Q. What is the relationship, if any, between
5 the proposed 1997 Federal settlement and the MSA
6 agreement?
7 A. Again, I'm not very familiar with the terms
8 of the proposed settlement, but my understanding, as
9 we discussed a little bit earlier, that it's
10 completely different. There is no such thing as a
11 PM or an NPM or an NPM adjustment or an Escrow
12 Statute because it's Federal legislation.
13 Q. And you were also asked several questions
14 about, in Document 9 of Claimant's Core Bundle,
15 Paragraph 39 involving out-of-state tobacco
16 manufacturers.
17 A. Oh, yes. The--this is--
18 Q. This is the document?
19 A. This is the frequently asked question
20 document?
21 Q. Yes, this is document nine, and
22 specifically Paragraph 39.

11:29:05 1 evidence to answer that question.
2 MR. VIOLI: No further questions,
3 Mr. Chairman.
4 PRESIDENT NARIMAN: Thank you.
5 Do you want to ask some questions?
6 MR. FELDMAN: Yes, please.
7 REDIRECT EXAMINATION
8 BY MR. FELDMAN:
9 Q. Good morning, Mr. Hering.
10 A. Good morning.
11 Q. I just had a few questions for redirect
12 examination.
13 You were asked on cross-examination about
14 your testimony before state legislatures in support
15 of the Allocable Share Amendment.
16 A. Yes.
17 Q. Were Non-Participating Manufacturers
18 involved in that legislative process?
19 A. The Non-Participating Manufacturers, as I
20 mentioned, were quite often at my testimony
21 testifying in opposition and active in lobbying
22 efforts against the legislation.

11:31:28 1 A. The one that says the--this is question 39:
2 The Tobacco Product Manufacturer is the person
3 responsible for paying into the escrow fund?
4 Q. Yes.
5 A. Okay.
6 Q. So, if you could just complete it.
7 A. Okay. This is on 39: The Tobacco Product
8 Manufacturer, TPM, is the person responsible for
9 paying into the escrow fund. It includes a
10 manufacturer intending its cigarettes to be sold
11 anywhere in the United States. And the first
12 purchaser for resale of cigarettes which were not
13 intended to be sold in the United States.
14 Q. So, under the Escrow Statutes, if a foreign
15 manufacturer does not intend for their cigarettes to
16 be sold in the United States, are they--is that
17 foreign manufacturer subject to escrow obligations?
18 A. No, they're not.
19 Q. And are you aware of foreign NPMs that have
20 complied with their escrow obligations under the
21 Escrow Statutes?
22 A. Yes, I am.

11:32:31 1 Q. Are you aware of any examples of foreign
2 NPMs?
3 A. KT&G, a company that's also represented by
4 Mr. Violi, in fact, is one that, as far as I know,
5 is at least in general compliance, if not complete
6 compliance, with the Escrow Statute in a good number
7 of states.
8 Q. And have states obtained judgments--
9 A. And maybe I should say that KT&G is Korea
10 Tobacco & Ginseng. I'm sorry, for those that don't
11 know, it's a company out of Korea.
12 Q. And have states obtained judgments against
13 foreign NPMs for the collection of escrow deposit
14 obligations?
15 A. Yes, they have.
16 Q. And can you recall any examples of
17 judgments that were obtained against foreign NPMs?
18 A. We have dozens and dozens of judgments
19 against foreign NPMs from really across the world in
20 any number of countries.
21 I--let's see. I'm just trying to think of
22 the countries. We have some from China. We have

11:35:19 1 on recross?
2 PRESIDENT NARIMAN: Yes.
3 RECCROSS-EXAMINATION
4 Q. Mr. Hering.
5 PRESIDENT NARIMAN: You could take more
6 than a couple of minutes.
7 MR. LUDDY: I'm going to be expeditious.
8 BY MR. LUDDY:
9 Q. On Page 39--or, I'm sorry, Question 39 on
10 the document we were just looking at, the NAAG
11 frequently asked question document.
12 A. Well, yes. It's the FAQ. Again, I'm not
13 sure whether it's solely a NAAG document or
14 something else, but yes.
15 Q. Okay. We did establish it had a NAAG fax
16 number on it, though; right?
17 A. I believe NAAG had a part in it, yes.
18 Q. Right. Okay.
19 Let's just look at the first sentence for a
20 minute and parse it from the second sentence that
21 deals with importers. The first sentence reads: If
22 the manufacturer is out of state, we may not have

11:33:42 1 some from Greece, from India, from the Philippines,
2 from a number of countries in South America, from
3 other countries in Europe and the Middle East, from
4 Canada, not including GRE, other Canadian companies,
5 although there's only just a couple, very small
6 ones.
7 MR. FELDMAN: Thank you, Mr. Hering.
8 No further questions.
9 PRESIDENT NARIMAN: I just wanted to know,
10 is he your principal witness on liability? Am I
11 correct?
12 MR. FELDMAN: Principal witness?
13 PRESIDENT NARIMAN: Yes? No?
14 MR. FELDMAN: No. He's one of--
15 PRESIDENT NARIMAN: One of several.
16 MR. FELDMAN: We have several witnesses.
17 Mr. Hering is one of them.
18 PRESIDENT NARIMAN: On liability, yes.
19 MR. FELDMAN: Yes. He's one of several
20 witnesses.
21 PRESIDENT NARIMAN: Okay.
22 MR. LUDDY: May I have just a few moments

11:36:08 1 jurisdiction over the company, may not be able to
2 require it to make escrow payments.
3 Now, that sentence on its face also applies
4 to a foreign company; correct? Because that foreign
5 company is, obviously, by definition, out of state;
6 right?
7 A. I'm sorry. The first sentence says the
8 Tobacco Product Manufacturer, TPM.
9 PRESIDENT NARIMAN: According to B.
10 BY MR. LUDDY:
11 Q. B, I'm sorry.
12 A. Oh, I'm sorry. I'm looking at the wrong
13 place.
14 Q. B. If the manufacturer is out of state, we
15 may not have jurisdiction over the company and may
16 not be able to require it to make escrow payments.
17 A. Yes.
18 Q. That sentence, on its face, applies to
19 foreign companies; correct?
20 A. Yes.
21 Q. Okay. All right. And that was the focus
22 of my questioning before, not the second sentence

11:36:55 1 that Mr. Feldman now focuses on with respect to the
2 importers.

3 And with respect to judgments, do you know
4 the difference between a judgment on the merits and
5 a default judgment?

6 A. Yes.

7 Q. What is the difference?

8 A. A default judgment is a judgment in which
9 the defendant has not made an appearance.

10 Q. Right.

11 And the court just enters a judgment on the
12 basis of the allegations made by the plaintiff
13 because no one is there to defend it; correct?

14 A. Roughly speaking, yes.

15 Q. And most of the judgments that you have
16 obtained against foreign manufacturers have been
17 default judgments; correct?

18 A. Yes.

19 Q. And, in fact, you've obtained some default
20 judgments against Grand River Enterprises, haven't
21 you?

22 A. Yes.

11:38:49 1 specifically South Dakota, and Ohio attempted to
2 domesticate--I believe they did--in the State of
3 South Carolina where Grand River was known to have a
4 creditor, Tobaccoville, that owed Grand River money,
5 and then thereby collect on the judgments. It was
6 only at that point where efforts to collect were
7 made that Grand River entered the case and attempted
8 to intervene.

9 Similarly in the California case,
10 California was ignored until such time as California
11 moved to enforce by domesticating its judgment in
12 New York. Grand River first defended on the basis
13 that their name was misspelled on the pleading.
14 Instead of saying Grand River Enterprises Six
15 Nations Limited SIX, California entitled it Grand
16 River Enterprises 6--the numeral--Nations Limited,
17 and Grand River moved to dismiss on those grounds,
18 and has fought it ever since.

19 Q. And what happened when it went back to
20 California after that procedural battle you just
21 mentioned?

22 A. I think you ought to ask Mr. Eckhart.

11:37:48 1 Q. And on some occasions, Grand River
2 Enterprises has come back in and opened those
3 default judgments and tried to contest them, have
4 they not?

5 A. Well, actually--

6 Q. Is that--have they or haven't they?

7 A. Well, if I could explain again. I mean, I
8 think there is some context here. A good number of
9 default judgments were obtained against Grand River
10 at great effort and expense in trying to serve Grand
11 River in Canada.

12 At times, my understanding is the Mounties
13 feared to go on the Reservation and even serve
14 because they were not welcome after a while in
15 serving process on the owners of Grand River.

16 And Grand River certainly had notice and
17 the ability to defend. It did not choose to show up
18 and defend itself, and yes, the judgments were
19 default judgments.

20 At that point, a number of states,
21 including you mentioned South Dakota earlier,
22 attempted to domesticate their judgments in a state,

11:39:52 1 Q. Do you know, sir, or you don't know?

2 A. I don't know.

3 Q. Okay. Well, I think we'll hear from
4 Mr. Eckhart, and the opinion is in the record as of
5 yesterday that the California courts said that
6 California had no jurisdiction over Grand River
7 Enterprises to require escrow payments; isn't that
8 correct, sir?

9 A. I don't know.

10 Q. And again, this gets back to the
11 fundamental point that we're talking about that is
12 in this NAAG memo. There is a difference between
13 not being able to enforce a judgment and not being
14 able to require Grand River Enterprises to make
15 escrow payments to go along with your MSA scheme,
16 isn't it? There is a fundamental difference there,
17 isn't there?

18 A. Could you read that back?

19 Q. You know what, I'll rephrase it.

20 It's difficult to call somebody a
21 "scofflaw"--and you're sitting 20 people from people
22 from Grand River Enterprises. It's difficult to

11:40:52 1 call somebody a "scofflaw" when the State of
 2 California doesn't have the authority to require
 3 them to make escrow payments, isn't it?
 4 A. Well, California and South Dakota are not
 5 the only states in which Grand River has sold, and
 6 I--my own opinion is that Grand River is subject to
 7 personal jurisdiction in the United States.
 8 Q. Okay. Your argument, though, is always
 9 that the states can't enforce a judgment and make
 10 Grand River pay what you think they're entitled to,
 11 correct?
 12 A. I'm not sure where you're going with that.
 13 My argument--
 14 Q. Let's look back--let's look back at Page 13
 15 of this document: If the manufacturer is out of
 16 state, we may not have jurisdiction over the company
 17 and may not be able to require it to make escrow
 18 payments.
 19 PRESIDENT NARIMAN: I don't think that's in
 20 the re-examination, but you had better limit
 21 yourself.
 22 MR. LUDDY: I will.

11:43:19 1 MR. WEILER: Okay, so how long do I have?
 2 (Discussion off microphone.)
 3 MR. WEILER: So I've got lots of time,
 4 then. Okay.
 5 PRESIDENT NARIMAN: What are you addressing
 6 here because there's a bit of a mixup here.
 7 MR. WEILER: You remember that lovely
 8 introduction yesterday that we began yesterday, with
 9 the long--this is more of that introduction. This
 10 would be the--see if I can move this towards
 11 you--this is basically the Claimants' continuing
 12 submissions on--more in this regard on the law.
 13 Basically it's the introduction I didn't do
 14 yesterday that I'm going to do now.
 15 PRESIDENT NARIMAN: Please. Go ahead.
 16 (Discussion off the record.)
 17 MR. WEILER: So I have two PowerPoint
 18 presentations. One is with the introduction that I
 19 had planned yesterday. The other is in answer to
 20 some of the questions that have come up concerning
 21 the nature of the investment. It would be what you
 22 would call one of those more detailed times when

11:42:02 1 PRESIDENT NARIMAN: You should have asked
 2 this earlier.
 3 MR. LUDDY: Actually, I am following up on
 4 his, but you know what? I will--I think the record
 5 is clear on this point, and I will let it stand on
 6 that point.
 7 Thank you, Mr. Chairman.
 8 MR. FELDMAN: Thank you, Mr. President. No
 9 further questions.
 10 PRESIDENT NARIMAN: All right. Thank you
 11 very much.
 12 THE WITNESS: Thank you.
 13 (Witness steps down.)
 14 PRESIDENT NARIMAN: All right. So what's
 15 next?
 16 MR. WEILER: Well, you could have 15
 17 minutes of me, Mr. President, or we could start--we
 18 could start lunch 15 minutes earlier and end at 15
 19 minutes earlier and then you would get me
 20 completely.
 21 PRESIDENT NARIMAN: Let's start because we
 22 stopped at before eleven.

11:44:54 1 Professor Anaya keeps getting to the questions that
 2 he keeps asking both parties. When do I get to ask
 3 you questions. We are getting close to that time,
 4 which I think you'd appreciate.
 5 To begin, I want to try to set up a bit of
 6 a road map for the parties and for the Tribunal for
 7 how the remaining 15 hours of our time will be used.
 8 Our time will continue to be devoted primarily to
 9 cross-examination of witnesses. Assuming we have
 10 some time remaining, though, we'd also like to show
 11 you the short promotional video that GRE produced a
 12 few years ago, which was included with the
 13 Claimants' Memorial, and it was attached to the
 14 First Witness Statement of Mr. Montour. If we don't
 15 have time for it, we're probably sure you have seen
 16 it already and that you can see it at your own time.
 17 We also, though, will be providing you with
 18 some what we might call question-and-answer session
 19 opportunities as we have the witnesses breaking up
 20 at various points. What we're going to try to do
 21 instead is give you a very short 5- or 10-minute
 22 presentation of what we think the issues are in a

11:45:58 1 particular topic and then invite your questions on
2 that topic because we have a sense that you already
3 have nice long lists of questions prepared, and that
4 might make it easier for us to have that flow.

5 As an aside, I should mention that we were
6 quite surprised that Mr. Montour, Jerry Montour,
7 actually hasn't been asked by our friends to be
8 cross-examined. It seems that they prefer the
9 safety of their Rejoinder to take shots at his
10 credibility and question a lot of his evidence, but
11 despite the fact we've given them repeated
12 opportunities to actually cross-examine Mr. Montour,
13 they don't want to.

14 And we are of the opinion that oral
15 hearings are to provide arbitrators with the
16 opportunity to take their own measure of a witness,
17 and we think it's one thing for the parties to
18 conclude that perhaps an extraneous expert witness
19 isn't necessary, but the key--one of the two key
20 witnesses for the Claimant to not to be
21 cross-examined, we submit, is a little odd.

22 MR. FELDMAN: Mr. President, this issue has

11:47:58 1 And then on Friday morning, if not also on
2 Thursday, we would basically have the residual of
3 any other questions you might have.

4 So, that's hopefully the road map,
5 dependent upon witnesses and how they go.

6 Yes.

7 ARBITRATOR CROOK: As you go forward--and I
8 thank you for giving us your PowerPoint, and I took
9 the advantage of looking at it beforehand--it would
10 be helpful to the Tribunal, as you go to clarify if
11 at any point you are modifying the claims that were
12 set out in the Memorial. At the moment we are sort
13 of taking the Memorial as your case.

14 Now, you're setting out points of emphasis
15 here that are maybe a little different than what was
16 done there. But insofar as you are sort of
17 reframing the issues that you think we are supposed
18 to decide, it would be helpful to make that clear
19 because at the moment we're taking your Memorial as
20 the baseline.

21 MR. WEILER: Thank you, Mr. Crook.

22 In a nutshell--I actually--the writing is

11:47:02 1 already been decided by the Panel.

2 PRESIDENT NARIMAN: Beg pardon?

3 MR. FELDMAN: The issue of Mr. Montour's
4 testimony has already been decided by the Panel.

5 MR. WEILER: If I understand, the decision
6 was that the Respondent is allowed to call whom the
7 Respondent requires or believe they require, and the
8 Claimant is also. That doesn't mean that the
9 Claimant can't have an opinion about the reasons
10 behind why you choose to exercise your discretion
11 the way you do.

12 In any event, space between the
13 cross-examine of the witnesses we're going to try to
14 do these question-and-answer periods. We think this
15 afternoon, time permitting, we're going to try to
16 answer questions on the remaining jurisdictional
17 objections.

18 Tomorrow, we are going to try to invite you
19 to ask questions about the on-reserve business, and
20 starting off with a short recap on that.

21 On Thursday we are going to try to cover
22 the off-reserve business.

11:49:15 1 right there, but I'll just tell you--essentially no,
2 every claim that we have in the Memorial is still
3 our claim. What I'm trying to do here is I'm trying
4 to demonstrate simple pathways for the Tribunal
5 because there have been--there is a lot of evidence,
6 and there are lots and lots of books, and we think
7 it would be useful for the Tribunal to see that it
8 is quite possible for us to demonstrate the case we
9 have to make, and I give you six examples.

10 So, the case to make, I tried to decide how
11 to best explain to you why we believe the Claimants
12 have been wronged and why you should give them
13 compensation, and I, perhaps being the law
14 professor, went back to basics, and so I tried to
15 say to myself, well, what do we need to prove?
16 What's the bottom line? I came up with three things
17 to answer a question on the merits.

18 One needs to know whether or not the
19 obligation exists: Has the Claimant articulated an
20 obligation owed to the host State--owed by the host
21 State to the Investors under the Treaty?

22 Breach: Has the Claimant demonstrated how

11:50:24 1 an action or inaction that's attributable to the
2 host State is not in compliance with that
3 obligation?
4 And causation: Can they connect the dots?
5 It seems to me that that's the basics of
6 any claim, and so in these preceding six slides what
7 I've tried to do is provide you with a demonstration
8 with respect to these six slides, how we get there.
9 PRESIDENT NARIMAN: You will, for my
10 benefit at least, at some point of time tell us as
11 to how you put the Claimants' case on investment, is
12 there an investment--at some point of time.
13 MR. WEILER: Certainly, Mr. Chairman. I
14 actually have the other slide set that you see there
15 as well but...
16 So, with respect to the essence of the
17 claims, as I have referred to them here, I think
18 it's easy to look at them in these six manners.
19 So, with respect to the first one--and this
20 is actually the other reason why I gave them to you
21 in print because that's kind of small.
22 With respect to the first one, off-reserve,

11:52:23 1 they are a good comparator for any national
2 treatment test.
3 ARBITRATOR ANAYA: Okay, so, but the U.S.
4 doesn't agree; right?
5 MR. WEILER: Yes.
6 ARBITRATOR ANAYA: You say "it seems to be"
7 like there is no issue, and I just want to--
8 MR. WEILER: I accept that the U.S. doesn't
9 agree.
10 ARBITRATOR ANAYA: Okay. And how do you
11 respond?
12 MR. WEILER: Well, I would need the U.S. to
13 articulate--
14 ARBITRATOR ANAYA: They have in their
15 Memorial.
16 MR. WEILER: Well, with respect, they don't
17 actually go down to brass tacks on the issue of why
18 you wouldn't compare competitors.
19 ARBITRATOR ANAYA: Okay. So you don't see
20 any--
21 MR. WEILER: I mean their position
22 essentially--

11:51:32 1 less-favorable treatment. It seems pretty
2 straightforward that the appropriate comparators are
3 going to be the exempt SPMs such as Liggett. That's
4 because it's Liggett's brands, it's JTI's brands,
5 General Tobacco's brands, it's these that are
6 competing directly in the same locations with Grand
7 River's brands.
8 It seems that they're also in the same
9 geographic areas.
10 So, they seem to be the appropriate
11 comparators.
12 The breach has to be proved with more
13 favorable treatment.
14 ARBITRATOR ANAYA: You say "they seem to
15 be."
16 MR. WEILER: They are.
17 ARBITRATOR ANAYA: Okay. But the United
18 States doesn't agree.
19 MR. WEILER: Well, I say "seem" in the
20 sense that it's not my position to tell the Tribunal
21 how to ultimately determine the facts, but in my
22 opinion they clearly are competitors, and therefore

11:53:00 1 ARBITRATOR ANAYA: Okay, if you don't want
2 to address that, that's fine.
3 MR. WEILER: Oh, no, I do want to address
4 it.
5 What they essentially try to do is they try
6 to do--they try to parse up the comparators based
7 upon the measure itself, and one cannot--if one does
8 that, one is--you're rigging the results. If you
9 say, oh, well, you're not in competition with each
10 other, you're not comparable because the measure
11 doesn't treat you the exact same way, but it's the
12 measure that's on the dock. So, if you use the
13 measure as the basis by which you define the
14 comparators, you're never--you're never going to
15 have a breach.
16 ARBITRATOR ANAYA: Why wouldn't the
17 comparator be domestic NPM?
18 MR. WEILER: The comparator would be a
19 domestic NPM because they are the people who are
20 taking advantage of their particular type of benefit
21 or bonus or quota, whatever you want to call it, to
22 be able to compete on the same shelf space, in the

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11:53:52 1 same locations with Grand River's products. They
2 are in competition with each other. They both--CEOs
3 of either company might get along on the golf field,
4 for all I know, but they're competitors. They
5 basically want the best advantage they can from
6 whatever means they can to be able to compete with
7 each other. So that's why it seems to me--it seems
8 to me--that they are the correct comparators.

9 ARBITRATOR ANAYA: Go ahead.

10 MR. WEILER: Mr. Violi is not sure that I
11 understood your question.

12 MR. VIOLI: I believe you asked why aren't
13 NPMs also comparators.

14 ARBITRATOR ANAYA: Domestic NPMs.

15 MR. VIOLI: Exactly. And NPMs are
16 certainly competitors. And my understanding, and
17 Mr. Weiler will speak to it, is that we're talking
18 about a standard of law that is supposed to impose
19 or at least require least-favorable treatment or a
20 most-favored-nation treatment. So other NPMs would
21 not be the comparators who have the
22 most-favored-nation treatment that we would compare

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11:55:44 1 the domestic, other domestic NPMs? Are you
2 considering them? Not considering them? What's
3 your case on them?

4 MR. WEILER: As a matter of comparison at
5 the first level of a national treatment or MFN
6 treatment test, you compare anyone who is in a
7 competitive like circumstance, the people who are
8 having the same competitive basis. So that would
9 include both domestic NPMs, foreign NPMs, domestic
10 SPMs, and foreign SPMs--anybody whose cigarettes are
11 on that same shelf space in the same tier, in the
12 same region.

13 Now, with respect to the
14 most-favored-nation treatment or treatment no less
15 favorable, what one does, what the jurisprudence
16 shows us, is the most logical application of that
17 word. What the Pope & Talbot Tribunal did is they
18 say who among this group has received the best
19 treatment? It's not required, but it's always only
20 the nationals that got the best deal.

21 For example, it's very common that there
22 may be a national champion, and the national

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11:55:04 1 ourselves to when determining the breach and the
2 consequent damage.

3 But certainly NPMs are competitors, exempt
4 SPMs and NPMs in the discount segment of the market,
5 they all are competitors.

6 ARBITRATOR ANAYA: I understand.

7 MR. VIOLI: And to some extent I said at
8 the opening--

9 ARBITRATOR ANAYA: Now, I understand.

10 Thank you, Mr. Violi. Now I better understand your
11 question.

12 MR. VIOLI: The words NPMs and SPMs sound
13 so similar sometimes from this side of the table
14 that when we see a PM sometimes we don't hear--and
15 likewise you hear us say S instead of N or M or--

16 ARBITRATOR ANAYA: There seems to be a
17 critical difference between the S and the Ns--

18 MR. VIOLI: Yes, yes, yes.

19 PRESIDENT NARIMAN: The point is that you
20 are only referring to the exempt SPMs like
21 so-and-so.

22 Now, the question, therefore, is what about

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11:56:57 1 champion will get a better deal somehow from the
2 government than even other competitors who are also
3 domestic, but one is favored. The example in Canada
4 is Bombardier. Another example from aerospace in
5 Brazil is Embraer. They get the best deal. And so
6 the question, when one asks for this treatment as an
7 individual Claimant, I do not represent Canada. I
8 represent the Claimant. So my comparison is not all
9 Canadians versus all Americans.

10 Because this is an individualized
11 obligation, I get to have, as the Pope & Talbot
12 Tribunal said, the best treatment going from the
13 host State, whether that be--and this is the point,
14 by the way of Article 1104--whether that be to
15 another foreigner or whether that be to a national,
16 I get the best treatment going, not the average of
17 that treatment. So that's why I target whoever got
18 the best deal, in this case an exempt SPM, not an
19 SPM without an exemption.

20 PRESIDENT NARIMAN: I just have--it's a
21 little above me all this. I would rather--I would
22 ask you to deal with it so far as I'm concerned,

11:58:12 1 that is there any other NPM who is treated more or
2 less favorably than you?
3 MR. WEILER: Any other NPM treated more or
4 less favorably.
5 PRESIDENT NARIMAN: (Off microphone.)
6 MR. WEILER: Oh, no. To the best of my
7 knowledge, I think the answer is no.
8 PRESIDENT NARIMAN: (Off microphone.)
9 MR. WEILER: I would say no but I would
10 make one caveat: An NPM off--that is not
11 indigenous, not Indian, is in like--is not exactly
12 in like circumstances with a provider such as my
13 Claimants, my clients, because they have two
14 businesses, an on-reserve and an off-reserve. So I
15 would say that it's best to compare apples and
16 apples so that if we're talking--we should be
17 talking about the on-reserve or the off-reserve, and
18 to a certain extent goes into what I presaged that
19 we wanted to have your question-and-answer sessions
20 about. No, I don't want to hold all of your
21 questions. We can certainly also come back to them
22 in the future.

12:00:14 1 right? But Grand River never went in the state,
2 never sold to anybody who sold in the state: South
3 Dakota, California, Wisconsin being examples.
4 Domestic NPMs who are in those states, who are
5 selling in those states should be and may be subject
6 to those Escrow Statutes. But when Grand River
7 sells from Canada to another distributor that sells
8 to another and perhaps to another or even a third
9 party that goes into California, Nevada, or
10 Wisconsin, and all the other states that are
11 off--that are off-reserve that led to the judgments,
12 then there is a violation of international law. As
13 Mr. Luddy pointed out, there is an application of
14 law beyond the jurisdictional limits of the states.
15 So in that situation, we would be treated less
16 favorable than domestic NPMs. Because as they've
17 said, they said that they want to reach across
18 far-flung jurisdictions--those are the words they
19 used, "far-flung"--to countries like Philippines,
20 Germany, China, India--"far-flung"--these are the
21 words they use to go and grab them to subject them
22 to jurisdiction in the remote state of California,

11:59:17 1 PRESIDENT NARIMAN: I don't understand this
2 question, and I'm going--I mean, we will ask you
3 whatever questions we feel like.
4 MR. WEILER: Yes, whenever you like.
5 PRESIDENT NARIMAN: No, no. But you said
6 there's going to be a question-and-answer session.
7 I mean that's not the program. When we feel some
8 difficulty, we will ask you whatever we want to ask
9 you. So if you ask a question, you answer it
10 yourself, by all means, because we are not going to
11 ask you or answer it in either you or your opponent.
12 MR. WEILER: We are completely in your
13 hands, Mr. President. All we were suggesting was
14 that if we can provide some structure to the
15 proceedings, that we would try to do it in that
16 matter.
17 MR. VIOLI: And we will reserve for another
18 time this question because, Professor Anaya, I
19 wasn't prepared for the question at this point, but
20 there is one circumstance where I can address
21 specifically. Where we're talking about a state
22 where Grand River's product is sold off-reserve;

12:01:18 1 Nevada or Wisconsin and South Dakota. In that
2 situation, there is a different treatment among NPMs
3 who are domestic and foreign.
4 PRESIDENT NARIMAN: Okay, I that's better
5 for argument after lunch.
6 MR. VIOLI: It's sometimes difficult to
7 give those on the spot and if we can reserve to
8 answer them.
9 PRESIDENT NARIMAN: Okay, if it's
10 convenient at this point, we can break and meet
11 again at 1:00.
12 (Discussion off microphone.)
13 PRESIDENT NARIMAN: So sorry. My mistake.
14 Keep going.
15 MR. WEILER: So, with respect to this first
16 slide in this first concept, we're suggesting that
17 under Article 1102, the appropriate comparators
18 starts with competitors. Then one turns to the
19 question of treatment and decides what best
20 treatment is on offer. The best treatment on offer
21 here, we submit, is for the exempt SPMs.
22 We would go further to suggest that they

12:02:25 1 are--and at this point I should caution, with
 2 respect to the off-reserve business, the Tribunal
 3 has ruled that the Claimant is time-barred from
 4 speaking to whether or not there was or was not
 5 better treatment offered prior to--I think it was
 6 2001-2002. While it is true as a factual matter
 7 that that better treatment was available, we come on
 8 line here with respect to liability when the
 9 Allocable Share Amendments are passed.

10 Our position is that we took the market as
 11 we found it when we came into the market in
 12 2001-2002. And I'll be corrected on the exact
 13 dates. When we came into the market, simply as a
 14 matter of the Tribunal's Decision on Jurisdiction,
 15 we take it as we find it. What do we have when we
 16 find it? We see that there are two choices
 17 presented to a party with this legislation. You
 18 either join the MSA, and when we are
 19 suggesting--when we asked to join the MSA, we're
 20 told because we're tracking your cigarettes as they
 21 come across the border and you pay Federal tax on
 22 all of them, we don't really care how many do or

12:05:04 1 turns out that they ended up having good markets in
 2 those states because they could take advantage of
 3 this Allocable Share Release.

4 So, when the Allocable Share Release is
 5 taken away, which we know is a valid measure for
 6 these proceedings, when it's taken away, what do we
 7 have now? Well, we had roughly similar
 8 circumstances before, taking advantage of the
 9 allocable share admittedly only in six markets
 10 versus these other competitors who have this general
 11 exemption across the country and can actually choose
 12 to keep their sales higher in places where we're not
 13 in, take advantage of that fact, keep their prices
 14 higher there, lower their prices against us to meet
 15 us, and you have an equilibrium to a certain extent.

16 It's clear that the Claimants were able to
 17 compete like that. You take away the allocable
 18 share and all of a sudden can't compete anymore
 19 because you're getting better treatment for the
 20 people who still have that general reserve, that
 21 general exception. We don't have the ability to go
 22 out to get the allocable share anymore.

12:03:55 1 don't go on-reserve because we're calculating them
 2 at that border point.

3 So, in our particular case, it was just not
 4 economical to join the MSA. So, what is our other
 5 choice? Our other choice is either to just stay
 6 on-reserve or just find some way to go off-reserve.

7 The choice was made for the Claimants
 8 because we start seeing increased enforcement
 9 on-reserve. They realize they've got to do
 10 something because they can hire Mr. Violi and hire
 11 some other people as much as they can to fight in
 12 these various places, but they're seeing an
 13 encroachment on their on-reserve sales.

14 So, what do they do? They look at the
 15 measure, and they conclude that there is a way to
 16 compete off-reserve. It is to use the Allocable
 17 Share Release formula.

18 And it is true that when the claim was
 19 originally filed, the Claimants were of the opinion
 20 that they were going to be out of luck. Fortunately
 21 for them, though, it turned out that this other
 22 strategy blossomed. It did well. And that's why it

12:06:13 1 So, this measure causes--brings about a
 2 difference in treatment, and it's clear on the facts
 3 of this case that it was intended to have this
 4 result. It was intended to prevent not just this
 5 company but any NPM from using this Allocable Share
 6 Release.

7 So, that much is clear, that there is
 8 better treatment being offered to competitors who
 9 previously for about three or four years were
 10 competing fairly well together. Treatment--but it
 11 results in those six regions, and keep in mind all
 12 of these measures are state measures, so they're not
 13 Federal measures, they're state measures. So, it is
 14 in those six regions that we're focusing on.

15 So, then the next question is: Is there a
 16 rational nexus to--I'm sorry--is there a reasonable
 17 nexus to a rational policy goal here? Is there a
 18 good reason to do this?

19 The Respondent has provided its reasons.
 20 We, as you can see through the cross-examination of
 21 the witnesses, are suggesting to you that the record
 22 shows that there are other reasons.

12:07:22 1 We are suggesting that it doesn't make
 2 sense from a health protection standpoint that one
 3 would allow this general exemption to continue. All
 4 of those billions of cigarettes are still able to be
 5 sold without any drag, any penalty. They don't have
 6 to put into MSA. They have this market share
 7 grandfathered for a whole lot of cigarettes.
 8 Now, my friends say, yeah, but we got your
 9 cigarettes out. Well, that's great. But what
 10 about--I mean, if it was really about healthcare, if
 11 it was really about making sure that every single
 12 cigarette got taxed a certain amount, you'd just use
 13 a general tax. You'd just apply a general tax to
 14 everybody, and then everybody would be able to
 15 compete rather than saying, okay, well, we're going
 16 to have this really crazy mechanism where these guys
 17 have to pay but not for the this exempt stuff, and
 18 you guys, you don't get that exemption thing we had
 19 before.
 20 States do have the discretion to impose
 21 whatever measure they want, but they are responsible
 22 for the effects of that measure, and they--you can't

12:09:52 1 words, didn't make sense?
 2 MR. WEILER: For starts I would say only
 3 six because we're dealing with the off-reserve. We
 4 don't have any issue with the 40-some-odd other
 5 state legislatures where we were not competing so--
 6 ARBITRATOR CROOK: We're only talking six
 7 states?
 8 MR. WEILER: Yes. With respect, we're
 9 talking about only the state measures that are
 10 actually at issue with respect to the offers of six.
 11 ARBITRATOR CROOK: Okay. And at some point
 12 you'll clarify what those were because I somehow
 13 have the sense there are only five.
 14 MR. WEILER: I'll leave that for my
 15 colleagues to confirm the number. Oftentimes with
 16 numbers, I have to admit five and six--
 17 ARBITRATOR CROOK: Okay. But the essence
 18 of your claim here, though, is that those five or
 19 six state legislatures acted in a way that didn't
 20 make sense.
 21 MR. WEILER: Well, I'm sure it made sense
 22 to them, Mr. Crook.

12:08:32 1 just jump up and say "healthcare" and not expect the
 2 Tribunal to be fully authorized to say, well, wait a
 3 second, you say "healthcare," but does that really
 4 make sense here? You are allowed to look at that
 5 issue. It's not--you do not--you are not limited to
 6 simply take their word for it because we're talking
 7 about a difference in treatment that we have, we
 8 believe, we have proved prima facie.
 9 Yes, Mr. Crook.
 10 ARBITRATOR CROOK: Okay, Professor Weiler,
 11 in the argument you were just making, it seems to me
 12 you were rolling together two things, the exemption
 13 for exempt non--subsequent participating measures
 14 and the Allocable Share Amendments, but the action,
 15 I take it that you're--is the action that you
 16 complain of here the perpetuation of the exemption
 17 for subsequent--some SPMs, or is it the Allocable
 18 Share Amendments?
 19 In either case--well, in the second case,
 20 are you asking the Tribunal essentially to find that
 21 46 democratically elected state legislatures did
 22 something that was unjustified and, to use your

12:10:45 1 The question is whether--I mean, it seems
 2 to me that your question begs whether or not a
 3 legislature, democratically elected or appointed
 4 otherwise, can never be wrong, can never make an
 5 unreasonable--
 6 ARBITRATOR CROOK: All right. But
 7 essentially you're inviting us to examine whether
 8 their judgment was an appropriate one.
 9 MR. WEILER: I would suggest to you,
 10 Mr. Crook, that the very purpose of international
 11 economic law, the very obligation to which the
 12 United States has committed itself is to subject its
 13 policy decisions, whether they be made at the
 14 executive, the judicial, or the legislative level to
 15 the test of international standards. So, yes,
 16 that's exactly what you are supposed to do as a
 17 tribunal. You are authorized--
 18 ARBITRATOR ANAYA: Okay. So, what is the
 19 test here, whether they're unreasonable, whether
 20 they're...
 21 MR. WEILER: The test would be--and here as
 22 a law professor--

12:11:45 1 ARBITRATOR ANAYA: Rational relation test?
2 MR. WEILER: As a law professor you--I
3 don't know if you're going to relish this or not,
4 but there have only been a handful of national
5 treatment cases--

6 ARBITRATOR ANAYA: I'm here as a member of
7 the Tribunal. I don't know about the law professor
8 business but...

9 MR. WEILER: Well, I'm just saying
10 as--the--go on.

11 ARBITRATOR ANAYA: No. I think there is a
12 question here. I mean you seem to be dismissive of
13 what Mr. Crook is asking.

14 I think that there is something we need to
15 come to grips with. What are you asking us to do in
16 this regard, and what kind of standard would we
17 apply in reviewing whether or not the legislatures
18 acted properly under international law, under the
19 standard?

20 MR. WEILER: I would submit that, as you
21 see in our briefings and as we've seen from the
22 handful of cases that have been made by other NAFTA

12:13:17 1 MR. WEILER: I'm arguing to you that it is
2 unreasonable, and in showing it is unreasonable, I
3 am suggesting that one of the most simple ways that
4 they could have acted reasonably, that they could
5 have raised prices and--

6 ARBITRATOR ANAYA: No, that's different.
7 To say that there are many reasonable ways to act, I
8 mean we could find other reasonable ways to act. I
9 mean we have to find, I understand your argument to
10 be, that this particular scheme was unreasonable, is
11 that right?

12 MR. WEILER: You have to find that the way
13 that this regime has impacted upon these
14 differentiated comparators is unreasonable in the
15 circumstances. And part and parcel of concluding
16 whether they were reasonable in the circumstances,
17 you should consider that an arbitrary,
18 discriminatory, or unfair result is generally in
19 international economic law not considered to be
20 reasonable.

21 ARBITRATOR ANAYA: Arbitrary,
22 discriminatory, and what else?

12:12:32 1 Tribunals on this particular issue, on Article 1102,
2 that the standard is, as I have there, reasonable
3 nexus to a rational policy goal. So, basically the
4 question is, if you were to--extricate that--try to
5 break that out--

6 ARBITRATOR ANAYA: There is a rational--

7 MR. WEILER: You need a rational policy
8 goal.

9 ARBITRATOR ANAYA: Okay.

10 MR. WEILER: Healthcare is a rational
11 policy goal.

12 ARBITRATOR ANAYA: All right. Okay.

13 MR. WEILER: So we know that they have put
14 on the table a rational policy goal. Is it a
15 reasonable--is there a reasonable nexus between the
16 policy goal they have enunciated and the measures
17 they've taken?

18 ARBITRATOR ANAYA: Okay.

19 MR. WEILER: Is it reasonable.

20 ARBITRATOR ANAYA: And you're arguing to us
21 that it's unreasonable and we should find it
22 unreasonable.

12:14:14 1 MR. WEILER: Arbitrary,
2 discriminatory--unfair, but I mean really--

3 ARBITRATOR ANAYA: Okay. All right. I'm
4 trying to get the handle on this because I want to
5 know what I need to find, you know. It's one thing
6 for us to argue about, you know, it was effective or
7 less effective or more effective, but arbitrary,
8 discriminatory and--

9 MR. WEILER: Or unfair.

10 ARBITRATOR ANAYA: Unfair.

11 MR. WEILER: I mean--no really, when you
12 say arb--when I say "arbitrary," that pretty much is
13 pretty close to unfair. What is arbitrary is
14 unfair.

15 ARBITRATOR ANAYA: Yes, but arbitrary--

16 MR. WEILER: I'd say it's probably smaller
17 than unfair. So and I would--basically, I think if
18 you go with discriminatory or unfair--manifestly
19 unfair let's say, than arbitrary because--well, it
20 has to be manifest obviously so...

21 I would like to say that there is a clear
22 dark-line test from a positive standpoint.

12:15:06 1 ARBITRATOR ANAYA: No, no, no. I'm not
2 looking for a clear-line test. I'm looking for some
3 good markers, you know.
4 MR. WEILER: Yeah. Well, then these would
5 be the markers.
6 ARBITRATOR ANAYA: Is there a margin of
7 appreciation that often is provided in international
8 law and in litigation?
9 MR. WEILER: I would say there is a margin
10 of appreciation, and we who write about it and who
11 argue about it are groping for it. Where that
12 margin is is a matter it seems--
13 ARBITRATOR ANAYA: No, I understand that,
14 but you're saying there is a margin of appreciation.
15 MR. WEILER: Yes.
16 ARBITRATOR ANAYA: I mean, yeah, we can
17 argue, you know, about what that is.
18 MR. WEILER: How far it goes or--
19 ARBITRATOR ANAYA: I understand that.
20 MR. WEILER: Yeah.
21 ARBITRATOR ANAYA: So there is a margin of
22 appreciation--

12:16:16 1 that--without--
2 MR. WEILER: Without borrowing all the
3 jurisprudence from U.S. law that comes with it,
4 capricious would be useful, too.
5 Essentially, when we look to try to find
6 other examples, we would go to--we would much prefer
7 to go to WTO Law--
8 ARBITRATOR ANAYA: Right. Okay.
9 MR. WEILER: --than we would domestic U.S.
10 law to find out.
11 ARBITRATOR ANAYA: I know, but I'm asking
12 you to bring that in, and I'm, you know, searching
13 for what I can to help.
14 MR. WEILER: Yes. Did I--
15 ARBITRATOR ANAYA: I think so, I think so.
16 But the next question is--and I guess this is
17 coming, that you have more proof about--that will
18 help us see this as arbitrary and unfair and all
19 these things, even applying a margin of
20 appreciation.
21 MR. WEILER: We hope so.
22 ARBITRATOR ANAYA: You're not asking us to

12:15:44 1 MR. WEILER: I would say that there is a
2 margin of appreciation.
3 ARBITRATOR ANAYA: I just what to
4 understand what the argument is, and I'm not trying
5 to be combative. I just really am trying to
6 identify what you are putting to us and what we need
7 to--what you say we need to find.
8 And so you are saying that there is a
9 margin of appreciation here--
10 MR. WEILER: Yes.
11 ARBITRATOR ANAYA: --to be accorded the
12 United States.
13 MR. WEILER: Yes.
14 ARBITRATOR ANAYA: And its constituent
15 Federal units access.
16 MR. WEILER: Yes.
17 ARBITRATOR ANAYA: Okay. And we would have
18 to find, then, that there is arbitrary,
19 capricious--I guess that's another word.
20 MR. WEILER: Capricious. I mean it's a
21 U.S. term I'm unsure about but it's--
22 ARBITRATOR ANAYA: I know but

12:17:03 1 step in, as I understand it, in the shoes of a
2 legislator who would balance among various different
3 options?
4 MR. WEILER: No, that is not your function.
5 ARBITRATOR ANAYA: Okay.
6 MR. WEILER: Your function is to test
7 whether or not this particular measure in the
8 circumstances, given the particular grief of the
9 Claimant--their particular grievance, I should
10 say--whether it, this particular example, not the
11 measure in its entirety, but this particular
12 example, application of the measure, does or does
13 not comply with the Respondent's obligations as a
14 NAFTA Party.
15 ARBITRATOR ANAYA: Well, that begs the
16 question of what I'm asking, I mean, whether or not
17 it applies goes to the question of--
18 MR. WEILER: Whether or not it's--
19 ARBITRATOR ANAYA: Yes.
20 MR. WEILER: Yeah, whether or not you have
21 a reasonable nexus to a rational policy goal.
22 ARBITRATOR ANAYA: Yes.

12:17:47 1 MR. VIOLI: Professor Anaya, I'm just--I
2 wanted to respond and--
3 ARBITRATOR ANAYA: Okay, go ahead.
4 MR. VIOLI: --respond--but as I read the
5 cases and as I read the law, we have pretty much a
6 bright line straightforward test, most-favored
7 nation and least-favorable treatment. So you look
8 at our comparators and you say are they treated more
9 favorably. The rational basis minimum
10 scrutiny/strict scrutiny test is more subject--it's
11 more of a procedural or a substantive due process.
12 I was looking at this more as a commerce
13 issue; and, in Commerce Clause or international
14 commerce cases, trade cases, are we looking at it
15 from a procedural or substantive due process
16 violation or a violation of the--which is brought in
17 in most contexts under a constitution or in some
18 context in a treaty.
19 In this context, I believe we're dealing
20 with a fairly straightforward question as to the
21 reasonable basis for the legislature in adopting one
22 measure or another and having a policy goal behind

12:19:54 1 ARBITRATOR ANAYA: I think I understand
2 what your argument is. It seems to differ from
3 Mr. Violi's.
4 MR. WEILER: That's why I'd like to--
5 ARBITRATOR ANAYA: You seem to present a
6 very different framework from what he just
7 presented, but--
8 MR. WEILER: Well, I'd like to clarify so
9 we can put it where it belongs.
10 ARBITRATOR ANAYA: I don't want to get
11 bogged down.
12 MR. WEILER: S.D. Myers versus Canada, a
13 case in which I was involved as counsel. The
14 question ultimately came down for the Tribunal as to
15 whether or not the environmental justification that
16 Canada provided was reasonable as--was--I'm sorry,
17 was a reasonable connection to a rational objective.
18 The Tribunal clearly said protecting the environment
19 is a rational objective. In this case, protecting
20 health is a rational objective. The question is--in
21 that case essentially it was whether or not there is
22 a reasonable nexus. That Tribunal decided that

12:18:57 1 it. If it shrinks, there may be good reason why you
2 want just American companies or just the people who
3 have been in the market in '97 and '98. There may
4 be good reason to give only those people
5 grandfather; right? Because you want to promote
6 incentive or this is the way you want the world to
7 look like in the United States in perpetuity: Lock
8 the market shares of these people in, the big guys
9 at the big level, the little guys maybe with a
10 little bit more, but they stay there. That may be
11 something the legislature may wants to do, but
12 if--and it may be reasonable in their mind--but if
13 it violates the NAFTA because it treats the Canadian
14 Investor less favorably, presents a barrier to
15 entry, which it does, affects an investment already
16 made and pares it, expropriates it, then I submit
17 that that would violate the NAFTA regardless of the
18 rational basis which is the foundation for the
19 measure.
20 MR. WEILER: I'd like to just give
21 you--I'll give you an example which might be
22 helpful.

12:21:01 1 while Canada vociferously argued that this was to
2 protect the environment, that the measure was
3 necessary because they just couldn't trust the
4 Americans to deposit the waste properly themselves
5 when it went across the border. The Tribunal found
6 that based on the weight of the evidence, that the
7 real reason this was happening was because Minister
8 Sheila Copps (ph.) had a national preference for
9 someone who had turned out six months earlier had
10 been on her personal staff and now was lobbying for
11 a company out in Alberta that wanted to get that
12 waste for itself.
13 So, the question in that case was who were
14 the comparators. Well, it was S.D. Myers that had
15 one way of destroying waste, and it was this
16 company--Swan Hills was the name--I can't
17 remember--I think it was called Swan Hills. The
18 name of the place where it was located was Swan
19 Hills--and the Tribunal looked at them and said,
20 yeah, they both want to destroy waste. They're both
21 in the same--they're both comparable, and definitely
22 one's now got better treatment than the other

12:22:06 1 because they closed the border, and now S.D. Myers
 2 can't access the market anymore, and then they
 3 looked at the rationale and said, you know, Canada
 4 can say it's about the environment, and that's a
 5 legitimate reason, but the facts here suggest that
 6 you may have had some color of the environment
 7 there, but you had some other things going on.
 8 In this case, we submit we have the same
 9 problem; and we submit that you, the Tribunal, will
 10 have to value and weigh the evidence. They say it's
 11 about healthcare. We say it's about protecting
 12 revenues as part of a deal, and you have to decide
 13 who you believe. If you believe us, then I would
 14 say it's not reasonable. It's not a reasonable
 15 nexus to a rationale alternative. If you believe
 16 them, then you go with them.
 17 PRESIDENT NARIMAN: I have one difficulty,
 18 and I would like you to later expound. My problem
 19 is, to what extent, for purposes of this NAFTA
 20 legislation, can we second-guess legislative
 21 judgment? To what extent?
 22 And, secondly, all other manufacturers are,

12:24:18 1 other--no, no, only if they join the MSA do all
 2 those obligations as part of that package kick in.
 3 In the meantime, though, we do have the Federal
 4 legislation that appears to have largely overlapped
 5 that anyway, but that's neither here nor there in
 6 the context of your question.
 7 To submit to the escrow regime or to pay
 8 into escrow does not oblige an NPM to do anything
 9 else for healthcare. They may do whatever they do
 10 on their own. They still have quality standards for
 11 the cigarettes and all that kind of thing but
 12 they're not under the obligation--
 13 PRESIDENT NARIMAN: I'm not talking about
 14 NPMs. I'm talking of the other manufacturers.
 15 MR. WEILER: An SPM?
 16 PRESIDENT NARIMAN: Who don't fall under
 17 the NPM category. They are subjected to certain
 18 discipline with regard to measures for public
 19 health.
 20 MR. WEILER: Anybody who joins the MSA
 21 takes on those obligations.
 22 PRESIDENT NARIMAN: Yeah, the NPMs don't.

12:23:16 1 are they not, subjecting themselves to a certain
 2 discipline or standards of health like
 3 advertisements and so on and so forth, whereas the
 4 NPMs are not?
 5 You see, under the Allocable Share
 6 Amendments as well, there are a large number--all
 7 the manufacturers have an obligation to subject
 8 themselves to certain aspects which promote public
 9 health, such as deleterious advertisements, things
 10 of that sort.
 11 MR. WEILER: Actually, Mr. President, I
 12 don't think that's accurate. If I understand
 13 correctly, and I'm sure my friends will correct me--
 14 PRESIDENT NARIMAN: That's why I want you
 15 to address that, yes.
 16 MR. WEILER: Well, what happens is the
 17 escrow payment--skip aside all the rest of the stuff
 18 about it, but the escrow payment is simply money put
 19 aside--
 20 PRESIDENT NARIMAN: But isn't there an
 21 obligation?
 22 MR. WEILER: There is no--there is no

12:25:20 1 MR. WEILER: NPMs do not.
 2 PRESIDENT NARIMAN: That's what I--please
 3 address that.
 4 MR. WEILER: Yes.
 5 PRESIDENT NARIMAN: That's the problem
 6 that's vexing me.
 7 And the second problem is with regard to
 8 what extent are we to second-guess legislative
 9 judgment? That's my difficulties.
 10 So, I'm putting it to you. Address it in
 11 due course, not immediately.
 12 MR. WEILER: Okay. With respect to your
 13 first question. It's important to keep in mind that
 14 the majority of the additional responsibilities that
 15 come with joining the MSA were part of a negotiated
 16 process between the very largest companies who were
 17 accused of very serious things that the smaller
 18 players were not accused of doing and that, for
 19 example, a prohibition on television advertising is
 20 not really relevant when we are talking about these
 21 Claimants. There's only a few big, big companies
 22 that that really applies to, that those health

12:26:33 1 protections really apply to. They certainly--all
 2 the rest of them say, sure, we take them on, but
 3 they don't care. It's not going to add to the
 4 marginal costs. They weren't doing that kind of
 5 thing before.
 6 And that's even to the extent that it
 7 actually worked because we know that we have
 8 evidence from the Respondent in its own Federal
 9 court saying, yeah, it didn't work.
 10 So, I would be cautious about putting that
 11 much emphasis on the notion that the exempt SPM has
 12 somehow taken on this extra burden, that puts it in
 13 a different circumstance than the Claimants because,
 14 on the ground, the facts just aren't there to
 15 support that.
 16 With respect to your second question, I
 17 would say that you were not here to second-guess a
 18 legislature, a court or a policy-maker because
 19 "second-guess" implies that you would stand in their
 20 shoes, imbued with their powers and their
 21 responsibilities. That is not your job. Your job
 22 is to conclude--with respect, if I may tell you your

12:28:56 1 we ought to look to for authority for your
 2 proposition that the proper comparator is the
 3 economic competitor.
 4 MR. WEILER: Pope & Talbot would be the
 5 first place to look.
 6 ARBITRATOR CROOK: Well, I understand so
 7 Pope--
 8 MR. WEILER: Feldman would be the second
 9 place to look.
 10 ARBITRATOR CROOK: Second world be?
 11 MR. WEILER: Feldman. Feldman v.
 12 ARBITRATOR CROOK: So, Pope & Talbot and
 13 Feldman.
 14 MR. WEILER: Yeah.
 15 ARBITRATOR CROOK: Okay.
 16 MR. WEILER: I would argue actually that
 17 UPS also stands for that proposition. Some may
 18 disagree.
 19 ARBITRATOR CROOK: Yeah, all right, well.
 20 So, it's either the two or the three. Okay.
 21 MR. WEILER: Certainly the trucking case
 22 would be another one.

12:27:49 1 job. Your job is to conclude whether or not these
 2 circumstances we present to you do or do not violate
 3 the international obligations of the Respondent. It
 4 is the Respondent that has obliged itself to meet
 5 these standards.
 6 It didn't say when it met those standards
 7 we agreed to accord national treatment, unless, of
 8 course, we decide later that the particular policy
 9 in this case would override it. They subjected
 10 themselves to this regime very similar to they
 11 subjected themselves to the WTO regime and to many
 12 other trade and investment regimes because they
 13 meant it. They meant that they would be allowing an
 14 international tribunal not to second-guess but to do
 15 its job and figure out whether in this particular
 16 case they crossed a line, the line drawn in the
 17 Treaty.
 18 Mr. Crook, you had a question a while ago.
 19 ARBITRATOR CROOK: Well, actually, I had,
 20 three, Professor Weiler.
 21 Number one, not necessarily off the top of
 22 your head, but in due course you will tell us what

12:29:27 1 ARBITRATOR CROOK: Okay.
 2 MR. WEILER: U.S. Trucking, it was another
 3 NAFTA case. I'm sticking mostly with NAFTA cases.
 4 ARBITRATOR CROOK: Okay.
 5 Now, next question. Let's assume that the
 6 argument you've been developing in cross-examination
 7 at length over the last two days is true and that
 8 the states--that a major, if not the sole
 9 motivation, for the things they did was revenue
 10 enhancement. You said a moment ago that that would
 11 not be a rational basis for action. Is that your
 12 position?
 13 MR. WEILER: No, it would not be a--that
 14 would not be a legitimate and/or reasonable--it
 15 would--I'm trying to make sure I say it correctly.
 16 You need a rational--I'm sorry. You need a
 17 reasonable nexus to a rational goal. Healthcare is
 18 a rational goal--
 19 ARBITRATOR CROOK: Is revenue enhancement a
 20 rational goal?
 21 MR. WEILER: Rational, yes. Yes, in this
 22 regard. Revenue enhancement is a rational goal if

12:30:34 1 they were exercising their taxing powers, and that's
2 why there is a whole different regime and a whole
3 bunch of carve-outs for taxing powers.

4 ARBITRATOR CROOK: Okay. So, your position
5 is that revenue enhancement is only a rational goal
6 if it's done in a certain way.

7 MR. WEILER: I would say that the parties
8 in the NAFTA have been very clear and very careful
9 to protect the right of a country to tax, and that's
10 why there are provisions in the NAFTA that prevent
11 complainants from going very close to judging--or
12 I'm sorry, second-guessing--whatever word you want
13 to use--challenging a tax measure, and that
14 safeguards their revenue collection authority.

15 If revenue collection is used in a
16 different context, especially if it's used in an
17 unfavorable context, in an unfair context, then I
18 would suggest no, it's not reasonable.

19 ARBITRATOR CROOK: Well, we're not there
20 yet. We're just--so, it only becomes unreasonable
21 if it's--

22 MR. WEILER: No, revenue collection is not

12:32:38 1 the fact that the Respondent has not been talking
2 about it and has been hiding that reasoning.
3 They've made it very clear, oh, no, this isn't about
4 that.

5 ARBITRATOR CROOK: Okay.

6 MR. WEILER: So, within that context,
7 saying one thing and doing another, that certainly
8 diminishes whether or not you should consider it to
9 be rational.

10 ARBITRATOR CROOK: Okay, so your--we'll
11 stop there.

12 Third question, and again I'm trying to
13 focus in on--this goes back to the issue that I
14 raised yesterday of the scope of our earlier
15 jurisdictional judgment, and I'm looking at your
16 slides here describing the breach. And the breach
17 that you list is that exempt SPMs were accorded a
18 significant competitive advantage, and we have an
19 argument whether that's true or not, but let's
20 assume for the moment that you're right.

21 That argument per se is, as I understand
22 it, now time-barred, and you--I just want to see if

12:31:36 1 rational within the circumstances of a healthcare--
2 ARBITRATOR CROOK: I'm assuming that you
3 win the argument. Let's assume you've persuaded us
4 that all this healthcare stuff was just made up and
5 fantasy.

6 MR. WEILER: Well, I wouldn't go quite that
7 far.

8 ARBITRATOR CROOK: I sort of thought that
9 was the drift but if not, in any case--

10 MR. WEILER: There's always a veneer of
11 truth in any lie.

12 ARBITRATOR CROOK: Okay, but it was reduced
13 to veneer of truth.

14 Well, I don't want to take more of your
15 time. I think you've made your position clear, and
16 that position is, as I understand it, that revenue
17 per se would not in this context be a, to use your
18 phrase--

19 MR. WEILER: Rational policy goal.

20 ARBITRATOR CROOK: --rational policy goal.

21 MR. WEILER: In this context, it would not
22 be a rational policy goal. Part of that context is

12:33:41 1 I--make sure I understand your argument. Your
2 argument is that no, it's not time-barred because we
3 only began to experience the bite at the point of
4 the Allocable Share Amendments. Is that the
5 argument?

6 MR. WEILER: No, that is not our argument.

7 ARBITRATOR CROOK: It's not the argument,
8 okay. Maybe you can clarify, then.

9 MR. WEILER: Certainly.

10 A time bar prevents a complaint to be
11 registered that as of 2001, when confronted with
12 these measures, when driven to make the choice to go
13 into this regional strategy, that when that--when
14 that was taking place, because of the time bar we
15 could not complain, and it turns out it's a good
16 thing we couldn't complain because it turns out that
17 things were better than we thought they were, that
18 actually they were able to compete quite well with
19 that allocable share.

20 Admittedly, the Claimants, when they first
21 launched this case, were not very sure of that.
22 They really thought that they were going to be out

12:34:48 1 of luck anyway, and it turns out we--the numbers
 2 show it--that they were able to compete very well in
 3 a limited number of states with the allocable share.
 4 So no, we are not saying that it's a
 5 continuation or any such thing. The status quo when
 6 we joined was those guys got the exemption, we got
 7 the Allocable Share Release. The change took place
 8 when they took the Allocable Share Release away. By
 9 taking that Allocable Share Release away, there was
 10 a new status quo of treatment. The treatment, which
 11 is the effective result of the measure, the
 12 treatment is these guys still got--still have their
 13 exemption, and we don't have an effective means to
 14 compete with them anymore.
 15 ARBITRATOR CROOK: I'm sorry, I'm just
 16 trying to think how the Tribunal is to put this down
 17 into words.
 18 So, do I then understand that the 1102
 19 complaint is that you have the allocable share
 20 repeal, and as a consequence of that you were placed
 21 at a significant competitive disadvantage vis-à-vis
 22 the Grandfathered SPMs? Is that the argument? Is

12:36:55 1 what was left? We submit unfair treatment.
 2 Now, we also submit, we go further because
 3 they have--my friends have a competition case going
 4 on in domestic court that--and in that case they
 5 have a burden that's a little bit tougher. They
 6 actually have to prove that competitive
 7 disadvantage. Here, we just have to prove who got
 8 the best treatment, and did we get it or did we not?
 9 If you find that we didn't get it, then the next
 10 question is, is there a valid reason? We don't
 11 think there is a valid reason. Your next question
 12 is, what's that worth to them?
 13 And we have a valuator who you will hear
 14 from later this afternoon who will be asked about
 15 his conclusions about how you would value that
 16 breach.
 17 ARBITRATOR CROOK: Well, in the Tribunal's
 18 analysis, in your view, is the Tribunal allowed to
 19 look at the reasons for originally granting the
 20 grandfather exemption to SPMs, or is that out of
 21 reach for us?
 22 MR. WEILER: Only as a factual matter. If

12:36:05 1 that the claim?
 2 MR. WEILER: Yes.
 3 ARBITRATOR CROOK: That's an accurate
 4 statement of the claim.
 5 MR. WEILER: Yes.
 6 ARBITRATOR CROOK: Okay, thank you.
 7 MR. WEILER: And I should mention by the
 8 way that the claim is nonetheless valid even if one
 9 was to accept Professor Gruber's argument, for
 10 example, that it wasn't a competitive advantage but
 11 nonetheless, that it was a windfall. That's good
 12 enough. It's not necessary for you to become a
 13 competition Tribunal. The bottom line is, was
 14 someone getting better treatment than someone else?
 15 You start with the question: Are they comparators?
 16 Are these people a fair comparison to begin with?
 17 Because their products are seen on the same market
 18 shelves, their employees go in there and they both
 19 kind of fight for market share, all that stuff, if
 20 that makes them comparative, and we submit that it
 21 does, then you look to the treatment. When they
 22 took away the Allocable Share Release mechanism,

12:38:02 1 you find that--it's no different than any other
 2 time-barred case. There was one, I can't think of
 3 the name of it. It was a South American case or it
 4 might have been Central American, where they had
 5 this. There was a Mexican one like this. Where
 6 essentially if you find that something that
 7 happened--I think the case is involved when there
 8 wasn't--when the Treaty wasn't yet in force. The
 9 conclusion was that that factual matrix may be
 10 useful in informing you with respect to what their
 11 goals were. It's not a tabula rasa. You don't
 12 start from the day we were allowed to claim and say
 13 we don't know what happened before, we weren't born
 14 then. We were born today, and so we only take the
 15 evidence of what's here. You can look at the
 16 evidence behind that.
 17 ARBITRATOR CROOK: We may not be
 18 communicating here. Let's accept your analysis and
 19 that, as a result of the repeal of the allocable
 20 share provisions, you were placed in a much less
 21 desirable position than you were previously.
 22 MR. WEILER: And if I may interrupt, that

12:39:11 1 somebody else was getting better treatment at the
2 time.
3 ARBITRATOR CROOK: Okay. Fine.
4 Then I'm trying to understand what the
5 state action is here that the Tribunal is to
6 analyze. You say the state action that we need to
7 analyze is the repeal of the Allocable Share
8 Amendments.
9 MR. WEILER: In those six states.
10 ARBITRATOR CROOK: In however many states.
11 MR. WEILER: Five states, whatever.
12 ARBITRATOR CROOK: My question to you is:
13 Is it open to us to consider at that time whether
14 the original grandfathering met your test of
15 being--whatever?
16 MR. WEILER: No, it's not.
17 Well, I wouldn't say that your analysis
18 should actually lead you to conclude whether or not
19 there was a breach before because we're time-barred.
20 ARBITRATOR CROOK: It's not a question of a
21 breach. You're now saying you suffered a
22 disadvantage because somebody else gets better

12:41:16 1 changed. They are join the MSA with someone who--
2 ARBITRATOR CROOK: I understand your
3 argument there, Mr. Violi--
4 MR. VIOLI: But you're saying whether you
5 can look back in time to '98, the original
6 formulation--
7 ARBITRATOR CROOK: I'm trying to figure out
8 what is the measure at issue here that results in
9 the violation of NAFTA Article 1102.
10 MR. VIOLI: It's the allocable share. It
11 is, indeed, the allocable share.
12 ARBITRATOR CROOK: And we cannot consider
13 whether the original granting of exemption was--met
14 your test or whatever it is.
15 MR. WEILER: Actually, my opinion would be
16 that you can, regardless of whether you do or don't,
17 you should come to the same conclusion.
18 So, I would say, sure, in a sense. If
19 you'd like to determine that everything was
20 copacetic and would meet a test beforehand, and that
21 now you conclude that the rules have changed, you
22 don't accept the reason why those rules have

12:40:15 1 treatment than you do.
2 MR. WEILER: As a result of a measure, yes.
3 ARBITRATOR CROOK: As a result of the
4 measure, the allocable share repeal.
5 But let us suppose the Tribunal says, well,
6 okay, it seems to us what they did back in 1998 was
7 reasonable and appropriate, that there were certain
8 benefits that stemmed from it. There were certain
9 costs, but on balance it was a reasonable and
10 appropriate measure.
11 Are we allowed to consider that, in your
12 view, or not?
13 MR. VIOLI: May I speak to that? The
14 problem is that back in 1998 through 2001, the
15 measure was an Escrow Statute that said join the MSA
16 with these conditions or not join the MSA and have
17 an Allocable Share Release. So that's the measure.
18 And the measure existed in 1998, it existed in 1999,
19 all the way through until 2004.
20 The measure has changed. So at that
21 point--because now the terms under which we
22 exercised the option under that measure have

12:42:16 1 changed, and therefore you conclude that the unfair
2 treatment deserves a remedy, that would be perfectly
3 fine with the Claimants. It seems to me that
4 you--it is open to you to conclude that.
5 As you know from what Mr. Violi just
6 intervened with, we don't think it was fair before,
7 but we know one thing: It's less fair now. We were
8 only in six states or five states--whichever it
9 is--because--and I'll confirm that before you see me
10 begin again--because we were not allowed to compete
11 across the whole country. The measure only gave
12 us--the old measure, which we cannot complain about
13 anymore, only gave us the chance to go into these
14 five, but in those states we were able to compete.
15 So, did we get the best treatment going?
16 No. The general exemption was still the best
17 treatment. If you conclude, though, that, you know,
18 all things being equal, yeah, they were restricted
19 to eight--to six states, to five states. These guys
20 may have had a slightly better deal, eh, it's
21 not--you know, let's say you say the treatment is
22 still close enough, that you can't discern

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12:43:25 1 economically a difference, you could make that
 2 finding. That would be fine. The question is:
 3 Today, now, what position are they in? Because you
 4 will see in our arguments that we have essentially
 5 admitted that we were wrong when we first came to
 6 you six, seven years ago. We thought that we were
 7 going to be out of business a lot sooner than we
 8 were. It turns out we competed a lot better than we
 9 thought we would in those five states, and we took
 10 that as the status quo. We're not challenging that
 11 anymore. We just say that they should have left
 12 well enough alone, stop trying to grab our
 13 off-reserve--our on-reserve sales, and let us
 14 compete in those five markets, but I'm afraid the
 15 Respondent just couldn't leave it there. They've
 16 decided to assert claims all across the board on our
 17 on-reserve sales and tried to close us off on those
 18 six states.

19 So, I would say yes, you can make that
 20 finding, but it's immaterial to where we are today.

21 How are we doing for--oh, no, I've got
 22 another 15 minutes, okay.

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12:45:38 1 detrimental reliance has essentially been borrowed
 2 from the minimum standard jurisprudence and placed
 3 into the 1110 jurisprudence.

4 So, now we see no Tribunal actually looks
 5 at the language, the straight language, of
 6 Article 1110 and finds on it because the
 7 Article 1110 language is stark. It actually says
 8 parties can't expropriate unless--and it gives four
 9 options--unless it's in accordance with
 10 Article 1105, unless it's not discriminatory.

11 Another one is escaping me at the moment. Something
 12 like that, and the final one is, and you pay.

13 Public purpose, thank you.

14 So it's "and you pay." It's not "or."
 15 It's an "and." So, if you actually take that
 16 provision the way it's written, and that's actually
 17 why environmental groups and other concerned
 18 citizens were so worried about that provision
 19 because, as it sits, it doesn't ask you to do any
 20 more than simply check off everything. It doesn't
 21 matter if it was nondiscriminatory. It doesn't
 22 matter if it was for public purpose. It doesn't

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12:44:30 1 So we'll see if we can get--you know I have
 2 six. It's no mystery now. We will go to the second
 3 one and see if we can get through it.

4 And by the way, this might change to a
 5 certain extent the need for us to have our
 6 question-and-answer sessions earlier because we're
 7 having it now. So we may not need to have to come
 8 back and say, well, this is the time we can--we're
 9 all prepared to talk about it. We'll talk about it
 10 all right now, and if we--to the extent that we have
 11 some time later, then we'll answer any other
 12 questions you have.

13 So, with respect to the second one, I made
 14 some statements yesterday concerning Article 1105
 15 and 1110, and they still are consistent. I haven't
 16 changed my mind. I think that it's fairly
 17 straightforward that the only difference
 18 between--and I should say--the way the law has gone,
 19 the way other tribunals have--consensus seems to
 20 have formed with respect to what tribunals have
 21 done, you're not bound by what they have done, but
 22 the consensus seems to be now that the notion of

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12:46:56 1 matter if it was in accordance with fair and
 2 equitable treatment. Did you pay? Well, I think,
 3 frankly, that was just too unpalatable from a
 4 political standpoint for most tribunals that have
 5 sat on these issues to take.

6 So, what they have done instead is they've
 7 gone back to Vonseidelhoven (ph.) is the German
 8 writer, who was--Ignots (ph.), who basically
 9 advanced this idea that essentially it's a matter of
 10 your legitimate investment-backed expectation. So
 11 now we need to look to see whether or not your
 12 investment was legitimately placed and whether you
 13 really should have expected that you would be free
 14 from this expropriation, and so we've imported this,
 15 and that's fine, but--and my friends now actually
 16 seem to be admitting that detrimental reliance,
 17 legitimate expectations is a valid theory, if you
 18 will, of the claim in Article 1110.

19 So, what I hear my friends saying is
 20 basically, if you have a case with the impairment,
 21 where the impairment is so severe that it
 22 effectively constitutes a taking, then you look at

12:48:03 1 the detrimental reliance.
 2 Our opinion is that the jurisprudence is a
 3 bit broader than that. Yes, I agree that's
 4 essentially where we are on expropriation, but I
 5 would say we're also there on 1105, on fair and
 6 equitable treatment.
 7 PRESIDENT NARIMAN: Mr. Weiler, are you
 8 saying that the repeal of the Allocable Share
 9 Amendment was to treat you unfairly, or were there
 10 other reasons for it? I mean, what's your case?
 11 MR. WEILER: Well our case--
 12 PRESIDENT NARIMAN: Was that repealed in
 13 order to treat you unfairly?
 14 MR. WEILER: I believe--doesn't matter what
 15 I believe.
 16 Yes.
 17 PRESIDENT NARIMAN: On the evidence, yes.
 18 MR. WEILER: Yes.
 19 PRESIDENT NARIMAN: You have to say yes.
 20 MR. WEILER: On the evidence, it was
 21 intended to treat, not just Grand River but anybody
 22 in Grand River's position who wasn't grandfathered,

12:50:20 1 legitimate for a government to change its mind and
 2 change the measure.
 3 PRESIDENT NARIMAN: Provided it has good
 4 reason.
 5 MR. WEILER: Provided it has good reason.
 6 Thank you, Mr. President.
 7 PRESIDENT NARIMAN: And if they show good
 8 reason, then your claim must fail.
 9 MR. WEILER: If they show good reason, our
 10 claim--
 11 PRESIDENT NARIMAN: And if they don't, then
 12 your succeed. That's your point.
 13 MR. WEILER: Then our claim succeeds.
 14 That's our point.
 15 And it's all about the evidence we see
 16 before us. Do we believe--and you weigh it. So, in
 17 a sense, while we have different pathways to get to
 18 the results, I think you can already see that
 19 essentially we're going to keep coming to the same
 20 result. It's a matter of weighing the evidence and
 21 determining on the balance and probabilities what
 22 story you believe.

12:48:59 1 it was meant to get them. They're considered
 2 scofflaws. We've heard it repeatedly. They
 3 basically were--that was the design of it.
 4 I should mention, though, with respect to
 5 this detrimental reliance argument, we're not out of
 6 national treatment. We're in to just detrimental
 7 reliance, and here the question is a different
 8 question. The question is: Did my clients deserve
 9 to have a legitimate expectation that when in
 10 2001-2002 they entered into the off-reserve market
 11 in those five states, were they entitled to
 12 legitimately expect that they would have that
 13 regime, that that would that be available to them?
 14 And I should mention that we're not
 15 suggesting--as my friends have suggested that we
 16 think--were not suggesting that an obligation is
 17 frozen. There is no--we do not have one of those
 18 kinds of agreements or treaties here. There are
 19 other cases--one I was involved in, Duke versus
 20 Ecuador--no, sorry, Duke and Peru--where we actually
 21 had a stabilization clause. We don't have a
 22 stabilization clause here. It is completely

12:51:08 1 Yes, Mr. Crook.
 2 ARBITRATOR CROOK: I'm a little confused by
 3 the exchange you just had with the Chairman, and I
 4 would be very careful, however, to suggest, you
 5 know, any difference between myself and the
 6 Chairman.
 7 MR. WEILER: Me, too.
 8 ARBITRATOR CROOK: But I want to go back to
 9 this sort of legitimate expectations notion. I mean
 10 it's a buzz word. We throw it around. I'm not sure
 11 we know clearly what it means.
 12 What was it that made it a legitimate
 13 expectation on the part of the Claimants that the
 14 regime would not change?
 15 Now, in some of your written papers, there
 16 is a certain element of sort of deal, an offer was
 17 made, and we accepted it. Mr. Violi said yesterday
 18 no, that's not it at all.
 19 So, what makes this different than any
 20 other change in law? Why was there--what made this
 21 expectation different than any other expectations?
 22 MR. VIOLI: What makes it principally

12:52:21 1 different is that we have the first time a
2 legislation, a statute, adopted by a state
3 legislature that says you have two options: Join
4 agreement--join an agreement or comply with the
5 statute. So, I guess at various points in time
6 you're constantly faced with that decision. It's a
7 melding, it's a combination of something that is
8 very foreign, certainly in U.S. law, certainly when
9 these investors entered the U.S. market, a statute
10 that says enter into an agreement or abide this way.
11 And so in that respect you are one person facing two
12 choices, choices that others and all manufacturers
13 in the market must face and exercise.

14 So, the agreement and the statute coexist
15 at the time we entered the market and contributed
16 significantly, and invest significantly.
17 \$50 million in the Escrow Statutes, right? Set up
18 distribution channels. Enter into an agreement with
19 exclusive licensee wholesalers who have a trademark
20 (ph.) in our trademark. We set up this whole system
21 in this regime under this regulatory system that
22 says you join an agreement or you follow this--you

12:54:41 1 years with that understanding, and then the state
2 comes along and says, well, we want to change one
3 part. We're are going to go through that funnel
4 again, and we're going to change one part. We're
5 not going to change the MSA part where your
6 competitors you have this exemption and you have
7 this Allocable Share Release. We're just going to
8 change this part. And that's where there is
9 abridgment and in encroachment or an impairment and
10 an expropriation of our investment. Our
11 expectation-backed interest or investment. And
12 that's how I would explain it.

13 PRESIDENT NARIMAN: Following up on what
14 you said, Mr. Violi, can there be an estoppel not to
15 change a statute?

16 MR. VIOLI: You know--

17 PRESIDENT NARIMAN: Isn't it tantamount to
18 that?

19 MR. VIOLI: It would appear that way.

20 PRESIDENT NARIMAN: You say that no, you
21 can't repeal it. In essence, square (ph.) you?

22 MR. VIOLI: Exactly. And the way--

12:53:36 1 follow this payment schedule.

2 So, it's this sort of--it's not a complete
3 just comply with the statute or it's not a complete
4 mandate that you enter into an agreement. It's this
5 combination.

6 So, now, when there comes time to change,
7 they change the statute. They change the statute in
8 one respect. They don't change it with respect to
9 the MSA, the agreement part of it. See? So, now
10 they're just changing one part of it. And there,
11 when you are putting an agreement on a table or you
12 are put in this kind of a situation, which is
13 hybrid, certainly hybrid and unique, where you have
14 one statute that flows into two options: An
15 agreement or a payment schedule as an NPM. You have
16 an expectation on the day you make that decision, on
17 the day you invest heavily to go with one or the
18 other that those two are going to, just like the
19 Turowappen (ph.) Treaty, they are going to proceed
20 in parallel in mutual coexistence without crossing
21 and encroaching or one going in front of the other,
22 on top of the other. And they proceed for four

12:55:34 1 PRESIDENT NARIMAN: So, that's what you are
2 saying.

3 MR. VIOLI: Yes, but they have. We don't
4 have the power to stop the legislature, so they've
5 done it so they would have to compensate us, but
6 that is the argument.

7 There is an estoppel, and if you don't want
8 to recognize our right and you want to sort of
9 change it and breach the estoppel-type of concept
10 here, then there has got to be some recompense.

11 MR. WEILER: If I could, Mr. Crook, also
12 answer your question.

13 ARBITRATOR CROOK: Okay. Well, I just
14 wanted to put a question.

15 MR. WEILER: Because this is where I get to
16 where you are.

17 ARBITRATOR CROOK: We're burning up all
18 your time.

19 MR. WEILER: Okay. So, a couple of things.
20 I just want to stress first something that Mr. Violi
21 just mentioned. You are not empowered as would a
22 panel under Chapter Twenty of this agreement.

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12:56:19 1 You're not empowered to make a determination
 2 that--well, actually even Chapter Twenty Panels
 3 aren't. They simply decide whether there is or
 4 isn't compliance. It's a matter of good faith
 5 whether the Respondent chooses to comply by changing
 6 its rules. But the implicit obligation with a
 7 Chapter Twenty Tribunal is that that will happen, so
 8 you effect our issuing an injunction of sorts. It's
 9 understood--if you were a Chapter Twenty Panel, it's
 10 understood that the U.S. would want to comply with
 11 you. But you're not. You're a Chapter Eleven
 12 Tribunal. You can't change the law, and we're not
 13 asking to you change the law. We're simply
 14 suggesting that because there's been noncompliance,
 15 we deserve compensation. And there is nobody else
 16 coming in the door behind us because the three-year
 17 rule is over for the Allocable Share Amendments. We
 18 are it. There is no floodgates problem here. It's
 19 really straightforward. Do we deserve compensation
 20 for the way this played out?
 21 And with respect to that, I would mention
 22 that you asked about, Mr. Crook, where this concept,

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12:58:47 1 compensation should also be owing as a result of
 2 that change, you are entitled, and we submit you
 3 should look at the procedural fairness and the
 4 substantive fairness of that. That's why we talk
 5 about things like transparency. Did we get invited
 6 to the show? Did we get consulted? Did they pass
 7 this in some sort of clandestine manner? That's the
 8 procedural side. The other side is how do we end
 9 up?
 10 ARBITRATOR ANAYA: Does that go to the--
 11 MR. WEILER: Sure.
 12 ARBITRATOR ANAYA: What you're just saying
 13 there, you described as the procedural side, where
 14 does that fit in here? Does that go to the
 15 legitimate expectation part or the--
 16 MR. WEILER: No, it doesn't go to the--I
 17 mean these obligations are overlapping. It goes to
 18 the consultation part in a few slides and it also
 19 goes to legitimate expectation. When one is
 20 evaluating whether or not a legitimate expectation
 21 exists and was reasonable and, therefore--because
 22 it's not just finding that there was legitimate

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12:57:32 1 this--I think you said catchword or something to
 2 that extent of legitimate expectation, where it
 3 comes from. We submit, and further to our arguments
 4 that we've submitted in writing, that it comes from
 5 the general international law principle of good
 6 faith, and we would suggest that the notion of
 7 detrimental reliance is found in all of the
 8 civilized legal systems--in quotes--of the world.
 9 And we would submit that a number of tribunals,
 10 including Tecmed, Saluka--a whole host of the many
 11 of them involving Argentina--have concluded that the
 12 minimum standard of treatment, whether that is the
 13 customary version or the Treaty version, that the
 14 minimum standard of treatment--and I should add
 15 whether that's full protection and security, which
 16 is the way the Vivendi Tribunal went or whether it's
 17 fair and equitable treatment, which is the way the
 18 Tecmed Tribunal went--that there is this minimum
 19 standard of transparency and certainty that is
 20 expected of the host State.
 21 The host State is entitled to change its
 22 laws, but in deciding in this case whether

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12:59:45 1 expectation. You also have to find that there was
 2 reasonable reliance. And in doing so, part of the
 3 evaluation is to determine how did they make the
 4 change? Because governments are allowed to make
 5 changes. The question is: How did they do it? Did
 6 they--was the result fair and was the process fair?
 7 Was it equitable? And we would submit that the
 8 process in this case wasn't fair and that the
 9 substance, the substantive result wasn't fair.
 10 PRESIDENT NARIMAN: But could they not
 11 say--I mean the other side of the picture--that it
 12 was your conduct which was inequitable? Because we
 13 would have continued the existing state of affairs,
 14 the allocable share, but you mean the whole lot of
 15 NPMs. By your conduct you were too greedy and you
 16 deliberately--you deliberately restricted your sales
 17 to one or two states and not to the entire country
 18 as it was before in order to get an unintended
 19 benefit of the original statute; hence the
 20 amendment. Could then--just as you plead legitimate
 21 expectation, that you had some legitimacy but--and
 22 you say that you went on and thought everything

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01:00:55 1 would be all right, but you--the answer would
2 be--and that's their answer--is you change your
3 conduct. You deliberately or unintentionally in
4 order to gain an advantage, which was not intended
5 to be given--adjusted your sales in this matter. So
6 just think about that.

7 MR. WEILER: We have an answer to that,
8 though. The answer to that is that implicit in your
9 restatement of the Respondent's position, which I
10 take to be accurate, is almost a notion of equal
11 bargaining power, that there's, you know, well, just
12 like two children saying, well, you were unfair, or
13 you were unfair, too.

14 PRESIDENT NARIMAN: No, no. Sorry. No,
15 no. I'm not talking about two children. I'm
16 talking about the intent with which it was amended.
17 This was not just--it was a fortuitous circumstance
18 that they found that ultimately that this doesn't
19 work as was expected because everything would go on
20 as it were, and everything would have gone on but
21 for the fact that a few people concentrated their
22 sales only in one or two states.

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01:03:09 1 you believe the Respondent, not the, you know, the
2 faithfulness of their arguments and how much they
3 truly believe in their argument, but on the facts is
4 it actually true that this was a loophole, that this
5 was by accident or that there is evidence that
6 suggests it wasn't that surprising to anybody.

7 And I would also mention that a part of a
8 baseline legitimate expectation of any investor is
9 they take the law as they find it, and they are
10 allowed and should be expected and understood to use
11 the law as it's provided to them.

12 PRESIDENT NARIMAN: Okay.

13 Mr. Anaya had a question.

14 ARBITRATOR ANAYA: And it goes back to the
15 intent, the issue of what the intention was behind
16 all this.

17 MR. WEILER: The intention of the
18 Respondent or the intention of the Claimants?

19 ARBITRATOR ANAYA: The Respondent in doing
20 away with the allocable share regime.

21 MR. WEILER: Yes. It goes back to the
22 intent.

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01:02:02 1 MR. VIOLI: Mr. President, I would submit,
2 as Mr. Luddy pointed out earlier, what the Claimants
3 did and the people in the Claimants' position
4 addressing exactly what you're saying is they simply
5 complied with the law. And what was the effect of
6 the law? Was it unintended consequence? The effect
7 of the law, as we mentioned yesterday, was that the
8 NPMs grew in market share identical to the exempt
9 SPMs. Identical. They were about 8.1 or 2 percent
10 the same. 8.2, 8.3, 8.4, 8.7, nine--they're almost
11 identical.

12 So, if what we did under this regime which
13 starts here and then gives you two choices, if what
14 we did on this parallel track mirrored what this set
15 of competitors did under their choice, their
16 parallel track, how could it have been unintended
17 when the result is they want to stop us but not stop
18 them? See? That is why the conclusion is it's not
19 unintended; it wasn't unintended for this group or
20 this--it wasn't unintended for us.

21 MR. WEILER: You will have to make a
22 factual finding, Mr. President, on whether or not

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01:04:18 1 ARBITRATOR ANAYA: Right, the intent. You
2 seem to be focusing on that, what the real intent
3 was.

4 MR. WEILER: Yes.

5 ARBITRATOR ANAYA: And it wasn't healthcare
6 you're saying it was--or not primarily.

7 MR. WEILER: And we're saying it wasn't a
8 loophole, but actually the evidence is that it was
9 actually--it is what it is, that the rules were what
10 they thought they'd be, and no one should be
11 surprised and that they're feigning surprise now.
12 We doubt the veracity of the statement that it was a
13 loophole, and we think they're feigning surprise.

14 ARBITRATOR ANAYA: What was it?

15 MR. WEILER: It was--the mechanism
16 was--well, actually Mr. Violi will probably--

17 MR. VIOLI: It's an equal mechanism. It
18 was an option that was--

19 ARBITRATOR ANAYA: I know that, but what
20 was the intent then or who--

21 MR. VIOLI: The intent of the allocable
22 share or the original?

01:04:56 1 PRESIDENT NARIMAN: No, the amendment.
 2 MR. VIOLI: Yes, yes. The intent was to
 3 stamp out the market share of the NPMs and
 4 effectively that's what happened, and the market
 5 share went to the SPMs, which caused reduction of
 6 NPM--
 7 ARBITRATOR ANAYA: I know that but--
 8 MR. VIOLI: --loss of profits and increase
 9 of the MSA revenues.
 10 ARBITRATOR ANAYA: The intent was--
 11 MR. VIOLI: To increase the MSA revenues,
 12 correct. Protect the market share--
 13 ARBITRATOR ANAYA: To protect--
 14 MR. VIOLI: --manufacturers.
 15 ARBITRATOR ANAYA: Okay. So you're
 16 basically asserting--
 17 MR. VIOLI: That's what the letter showed,
 18 right.
 19 ARBITRATOR ANAYA: You're asserting
 20 collusion between, you know, the government, state
 21 governments, and the SPMs.
 22 MR. VIOLI: Right, and the OPMS. Right.

01:05:55 1 intent, but you can find intent and it would lead to
 2 the same result.
 3 ARBITRATOR ANAYA: We seem to be spending a
 4 lot of time on that, and so I'm just trying to
 5 figure out--
 6 MR. WEILER: With respect--
 7 ARBITRATOR ANAYA: --analysis.
 8 MR. WEILER: With respect to the legitimate
 9 expectation intent--
 10 ARBITRATOR ANAYA: No, no, no. In any
 11 case, all right? Let's go back.
 12 MR. WEILER: Well, no. With respect to
 13 legitimate expectation, we have a burden to show
 14 that we had a legitimate expectation and that the
 15 state made a change in such a manner that was unfair
 16 and unreasonable and--
 17 ARBITRATOR ANAYA: Okay, but that could be
 18 just negligence. That could be just they forgot to
 19 pay attention to your interests.
 20 MR. WEILER: Yes, it could be, you're
 21 right.
 22 And so, no. You do not have to make a

01:05:30 1 There was collusion--
 2 ARBITRATOR ANAYA: OPMS, SPMs to protect
 3 their market share.
 4 MR. VIOLI: Yeah.
 5 ARBITRATOR ANAYA: Is that what you're
 6 saying?
 7 MR. VIOLI: Indeed.
 8 ARBITRATOR ANAYA: And you're saying that
 9 we have to find that for you to win.
 10 MR. VIOLI: I don't know if there's going
 11 to be a finding that there was collusion. The fact
 12 that even if the states--
 13 ARBITRATOR ANAYA: That that was the--
 14 MR. VIOLI: Right. Even if the states did
 15 it on their own. So, you know what, as Mr. Crook
 16 said, is it--
 17 ARBITRATOR ANAYA: All right. Okay, okay.
 18 I understand.
 19 So we have to find there was some kind of
 20 intent along those lines, is what you're saying. Is
 21 that right? I just want it clear.
 22 MR. VIOLI: I don't think you need to find

01:06:29 1 finding. We would argue that you could make that
 2 finding. But no, you don't have to make it to come
 3 to that conclusion.
 4 ARBITRATOR ANAYA: The other issue we were
 5 talking about, the no-less-favored-treatment
 6 standard--intent.
 7 MR. WEILER: They end up being very similar
 8 in application.
 9 ARBITRATOR ANAYA: Just one last one. And
 10 if we get into this intent stuff, whose intent? Is
 11 it Mr. Hering's intent? Is it the state
 12 legislatures' intent? I mean who among the state
 13 legislatures is--
 14 MR. VIOLI: I think we have to look at the
 15 states as one body. We would have to look at the
 16 states as one body because you have the Attorneys
 17 General--
 18 ARBITRATOR ANAYA: I know but how can we
 19 find intent?
 20 MR. VIOLI: The problem is you have an
 21 agreement that's the Attorneys General's, and that's
 22 combined with the statute--

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01:07:12 1 ARBITRATOR ANAYA: I know the problem.
 2 That's what I'm asking you to give some guidance on.
 3 So, do we look at the Attorneys General? Do we look
 4 at the state legislatures? Do we look at the
 5 governors? That's always the problem with intent;
 6 right?
 7 MR. WEILER: And actually, I'd like to
 8 strongly make a point. That is actually one of the
 9 key differences between the national treatment
 10 standard and a fair and equitable treatment
 11 standard. In the national treatment standard, there
 12 are tribunals and WTO Panels who very clearly said
 13 we don't want to get into the mugs game of trying to
 14 guess intent. We're not going to go there. We're
 15 not going to see if we can go find what the intent
 16 was because whose intent do we check?
 17 PRESIDENT NARIMAN: But you don't want us
 18 to go into intent at all. Is that your--
 19 MR. WEILER: Not with respect to national
 20 treatment.
 21 PRESIDENT NARIMAN: It doesn't matter about
 22 anything. I mean you--putting in pigeon holes makes

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01:08:36 1 actually have to find intent to discriminate against
 2 a foreign national.
 3 ARBITRATOR ANAYA: No, I understand that.
 4 I understand that. I'm trying to find out what
 5 you're trying to tell us.
 6 MR. WEILER: We're trying to tell you that
 7 you don't need to look for specific intent, that the
 8 result is manifest in the facts. Was there or was
 9 there not unfair treatment. They say it's for
 10 healthcare. Did they meet that strategic burden,
 11 did they really prove to you enough that it really
 12 was about healthcare or was it about something else.
 13 MR. VIOLI: Professor Anaya, just that--did
 14 they--there is a distinction here between did they
 15 intend to discriminate or did they intend the
 16 result? Our point is clearly that they intended the
 17 result, the result being pass the allocable share
 18 and take away the market share--
 19 ARBITRATOR ANAYA: I understand that. I
 20 understand that.
 21 MR. VIOLI: That's why I'm trying to follow
 22 what you're saying about intent. Are we talking

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01:07:57 1 no difference. I'm saying do you want us to go into
 2 it or not? That's all I want to know. Whether in
 3 under one pigeon hole of 1102 or 1105--whichever.
 4 MR. WEILER: You don't need to, but we
 5 think you can.
 6 PRESIDENT NARIMAN: That's not an answer.
 7 MR. WEILER: No?
 8 ARBITRATOR ANAYA: I understood the whole
 9 argument you were making with regard to 1102 is that
 10 we had to, you know, find that they didn't
 11 intend--this wasn't really about healthcare, it was
 12 about something else, and so we have to find out--
 13 MR. WEILER: And that's manifest in the
 14 facts.
 15 ARBITRATOR ANAYA: Okay. So, we do have to
 16 find that, and you can prove it is what you're
 17 saying.
 18 MR. WEILER: Yes, manifest in the facts.
 19 ARBITRATOR ANAYA: Okay--
 20 MR. WEILER: So it's not a matter of
 21 actually finding out--there's a diff--the difference
 22 is that my friends are going to tell you that you

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01:09:22 1 about the intended result or does it have to be an
 2 intent to discriminate?
 3 ARBITRATOR ANAYA: Either way. But I
 4 understand what you're saying. My question is
 5 precisely that, do we have to find intent one way or
 6 the other, and you're saying yes, we do.
 7 MR. VIOLI: Certainly the intended result.
 8 MR. WEILER: Intended result, yeah. It may
 9 be a matter of semantics.
 10 PRESIDENT NARIMAN: Whose intent? Please
 11 address us.
 12 MR. WEILER: Well--
 13 PRESIDENT NARIMAN: Whose intent?
 14 MR. WEILER: Manifest in the facts. I
 15 mean, we're never going to be able to, you know,
 16 examine, x-ray the heads of the particular Attorneys
 17 General to know exactly, you know, so you know, to
 18 be clear. It's more a question of manifest and the
 19 result.
 20 PRESIDENT NARIMAN: Okay. Lunchtime.
 21 MR. WEILER: Okay.
 22 (Whereupon, at 1:09 p.m., the hearing was

01:10:22 1 adjourned until 2:20 p.m., the same day.)
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02:26:18 1 A. Yes, sir, I did.
 2 Q. The most recent was under the heading--the
 3 letterhead of Protiviti, as you mentioned; correct?
 4 A. That's correct.
 5 Q. And the first one was with your former
 6 firm; is that correct?
 7 A. That's correct. It would be under Gordius
 8 Consulting.
 9 Q. Gordius Consulting, okay.
 10 Your witness, Mr. Sharpe.
 11 CROSS-EXAMINATION
 12 BY MR. SHARPE:
 13 Q. Thank you, and good afternoon, Mr. Wilson.
 14 MR. SHARPE: I will be referring most to
 15 Mr. Wilson's report and documents, and we have a few
 16 additional documents which we can distribute just
 17 for reference that are referenced in the Table of
 18 Contents, just five or six documents.
 19 We also have a number of slides. We will
 20 put the documents up on the slides for your
 21 convenience, and we can give you a copy of those
 22 slides at the end of the examination of Mr. Wilson.

1 AFTERNOON SESSION
 2 WAYNE WILSON, CLAIMANTS' WITNESS, CALLED
 3 DIRECT EXAMINATION
 4 BY MR. LUDDY:
 5 Q. Sir, would you state your full name for the
 6 record.
 7 A. Wayne Roy Wilson, Junior.
 8 Q. And by whom are you employed or affiliated?
 9 A. I work with Protiviti, Incorporated, which
 10 is a wholly owned subsidiary of Robert Haff
 11 International.
 12 Q. And were you retained by the Claimants in
 13 this matter?
 14 A. Yes, I was.
 15 Q. For what purpose?
 16 A. To evaluate their claims and to determine
 17 what, if any, damages arose from their claims
 18 related to the actions of individual states
 19 off-Reservation and individual states on-Reservation
 20 for certain sales.
 21 Q. And you rendered two reports in this
 22 matter; correct?

02:27:45 1 PRESIDENT NARIMAN: Okay.
 2 BY MR. SHARPE:
 3 Q. I'm Jeremy Sharpe from the Office of Legal
 4 Adviser at the State Department.
 5 Thank you for agreeing to answer questions.
 6 You submitted two expert reports in this
 7 case you noted?
 8 A. That's correct.
 9 Q. And do you have copies of those?
 10 A. Not as I sit here, I do not.
 11 Q. Do you have copies of those for him?
 12 Great.
 13 And, Mr. Wilson, did you draft these
 14 reports?
 15 A. Yes, I did.
 16 Q. Okay. If you could open your First Report
 17 to Exhibit 1 Revised, and I will put this on the
 18 screen for convenience as well.
 19 Do you have that?
 20 A. I'm not sure this is--this is not revised.
 21 I just have the Exhibit 1. I don't have the Exhibit
 22 1 Revised.

02:29:40 1 Q. In the meantime, why don't we use the
2 document off the screen, and perhaps you could give
3 Mr. Wilson his revised report with his revised
4 numbers in it.
5 Thank you.
6 Looking at the screen, Mr. Wilson, you used
7 two methodologies to determine the impairment to
8 Claimants' investment in the United States; is that
9 correct?
10 A. Yes. In one I used an analysis whereby we
11 were evaluating the impact to the brand on the five
12 individual states, five original states that the
13 off-Reservation sales occurred in, as well as the
14 on-Reservation sales in order to ascertain the
15 damage to those lost profits.
16 We looked specifically at the lost sales,
17 which is a widely accepted measurement of diminution
18 of value of an intellectual property, and we
19 analyzed that because, frankly, the damages in this
20 case didn't happen in the U.S. as a whole. It only
21 happened in certain specific states.
22 To use the overall measurement of the

02:31:56 1 represent the benefit or the damages since it wasn't
2 done in this case to the Claimants?
3 Those are the two analyses.
4 Q. So, look looking at the screen, one of your
5 methodologies is called the lost sales approach, and
6 the other is called the exemption approach; is that
7 correct?
8 A. That's correct.
9 Q. And the lost sales calculations include
10 what you've called an investment in markets;
11 correct?
12 A. Yeah, that's the investment, the physical
13 investment in actual assets that is not included in
14 the subsequent two numbers because that investment
15 in markets is actually depreciated over a period of
16 time, and that depreciation expense is a reduction
17 that is applied to the revenues that are experienced
18 by GRE off-Reservation and through the sales
19 off-Reservation, on-Reservation.
20 Q. The equipment you identified is for the
21 Ontario plant that's used, as you say, exclusively
22 to serve the U.S. market; is that correct?

02:30:44 1 entire country would have been very sloppy and would
2 not have been an appropriate analysis because
3 damages, for instance, in the state of Arizona or
4 Nevada would have been offset by successes in, say,
5 the state of New York.
6 Then we also performed an analysis where we
7 essentially looked at what occurred when what I
8 describe in my original report as the last
9 significant legal change took place, which was the
10 adoption of the MSA to see what activities took
11 place around the adoption of the MSA by the states.
12 And what occurred was an exemption from escrow for
13 individual companies that chose to participate in
14 the MSA as subsequent participating members, and we
15 performed an analysis similar to the analysis that
16 was occurred at the point in time that the MSA was
17 put in place at the point in time that the ASA would
18 have been put in place, the Allocable Share
19 Amendment.
20 So, looking at it as a last time we had a
21 major legal change, this is what happened. If the
22 same type of thing happened today, how would that

02:32:56 1 A. Those were assets--I assume we are going to
2 talk about the rebuttal report as well because this
3 gets refined later on as we sit down and are able to
4 more fully explore what that asset listing is.
5 This initially was a request by myself to
6 identify the assets that were incremental in nature.
7 When evaluating lost profits, total costs
8 are not a relevant measure. Generally the process
9 that takes place is the damages expert for
10 plaintiffs or in this situation Claimants,
11 calculates the lost profits that were incurred based
12 predominantly on variable costs, and then all of the
13 overhead costs which are not necessarily variable or
14 analyzed in order to evaluate what costs are
15 incremental to the investment. For instance, if you
16 already have a building and you don't need an
17 additional building, then that's not an incremental
18 cost to expand your operations. On the other hand,
19 if you have to buy more trucks or you have to buy
20 additional machinery, those are incremental costs.
21 And so, our goal was to understand the
22 assets that were incremental in nature for GRE when

02:34:06 1 they decided to move into the United States market
2 and were, in fact, incremental to moving into the
3 U.S. market, and incremental to their activities in
4 there on a go-forward basis.

5 Q. All right. So your argument is that you
6 are claiming for both lost profits and for certain
7 equipment that you feel was necessary in order to
8 generate the sales for the United States; is that
9 correct?

10 A. My understanding is there is essentially
11 three reasons that we do that. The first one is the
12 depreciation reason that I just explained.

13 The second, as I articulated in my report,
14 there are two aspects of the value that was
15 invested. The first value was an investment made
16 specifically for the market in physical assets, and
17 the second is the investment that's made in
18 developing a brand within the United States.

19 And then my understanding, and I apologize
20 for not being a little more precise about this, but
21 we were also asked by counsel to evaluate that
22 investment because my understanding is, under

02:35:58 1 rate based upon GRE's historic growth and growth we
2 saw of other brands in the marketplace, and we
3 applied that growth rate, so it gives a range for
4 the Tribunal to be able to evaluate where they think
5 the damages are more likely to occur going forward.

6 Q. Right.

7 And looking at the screen, you calculated
8 initially about R248.7 million in damages, assuming
9 further growth in sales; correct?

10 A. That is correct.

11 Q. And you also calculated about
12 \$173.6 million in damages, assuming no further
13 growth in sales; correct?

14 A. That's correct.

15 Q. Now let's look at the exemption approach
16 which is below. Under that approach you calculated
17 a value, as you said, of the negative impact of
18 Claimants' escrow obligations under the Allocable
19 Share Amendments; correct?

20 A. Can you ask that question again?

21 Q. I'm just reading from your report. It says
22 exemption approach, this is at Section 5-A of the

02:35:01 1 Chapter Eleven of NAFTA, due to the way this case is
2 filed, that there is also a claim under that that is
3 separate and apart from our usual analysis, and I
4 apologize. I'm not an attorney, and would love to
5 be more articulate.

6 Q. That's okay. That's wrong in any event,
7 but let's go back to your screen.

8 The lost sales approach quantifies lost
9 profits for on- and off-Reservation sales; that's
10 correct?

11 A. That's correct, for the specific states in
12 which damages occurred.

13 Q. Right. And so using this approach, you
14 calculated a range of impairment; correct?

15 A. That's correct, because what we did is we
16 evaluated under two models. We did one that just
17 said, okay, if there is no growth, if we just
18 retained the market share that we had at the point
19 in time that the actions in question took place,
20 what would those projected sales look like.

21 And then the second thing we did is
22 evaluate what we thought was a reasonable growth

02:36:55 1 second report, Exemption: Value of the negative
2 impact of the escrow terms under the ASA.

3 A. Correct.

4 Q. Okay. So, you calculated the value of the
5 exemption at about \$315.3 million, assuming further
6 growth in sales; correct?

7 A. That's correct. And that analysis, one
8 important thing to differentiate the two that we
9 haven't mentioned is that, in the previous analysis,
10 at least in the off-Reservation sales, we offset
11 those sales with the sales--the lost profits with
12 the sales that they continued to make. And, of
13 course, under the escrow exemption, we are
14 calculating the escrow exemption at kind of time
15 zero with no offset necessarily for whatever GRE or
16 Claimants were able to successfully achieve in spite
17 of the higher costs and the actions that were taken.
18 So, there was going to be a differential between the
19 two by necessity.

20 Q. And so you calculated the value of the
21 exemption of about \$282.1 million, assuming no
22 further growth in sales; correct?

02:37:58 1 A. That's correct.
 2 Q. Okay. Now, if you could--I don't know if
 3 you have your revised report now, but I will put it
 4 on the screen. This is Exhibit 1 to your revised
 5 report.
 6 I'm sorry, your second Report.
 7 A. The rebuttal report?
 8 Q. Yes, the Rebuttal Report.
 9 This is titled Summary of Valuation and
 10 Impairment Values; correct?
 11 A. That's correct.
 12 Q. And it summarizes your revised
 13 calculations; correct?
 14 A. Yes. It summarizes the calculations that
 15 we made in light of probably three primary issues.
 16 The first was criticisms raised by NCI, Navigant
 17 Consulting, in their report, and our eval based upon
 18 our evaluation of their criticisms and either
 19 acceptance or rejection of those criticisms.
 20 The second was because we've achieved--we
 21 have been able to receive more precise information
 22 as well as updated information.

02:39:58 1 Do you see that?
 2 A. Yes.
 3 Q. And under the growth model, you calculated
 4 about \$97.2 million in damages; correct?
 5 A. That's correct.
 6 Q. Under the flat or no growth model you
 7 calculated about \$74.9 million in damages; correct?
 8 A. That's correct.
 9 Q. Okay. And you also readvised your
 10 calculations for the exemption approach; correct?
 11 A. Yes, there were some minor revisions
 12 because of volumetric differences in the data we
 13 originally received. Our goal was to try to get the
 14 best information, and unfortunately we are dealing
 15 with companies that don't necessarily track their
 16 sales all the way to individual states in some
 17 cases. They would track them to a regional
 18 distributorship, and it's just not in their nature.
 19 They have clients in those states and are able to
 20 build it back up, but in the normal course of
 21 business, these aren't the types of data that they
 22 normally keep.

02:39:00 1 And then finally, if you actually look
 2 through the text of the original report, when we
 3 discuss the on-Reservation sales, there is a line at
 4 the end of the paragraph that indicates they are
 5 offset by actual sales that occurred. Due to a
 6 last-hour change, we did not do that offset, so
 7 there is a significant change just because of
 8 something that we intended to do and ended up not
 9 getting done because we didn't get the data at the
 10 time to be able to do it. We didn't have the data
 11 in time, unfortunately.
 12 Q. Is this the reduction to the 2005 base
 13 year?
 14 A. No. I mean, the 2005 falls under Navigant
 15 Consulting raised that issue, so we evaluated it.
 16 If there is kind of a basket of things that we
 17 looked at that they had raised in an effort to
 18 engage in intellectual discourse. We evaluated what
 19 they said.
 20 Q. Okay. Well, let's look at this table.
 21 Using the lost sales approach, there is a heading,
 22 "Total Impairment Due to Lost Sales."

02:40:51 1 So, as we continued to move forward through
 2 several conversations with personnel at Tobaccoville
 3 and at NWS, we achieved a better understanding as to
 4 what data we actually needed, and our goal was to
 5 get the best information we could about what the
 6 sales were in individual states.
 7 Q. Right.
 8 So, looking under the exemption approach,
 9 under the growth model you calculated about \$267.9
 10 million in damages; correct?
 11 A. That's correct.
 12 Q. And the flat or no growth model, you
 13 calculated about \$238.2 million in damages; is that
 14 correct?
 15 A. That's correct.
 16 Q. Okay. So, and you may know, Navigant's
 17 Rebuttal Report contained a table that set out your
 18 primary damages finding, and I will put that on the
 19 screen for convenience, and that's in the packet
 20 that we distributed.
 21 This table is called Summary of
 22 Mr. Wilson's Revised Primary Damages Estimates.

02:41:48 1 Correct?

2 A. That's correct.

3 Q. Start at the top of the table in the growth

4 scenario. Your calculations for off-Reservation

5 lost profits decreased from about \$87.6 million to

6 about \$50.9 million; correct?

7 A. That's correct.

8 Q. And that's a decrease of about 42 percent?

9 A. And as I said before, the issue we ran into

10 is we had information for off-Reservation sales that

11 we were able to update, and in some cases I

12 identified additional sales that were made

13 subsequent to our First Report.

14 The second issue we ran into was that we

15 were able to better understand where sales took

16 place in terms of individual states.

17 So, it was my preference, even though it

18 wasn't in the best interest of my client to use the

19 right information as opposed to the information that

20 perhaps would have been opportunistic and allow me

21 to have higher damages in the interest of trying to

22 find the truth.

02:43:53 1 profits decreased from about 123.1 million to about

2 \$22.1 million; correct?

3 A. Yes.

4 And the majority of decrease is caused by

5 two primary things. As I indicated previously, our

6 inability to apply the actual sales that had

7 occurred, and by doing that we had a significant

8 reduction.

9 And the second was that the Claimants, in

10 spite of letters that they had received, for

11 instance, in the case of California, from the

12 Attorney General of California saying that their

13 cigarettes were banned, were actually able to

14 successfully mitigate damages by continuing to argue

15 that case and continuing to make sales in

16 California.

17 So, in fact, unfettered or at least being

18 able to continue to compete and not being labeled as

19 contraband and kicked out of the state, they were

20 able to gain significant market share in that

21 market, and as a consequence, I didn't feel like it

22 was reasonable to evaluate those damages at this

02:42:52 1 And then finally, when we looked at the

2 off-Reservation profits, there were some more minor

3 adjustments like you reference, the 25 percent

4 versus 18 percent adjustment in the 2005 numbers,

5 where we looked at what NCI had proposed in terms of

6 their criticisms, evaluated the efficacy of those

7 criticisms, and made adjustments where we felt it

8 was appropriate in order to find the correct number

9 for the Tribunal to look at.

10 Q. I see. So, your client would have

11 preferred that you used the erroneous numbers?

12 A. We didn't ask really their input because

13 generally speaking, I view this as more a matter of

14 personal credibility and integrity than a matter of

15 placing myself in a subservient role to my client.

16 We looked at the information. The facts

17 were what the facts were, and we were simply trying

18 to get the right answer so that we would be able to

19 provide good information to the Tribunal as it made

20 its decisions.

21 Q. I see. So, let's go down the chart.

22 Your calculations for on-Reservation lost

02:44:55 1 point.

2 Unfortunately, if the State of California

3 is ever successful in applying the MSA to the

4 on-Reservation sales, those damages would occur at

5 some point in time in the future. But due to the

6 interesting situation we find ourselves in, where

7 due to statutes of limitations and the need to

8 evaluate the damages in this matter, and not being

9 able to wait until every case and every state as a

10 result, we removed that number because we felt--I

11 felt personally that it was improper to include it

12 at this point because it had not actually occurred.

13 It's one of the difficulties in this business is you

14 try to identify the damages that are actually

15 happening, not the damages that will someday happen

16 if they're successful in what they're trying to do

17 in California.

18 Q. I see. So, your initial speculation that

19 would be zero damages in California was incorrect,

20 but now you would like the Tribunal to assume no

21 further--you had at the time of your report asked

22 the Tribunal--

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02:45:59 1 A. No, there really was no speculation when I
2 received--there really is no speculation about no
3 sales in California. When you receive a letter from
4 the Attorney General of California that says that
5 you are banned, your tobacco is labeled contraband,
6 and you're not allowed to sell anymore, and you have
7 gotten notification from your main customer in
8 California that basically they're scared and don't
9 think they can continue to do business with you,
10 there is not a lot of speculation there.

11 I didn't know at the time that GRE and
12 Claimants would be successful in fighting the
13 actions that were being taken in California. That's
14 the reason that we updated the numbers when we
15 reached the Rebuttal Report in an effort to evaluate
16 fairly the damages.

17 I guess the alternative is I could have
18 just left the numbers the same and we would have had
19 the wrong answer, and we would be talking about why
20 my numbers are wrong. I would rather talk about why
21 my numbers change so that they are correct.

22 Q. Okay. Well, let's continue in that vein.

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02:48:00 1 So, there was really--there was no benefit
2 one way or the other, in my mind, in terms of moving
3 this number any direction. It was simply a matter
4 of we had additional conversations more or less
5 confirming that that 38 million was what we expected
6 it to be, and it became clear to me very quickly in
7 talking to the accountants that the train had gone
8 off the tracks, and that their understanding of what
9 incremental costs were were not what I needed it to
10 be.

11 And so, we literally sat down in Canada and
12 went asset by asset in order to understand what each
13 individual piece of equipment made, what that did,
14 and where it fit, if it was used for a particular
15 marketplace, if it was unique in its nature. If it
16 was required because of the volumetric increases
17 that happened in California or if there was a
18 regulatory requirement for it.

19 So, it was a rather arduous process to
20 identify those individual assets, but the numbers
21 shrink.

22 Q. You noted that the train went off the

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02:46:55 1 Your calculations for the investment in
2 markets or the as you noted the equipment purchased
3 to serve U.S. market decreased from \$38 million to
4 about \$24.2 million; correct?

5 A. Exactly. And one of the reasons that this
6 decrease as I describe when we discussed my First
7 Report was we made--I made attempts in conversations
8 with GRE personnel to identify the actual assets
9 that were incremental to the market. Unfortunately,
10 we are asking--you ask that of almost of any company
11 in the world, that is not the type of information
12 that they have, and so there is a series of
13 conversations that need to take place.

14 Frankly, it didn't help us or hurt us
15 regardless of which way this number went. If it was
16 38 million, it would mean that our depreciation
17 expense that's applied to the lost profits would
18 have been higher. If the number is lower, it means
19 that the amount that you claim as the investment in
20 assets is higher and the amount--or lower and the
21 amount you take for depreciation would be lower as
22 well.

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02:49:03 1 tracks. Are you referring to GRE accountants?

2 A. Well, it's a matter of trying--the problem
3 of being a damages expert is, we speak a language
4 that's not--not in the general course of business
5 for accountants. So, when I go and I ask an
6 accountant what are the incremental costs to go into
7 the United States, that's typically not a cost that
8 they look at, that they don't analyze their
9 investments that way. They analyze their
10 investments because we need a new machine or this
11 would increase efficiency.

12 And it's oftentimes not even their
13 decision. It's just their decision to account for.

14 So, you can't just have an accountant in
15 the room. You have to have someone who understands
16 what all the equipment does. You then have to have
17 someone who actually understands the maintenance of
18 that equipment and then generally have to have
19 someone that understands the regulatory nature to
20 understand if there is any regulatory need for some
21 of this equipment.

22 And so, we had started the conversation

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02:49:58 1 with the accountants. I was satisfied at the time
2 we filed our First Report that we were all in
3 agreement; and, unfortunately, when we revisited the
4 subject prior to filing our second Report, it became
5 obvious to me that it was unclear. And my
6 general--like I said, my take on it was I don't care
7 if the number goes up or goes down. I just need to
8 know that we are actually getting the right number
9 because for a lost-profits analysis I need to make
10 sure we are talking about incremental costs. And as
11 I understood from counsel, what we needed for this
12 investment numbers for their legal issue is it has
13 to be the incremental costs to go into the United
14 States market.

15 So, that's what we were trying to do, is
16 get the right number, and that's what I mean when I
17 say the train went off the tracks. My communication
18 skills apparently failed me. Perhaps their
19 listening skills failed them, and ultimately
20 in-house counsel or in-house accountants
21 communicating with a damages expert rarely goes
22 extraordinarily smoothly because we're asking them

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02:51:55 1 serve the U.S. market?

2 A. I'm not sure how I would do that. You
3 know, that's a nice theory, but the reality is that,
4 unless, and I do not intend to underestimate the
5 Tribunal at all, but unless they are intimately
6 familiar with the workings of a cigarette
7 manufacturer and what each individual piece of
8 equipment does and, more importantly, the volumetric
9 demands of GRE at any given point in time and
10 whether these demands are driven by demand in the
11 U.S. market and growth in the U.S. market, or if
12 they're being driven by worldwide demand in Germany
13 or in Mexico, you know, other than presenting the
14 people that I spoke to and letting them communicate,
15 that's part of my role, is to evaluate as an expert
16 what assets are relevant and to use the intelligence
17 and background of the people that operate this
18 machinery in order to make sure that I'm getting the
19 right information because I'm kind of speaking the
20 damages language. I have accountants that speak the
21 in-house accounting language, and then I have
22 operational people that speak the language of making

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02:50:56 1 to make their accounting system more or less stand
2 on its head.

3 Q. Let me see if I understand this correctly.
4 You made a claim for \$38 million for equipment in
5 Canada. Navigant said that you didn't produce any
6 evidence that this equipment was used solely to
7 serve the U.S. market. You went back, you realized
8 the train had gone off the tracks, and you sorted
9 everything out, and now the evidence in the record
10 is such that you're confident that the \$24 million
11 that you're claiming is for equipment in Canada to
12 solely serve the U.S. market.

13 A. I could answer that the evidence that I
14 have seen in the conversations I have is sufficient.
15 I can't say that I have reviewed every single piece
16 of paper in the record, so I would hesitate to
17 answer that part of your question, but in terms of
18 what I revised in my understanding, I feel
19 comfortable.

20 Q. Did you produce evidence that would allow
21 the Tribunal independently to determine that the
22 \$24 million claimed for this equipment is solely to

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02:53:04 1 cigarettes, and so I have to get those three
2 languages all together so we can find an answer that
3 allows us to get the right answer for this matter.
4 Q. So, in theory, it would be nice if there
5 were documents that showed that this equipment
6 exclusively served the U.S. market, but, to your
7 knowledge, there are no documents that demonstrate
8 that this equipment exclusively serves the U.S.
9 market?

10 A. I don't think there would ever be that kind
11 of information for any asset because
12 ultimately--outside of, say, I know there is a
13 machine that makes one hundreds, a type of cigarette
14 that's only sold in U.S. market. Nobody else in the
15 world buys these. If you're in Europe, you want to
16 buy a pack of 100s, they don't sell them there.
17 They only sell them in the U.S. markets.

18 So, that's an example of a machine that if
19 you know about cigarettes, and I tell you there is a
20 one hundreds machine there, you know that that
21 machine is only used for the U.S. market, so that
22 cost is in our analysis.

02:54:02 1 But there are other machines that are in
2 there that may have other purposes, but would be
3 based on conversations why they put it in there,
4 that's why. It's not part of accounting. It's not
5 part of normal recordkeeping. It's likely not part
6 of any corporate bylaws or standards to ever create
7 a document like that, so what you're asking for is
8 is there a mythical shield of Aries? I don't know.
9 I don't have that piece of information because, in
10 fact, there would never be that piece of information
11 unless someone saw fit to create it and say we need
12 to buy this for the U.S. market.

13 Q. Did someone see fit in this case, to your
14 knowledge, to put in a report saying that I met with
15 Mr. Wilson, I work for GRE, and I can attest that
16 this equipment exclusively serves the U.S. market
17 for the following reasons?

18 A. I don't know the answer to that question.

19 Q. Okay. Let's move on. Let's go back to our
20 chart here.

21 Let's go to the growth scenario, the total
22 impairment line, where we left off.

02:56:03 1 do because of the Claimants' ability to fight off
2 some of the enforcement actions that were being
3 taken against them.

4 And then finally just evaluating the things
5 that Mr. Kaczmarek brought up. I'm a big believer
6 that experts ignoring one another serves no role for
7 the Tribunal. The damages experts need to engage,
8 and so I'm a big believer that when a damages expert
9 represents to me that there are things that I ought
10 to look at, I ought to look at that, and I will
11 evaluate the efficacy of his arguments. In some
12 cases I flat out disagree with Mr. Kaczmarek because
13 his volumes that he uses are completely
14 opportunistic where he's went out of his way to use
15 an allocation methodology to move sales from states
16 that aren't part of damaged states in the damaged
17 states in order to further offset sales. He's
18 ignored any changes to the volume based purely on
19 his representation that it's a handwritten note.

20 These are companies who deal in handwritten
21 notes. They don't have a multimillion dollar
22 accounting system, and oftentimes that's how they

02:55:04 1 There is a reduction from \$248.7 million to
2 about \$97.2 million; is that correct?

3 A. That's correct. That's a mathematical
4 process.

5 Q. Yes. And that's about a about 61 percent
6 reduction; correct?

7 A. That's correct.

8 Q. And in the no growth scenario, we see
9 similar results; right? Your calculations for
10 off-Reservation lost profits decreased from about
11 \$70.3 million to about \$40.3 million; correct?

12 A. And I would expect that as based on the
13 things that we evaluated and changed in our rebuttal
14 analysis versus the original analysis. It's not
15 surprising in any way, you know. If we want to talk
16 about how--what a horrible thing it is that I
17 reduced the damages that the Federal Government is
18 facing, U.S. Government is facing, that's fine, but
19 the end result is we have got the better answer. We
20 have got the right answer. That makes sense and is
21 supported by the data because of subsequent
22 information, because of one thing we weren't able to

02:57:06 1 communicate.

2 When I evaluate the volumes and try to
3 measure them correctly and respond to
4 Mr. Kaczmarek's responses, I'm somewhat frustrated
5 because my general belief is after reading his
6 Rejoinder, he's by and large ignored the things that
7 we brought up, and he's doing the exact opposite of
8 not engaging on the disagreements that we have.

9 Q. That's curious you mention that on your
10 first point. You noted in your Rebuttal Report that
11 Mr. Kaczmarek had opportunistically moved these
12 numbers. Mr. Kaczmarek responded and said he did
13 not move these numbers. In fact, he pointed it out
14 that this was an issue for you to look at, but maybe
15 you could point to where in his report--are you
16 familiar with where it is in the report?

17 A. The difficulty in his report is--what he
18 did is he used I think it was the Eisenstadt method
19 that he used to allocate sales from Texas into
20 Oklahoma.

21 Q. Oh, I see.

22 A. There were direct instructions provided by

02:58:00 1 Tobaccoville that said these sales should be
2 allocated in this way.
3 And instead of doing that, he chose instead
4 to allocate 100 percent of those sales to Oklahoma,
5 which is, of course, was one of the five original
6 states, thus creating sales in Oklahoma that never
7 occurred in Oklahoma, based upon everything that we
8 have been told, all the records that we have seen,
9 and all of the analysis we have been provided by
10 Tobaccoville.
11 Q. We will let Mr. Kaczmarek speak to this
12 issue, but my understanding is that Mr. Kaczmarek
13 said he relied on the data that was provided to him,
14 and to the extent that you had different data and
15 were relying on that data, that that's a separate
16 issue. But I think--
17 A. He selectively relied on the data. There
18 was data in the analysis that by his own words he
19 chose to ignore and footnoted that it was a
20 handwritten document, and that was literally the
21 entire import of his analysis.
22 Q. Right. Well, let's take this up with

03:00:02 1 Did I read that correctly?
2 A. That is correct.
3 Q. Right.
4 But, isn't it true that in order to
5 calculate combined profits for GRE and NWS you can't
6 simply look at GRE's costs? You would need to look
7 at NWS's costs as well?
8 A. To the extent they were applicable, yes.
9 Q. To the extent they were applicable. So, if
10 you were looking at combined profits for GRE and
11 NWS, you would need to look at NWS's costs to the
12 extent--
13 A. Not all costs. You would specifically look
14 at the incremental costs that were relevant to the
15 state. So, when you try to identify incremental
16 costs--in accounting terms we use the phrase
17 accounting, we use the phrase variable costs, fixed
18 cost, and now this phrase incremental costs. And I
19 know Mr. Kaczmarek refers a lot to the Audited
20 Financial Statements. Well, GRE has no requirement
21 to file Financial Statements. The only reason NWS
22 has any Financial Statements is because they have a

02:58:52 1 Mr. Kaczmarek, shall we?
2 Let's just go down to the total impairment
3 value there.
4 A. For the growth or nongrowth?
5 Q. For the nongrowth.
6 \$173.6 million down to about \$74.9 million;
7 correct?
8 A. That is correct.
9 Q. That's a 57 percent decrease?
10 A. That's what the math says.
11 Q. Right. Well, let's look at some of the
12 reasons for these changes.
13 If you could look at Paragraph 68 of your
14 First Report, which addresses how you calculated
15 Claimants' on-Reservation lost profits--I will put
16 that up on the screen also--it states, "The
17 on-Reservation profits are calculated by taking the
18 per unit profit achieved by Claimants on sales
19 on-Reservation and applying that rate to the
20 projected sales volumes. The rate of profits
21 represents the difference between NWS's sales price
22 and GRE's costs for production."

03:00:57 1 loan, and the bank requires them to file the
2 Financial Statements. They required them at one
3 point in time.
4 So, there is no legal reason why GRE would
5 ever have Audited Financial Statements.
6 And Audited Financial Statements would
7 simply have variable costs and overhead costs, which
8 would not be useful for this analysis because it
9 would be total variable costs independent of which
10 market it was in. And, in fact, the variable costs
11 are different for different markets. You have
12 different raw materials. You have different sizes.
13 You have different equipment that may be more
14 efficient because it's more modern. You also have
15 different labor costs because everyone on the floor
16 is paid a different salary. So whoever runs that
17 machine is going to be the relevant direct cost.
18 And then you have to look at overhead, and
19 the question with overhead is which of these costs
20 change incrementally with an investment decision?
21 So, as an example, Mr. Jerry Montour runs, owns, and
22 is employed by GRE. Do you need another Jerry

03:02:00 1 Montour because you go in to the United States
 2 market? No, that's not an incremental cost.
 3 There is no additional cost to having--for
 4 another Jerry Montour.
 5 So, that's the type of analysis you do.
 6 And as we discussed earlier on, you would
 7 want to actually analyze each of these costs after
 8 you first agree on what are the costs that are
 9 relevant on a variable basis, so we look at variable
 10 costs.
 11 Q. You mentioned the audited Financial
 12 Statements for the Claimants. Did you review
 13 Claimants' Audited Financial Statements for years
 14 ending 2006, 2007, and 2008?
 15 A. Are you talking about the NWS Financial
 16 Statements?
 17 Q. NWS GRE, the Claimants.
 18 A. As far as I know, GRE doesn't have Audited
 19 Financial Statements.
 20 Q. As far as you know. Did you ask them?
 21 A. Yes, I did, several times.
 22 Q. And what did they say?

03:03:50 1 and as Mr. Kaczmarek thinks about them.
 2 Q. So, there are GRE audited financials before
 3 year ending 2006, so GRE stopped having their
 4 Financial Statements audited? Is that your
 5 understanding?
 6 A. There is no--I don't know why they made the
 7 decision. I would say it's a smart decision because
 8 I don't know why you would spend the money outside
 9 of you were trying to get a bank loan and the bank
 10 required you to have Audited Financial Statements.
 11 But the statements themselves have no use for the
 12 analysis that we are talking about. They don't help
 13 you from a volume standpoint. They don't help you
 14 from a revenue standpoint because they're done at
 15 such a high level, and the costs represented in that
 16 Financial Statement are of no import to the
 17 evaluation of lost profits because the incremental
 18 costs are never measured in those financials.
 19 Q. I see. So, given your testimony that the
 20 accountants at Grand River are bit of a train wreck
 21 and given the massive--
 22 MR. LUDDY: Objection. You're being

03:02:47 1 A. They said they didn't have them.
 2 Q. They didn't have them--
 3 (Simultaneous conversation.)
 4 Q. Did they tell you that they did not produce
 5 them or that they did not have them to produce to
 6 you?
 7 A. My understanding is no audit was ever
 8 performed, and I would go one step further to say as
 9 an accountant, if GRE had called me independent of
 10 my involvement in this case and asked should we have
 11 an audit done, my answer would be a firm no. Unless
 12 you have a bank that requires it, you intend to
 13 start being traded and in the United States or
 14 subject yourself to regulation by being a public
 15 company, there is really no advantage. Your money
 16 would be better spent in other areas to enhance your
 17 accounting records, to enhance the efficiency of
 18 your operations, to evaluate the process.
 19 So, based on my conversations with people
 20 from Jerry Montour all the way down to some of their
 21 more junior accounting personnel, there are no
 22 Audited Financial Statements as we think about them,

03:04:54 1 offensive.
 2 BY MR. SHARPE:
 3 Q. I apologize. Given that the evidence in
 4 the record, massive discrepancies in the numbers,
 5 it's your testimony that an Audited Financial
 6 Statement would not help make sense of these, the
 7 financials in this case?
 8 A. I'm not sure what you mean by--you said
 9 huge discrepancies in the data, so first, I want
 10 to--you're talking about the changes in our damages
 11 numbers?
 12 Q. No, no, no. I'm talking about all of the
 13 discrepancies in the data that Navigant identified.
 14 For instance, sales to tobacco, the amount
 15 of the escrow deposits that were notified to the
 16 states versus that were notified to the Tribunal for
 17 purposes of this case. There are discrepancies in
 18 the data. My question is: Would Audited Financial
 19 Statements help clarify these or not?
 20 A. Well, the discrepancies you talk about,
 21 it's fascinating you asked that question because
 22 Audited Financial Statements, if you were looking at

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03:05:54 1 Audited Financial Statement from GRE, it's going to
2 talk about GRE's operations, not Tobaccoville's
3 sales, not NWS sales, not sales that were reported
4 by retailers to individual states, which are
5 all--which is where all that information comes by.
6 And ultimately, I'm a little--I was a
7 little mesmerized by this discussion by
8 Mr. Kaczmarek because when I read through this, my
9 first thought was, outside of an amazing
10 coincidence, I can't imagine that the numbers would
11 be exactly equal. Because outside of the ability to
12 produce a cigarette and instantaneously put that
13 cigarette up for sale in Arizona, you're by
14 definition going to have delays that occur between
15 GRE and its distributors, so that's NWS and
16 Tobaccoville, and between those--between
17 Tobaccoville and the retailers where the eventual
18 number gets reported to the state.
19 In fact, if there weren't discrepancies, I
20 would be very concerned that something wrong had
21 happened. So, that's kind of the first part.
22 The second part is when you look at some of

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03:08:08 1 retailers not associated with any of these entities
2 to individual states across the United States.
3 I can't even imagine where that Financial
4 Statement would exist.
5 Q. Let me ask a more simple question: Do you
6 think that Audited Financial Statements would assist
7 the Tribunal in deciding any damages that might be
8 appropriate to award to Claimants?
9 A. Absolutely not. I can't imagine how you
10 would be able to glean the relevant information in
11 order to evaluate the impact of the U.S. market.
12 The first thing you would have to assume is that the
13 Audited Financial Statements would provide detailed
14 geographic segmental breakdown for you to even know
15 what percentage of sales were actually made in the
16 U.S. in general by GRE of Seneca branded cigarettes
17 because it would combine the Seneca brand as well as
18 the private label brands into one volume in the U.S
19 that's problem number one.
20 Problem number two, the only damages that
21 are relevant in this discussion are the damages in
22 the states where these actions took place. We are

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03:06:58 1 the analysis that Mr. Kaczmarek has in volumes, he
2 opportunistically again takes the position that if
3 in one year you have a negative variance and in the
4 following year you have a positive variance, it
5 cannot be due to these timing issues. Obviously,
6 those two should be--the absolute value of those two
7 differences should be added together to magnify.
8 So, for instance, if you had a negative
9 16 percent differential in Year 0 and in Year 1 you
10 had a positive 15 percent, that's a 31 percent
11 difference instead of the real 1 percent difference
12 that it likely represents because of a delay between
13 a manufacturer, a distributor, and a retailer.
14 And so when you talk about these
15 differences first Financial Statement, I've never
16 seen a financial statement that would list the sales
17 made by companies that are not affiliated, so you
18 are basically saying that somewhere in the world
19 there exists a financial, Audited Financial
20 Statement for GRE that would show sales by
21 Tobaccoville, sales by NWS, and the amounts
22 reported, the volumes reported by individual

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03:09:09 1 not talking about offsetting the damages that are
2 incurred on-Reservation in Arizona with the benefit
3 that the fact that the State of New York hasn't
4 decided to, based on counsel's explanation,
5 incorrectly apply the MSA to on-Reservation sales.
6 Likewise, you know, from that perspective,
7 you can't just take all the sales in the United
8 States and clump them together, and that's the most
9 information you would ever get out of a Financial
10 Statement if it provided the maximum detail
11 necessary in order to be an Audited Financial
12 Statement.
13 So, no, they serve no purpose whatsoever
14 because when you look at it, you're going to look at
15 numbers that are generalized and that are at such a
16 high level as to preclude any meaningful analysis
17 for the damages at issue in this matter.
18 PRESIDENT NARIMAN: Mr. Wilson, what is the
19 difference between an audited Financial Statement
20 and an unaudited Financial Statement?
21 THE WITNESS: Essentially the difference,
22 if we are speaking about United States GAAP, and it

03:10:13 1 generally applies across countries, is that an
2 independent auditor comes in and reviews the
3 Financial Statements, and in performing that review
4 they perform statistical testing to make sure that
5 the numbers are, quote-unquote, correct, and they
6 then sign off on those Financial Statements as being
7 correct. The problem is in the United States we are
8 faced with the reality that Bernie Madoff had
9 Audited Financial Statements, Enron, Global
10 Crossing, Adelphia, WorldCom all had Audited
11 Financial Statements.

12 The only thing that the Audited Financial
13 Statements serve is that an independent party had
14 reviewed your accounting standards--accounting
15 application and evaluated whether or not it's in
16 conformity with generally accepted accounting
17 principles.

18 Now, whether or not those principles
19 adequately account for the activities, whether or
20 not it provides any meaningful data, it has to be
21 evaluated on a case-by-case basis. And when you're
22 evaluating incremental costs, what you're really

03:12:15 1 The problem is it's not broken down by
2 product line, so if you went and looked at
3 Coca-Cola, and I haven't done this, but I would be
4 very surprised if we had broken out the revenue for
5 instance in the United States between Coca-Cola and
6 Diet Coke. That would be a relevant factor if you
7 were trying to measure the damages to a Diet Coke
8 infringement; right? You would want to know how
9 many sales you actually had of Diet Coke. Your
10 sales of Coke don't really matter, but if it's Diet
11 Coke that's being knocked off or infringed in some
12 way, then that's what you want what to look at.
13 That information is not available in a Coca-Cola
14 audit.

15 PRESIDENT NARIMAN: But the totality of
16 revenue sales would be better represented by an
17 audited statement rather than by an unaudited one,
18 obviously. Or no?

19 THE WITNESS: Well, I don't agree with that
20 as a general rule. I think it would represent that
21 the controls in place were better, it would
22 represent that the accounting for the revenues were

03:11:13 1 interested in is the managerial cost accounting
2 system which is what individual companies use to
3 manage their day-to-day operations. That's where
4 you're going to see incremental costs.

5 When you looks at audited financials,
6 that's what we call Financial Statements or
7 financial accounting, and what that does is
8 represent the values to the Investor, so that's why
9 we have the SEC in the United States. It's to
10 protect Investors through performing audits under
11 standards that are designed to protect the
12 quote-unquote common individual from being misled by
13 Financial Statements. Whether that's successful or
14 not probably has yet to be seen, but the reality is
15 that the information is very high level. It's very
16 conglomerated in an effort to provide as much--as
17 much overall input as they can, and we have some
18 requirements in the U.S. of very large companies
19 where they have what we call identifiable segments,
20 so you'll have companies that say these are all of
21 our profits in the United States. These are all of
22 our profits in Germany.

03:13:09 1 according to generally accepted accounting
2 principles, but when you're talking about the sales,
3 especially when you're talking about GRE sales,
4 those occur, you know, FOP shipping point at Canada,
5 and so those sales, the timing of those sales is
6 pretty clear to GRE. The question that you're
7 asking are the costs that are associated with that,
8 and ultimately is up to the Tribunal to decide
9 whether they believe that the sales prices and costs
10 that we used were appropriate or if you should be
11 using all of the costs in the Financial Statements.

12 BY MR. SHARPE:

13 Q. Let me just read you this one paragraph
14 from Navigant's Rejoinder report, Paragraph 77. It
15 says, "The importance of Audited Financial
16 Statements--"

17 A. Excuse me, is this in your book that you
18 handed me? I'm just curious. Is it in this?

19 Q. No, this is from Navigant's Rejoinder
20 report, 13 May 2009.

21 Paragraph 77, "The importance of audited
22 Financial Statements for the damage analysis is

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03:14:12 1 threefold. First, they provide a holistic snapshot
2 of the financial performance of a company for a
3 given year. Second, the Financial Statements are
4 certified by an independent auditor and prepared in
5 accordance with generally accepted accounting
6 principles, GAAP, which enhances the accuracy and
7 reliability of the information. Third, Audited
8 Financial Statements can be used to substantiate the
9 accuracy of underlying or more detailed data
10 produced from the company's sales or accounting
11 systems."

12 Do you disagree with that?

13 A. Can I--do you have a copy I could kind of
14 walk through it? I apologize. I just can't
15 remember exactly everything you just said.

16 Well, this is the on-Reservation, this is
17 the quote that's up is from my report, right?

18 MR. LUDDY: It's in your--

19 THE WITNESS: So, if we walk through each
20 of those points, first they provide a holistic
21 snapshot of the financial performance of a company
22 for a given year.

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03:16:22 1 Financial Statements are certified by an independent
2 auditor and prepared in accordance with generally
3 accepted accounting principles. Well, that's true
4 except that the generally accepted accounting
5 principles that we are talking about here aren't
6 necessarily relevant again to evaluating the
7 damages.

8 So, that statement in and of itself is a
9 true statement, but doesn't provide any real import
10 into the usability of the Financial Statements or
11 that it would provide any benefit. I don't think it
12 would necessarily enhance the accuracy or
13 reliability of the information, if the information
14 that you're using is from a managerial accounting
15 system that, by definition, never necessarily flows
16 into the financial accounting system. And that's
17 the system you have to look at in order to find much
18 of this cost information.

19 And finally, it says third, Audited
20 Financial Statements can be used to substantiate the
21 accuracy of underlying or more detailed data
22 produced from the company's sales or accounting

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03:15:19 1 Well, that can be useful, but it's not
2 always useful, and so the question that we have that
3 both Mr. Kaczmarek and I have as damages experts, as
4 quantum experts in this matter, are to determine
5 what evidence is relevant to our analysis. Is it
6 relevant to have a picture that may include all of
7 Canada and U.S. sales? It may include inside of
8 U.S. sales. Off-Reservation and on-Reservation
9 without any distinction between the two as well as
10 sales of private brands and Mexico because Mexico is
11 actually included in the Financial Statements of GRE
12 as the U.S.

13 So, while generally speaking they are
14 useful, but I don't think they're useful in this
15 damages analysis. So, if he's trying to make an
16 overarching statement, my modification would be the
17 importance of Audited Financial Statements for some
18 damages analysis can be threefold: First, they may
19 provide a holistic snapshot which may or may not be
20 relevant to the damages calculation of the financial
21 performance of a company for a given year.

22 Then the next point he makes is that

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03:17:14 1 system. I would change "can" to "it may be able to
2 be used." Not in all cases, and certainly not in
3 this case because the Financial Statements--when
4 you're talking about a financial accounting system,
5 the information that you have to look at in order to
6 evaluate lost profitability is of such a granularity
7 that it is impossible to distill between--it's
8 similar to saying if you decided you were going to
9 look at--well, I don't even know that there is a
10 good metaphor, but on one case it's the financial--I
11 mean, there are two different sets of rules:

12 Managerial accounting is devised so
13 management can run the company, so it can measure
14 its costs, it can measure its incremental costs. It
15 can evaluate the decision do I or do I not move into
16 a new market? So, if you're sitting in Jerry
17 Montour's seat and you're trying to make a decision
18 do I want to go into the U.S. market, I have some
19 relevant decision criteria. And if I have to rely
20 on the financial information, I'm not going to be
21 able to make that decision because it doesn't
22 provide me one level of granularity or, two, even

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03:18:22 1 the information that I would need at any granularity
2 to make that ultimate decision.
3 Q. Thank you.
4 A. So you have to rely on the managerial.
5 Q. Thanks.
6 I would like to move away from audited
7 Financial Statements, but I'm not sure we got to
8 NWS. Did you request NWS's Audited Financial
9 Statements for the years ending 2006, 2007, 2008?
10 A. We did, and we reviewed them.
11 Q. You did and you reviewed them. And did you
12 produce them with your Rebuttal Report?
13 A. My understanding is they were produced. I
14 don't know that they were part of what--I mean, we
15 had--the financials--maybe I should restate that.
16 The financial statements that we received
17 from NWS included some detailed cost breakdowns,
18 but, and we have looked at the--some of them are
19 audited, some of them are reviewed, and I believe
20 one of them may have even been compiled, which are,
21 and if you want to spend the time, we can talk about
22 what the differences are between those, but I can't

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03:20:18 1 Q. You presume he has access to them, and if I
2 understand you're agreeing that it would have been
3 useful for Mr. Kaczmarek to have had these Audited
4 Financial Statements when preparing his Rebuttal
5 Report?
6 A. Well, I'm not sure how he got the numbers
7 if he didn't have those statements. So, I mean,
8 Brent and I have known each other for years, but we
9 make it a professional courtesy not to discuss
10 cases. So, I didn't call him up and say did you
11 receive these Financial Statements. But the
12 Financial Statements, as far as I know, were
13 produced.
14 Q. Let's just finish off the point we started
15 with here on Paragraph 68 in your report where you
16 calculated net profits for GRE and NWS, and as you
17 acknowledged, that there were certain costs that
18 Navigant pointed out should have been included for
19 NWS that were not included in your calculation; is
20 that correct? Is that fair?
21 A. So this is from--is this from the Rebuttal
22 Report that I'm looking at right now, or is this the

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03:19:19 1 imagine very many people wanting to talk that much
2 about accounting standards, but if you would like to
3 know, I'm happy to tell you. But basically they run
4 the gamut from a simple compilation which is
5 equivalent taking a shoe box to an accountant and
6 saying give me Financial Statements to review where
7 someone read through them and didn't see any glaring
8 errors to a formal audit. And all those Financial
9 Statements, my understanding, were produced. My
10 process kind of ends when I hand it over to the
11 attorney, so...
12 Q. So, from your perspective, they should have
13 been produced because those could have been useful
14 for the Tribunal for making a determination of any
15 damages that might be awarded to Claimants?
16 A. I believe that Mr. Kaczmarek's cost
17 analysis on NWS where he attempts to essentially
18 apply all of the overhead costs to the lost profits
19 on-Reservation are based on information from those
20 Financial Statements that we received. Like I said,
21 some were audited, some were reviewed, and some were
22 compiled, so I presume he has access to those.

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03:21:20 1 original report?
2 Q. That is your original report.
3 A. Okay. So, your comment is that--
4 Q. I read to you the sentence that says the
5 rate of profits for Claimants the difference between
6 NWS's sales price and GRE's costs for production,
7 and you acknowledged that you made changes to your
8 report when Navigant pointed out that in order to
9 calculate profits for NWS, GRE needed to include not
10 only GRE's costs, but NWS's costs; correct?
11 A. Well, it wasn't that simple. It was a
12 matter of reviewing--first, we got additional cost
13 information from NWS, so we didn't have initially.
14 When we talked to NWS initially, it did not appear
15 that there were really variable costs of any
16 substance. We continued that communication after we
17 got Mr. Kaczmarek's report and identified some
18 costs.
19 Mr. Kaczmarek essentially takes all of the
20 costs that NWS incurred and assumes that all of
21 those must be incremental costs that they would
22 incur, and that's not true. In fact, if you look at

03:26:55 1 in order to maximize profitability and avoid future
2 cost increases is fairly common within the consumer
3 tobacco products industry."

4 Do you see that?

5 A. That is correct.

6 Q. You then note in that paragraph that you
7 modified your valuation to account for the spike in
8 sales that occurred in the latter half of 2005,
9 which occurred because of the anticipated increase
10 in the state tax rate, as well as the measures that
11 you complain of in this arbitration; is that
12 correct?

13 A. That's correct.

14 Q. Okay. Now, if you could just turn a couple
15 of pages to the second chart at the bottom of
16 Paragraph 37, I will put it on the screen for you.
17 You note at Footnote 2, sales in 2005 have been
18 reduced by 18 percent; correct?

19 A. That's correct.

20 Q. And that reduction is meant to offset the
21 spike in sales that you mention in Paragraph 33; is
22 that correct?

03:28:35 1 tax increase is going to happen, or they may be
2 aware of changes in pricing even from GRE where they
3 would reap a benefit if they bought the cigarettes
4 in December as opposed to wait until January, for
5 instance, if the price increase goes up. And we ask
6 them if that happened in '05, and they said yes.

7 So, we looked at their data and we analyzed seasonal
8 trends across individual years to see how they
9 typically purchased, and then we also went out and
10 looked at data that was available on sales of other
11 companies where we were able to identify times when
12 there was clearly information in the marketplace of
13 either tax increases or changes in escrow rates in
14 order to identify what the rates should be.

15 The reasonable rate looks to be 18 percent,
16 and that was why we picked that number.

17 Q. I see.

18 So, you didn't notice the spike in sales at
19 the end of 2005, when you prepared your First
20 Report?

21 A. Well, I'm not sure we looked at the
22 seasonality of the cigarette sales. It's not--maybe

03:27:44 1 MR. LUDDY: Jeremy, I'm sorry for
2 interrupting. What page is that insert there?

3 MR. SHARPE: That is at the bottom of
4 Paragraph 37.

5 MR. LUDDY: Oh, okay. I thought you said
6 Page 37. I'm sorry for interrupting. Go ahead.

7 BY MR. SHARPE:

8 Q. So, that reduction is meant to offset the
9 spike in sales you mentioned in Paragraph 33?

10 A. That's correct.

11 Q. Okay. And you noted that you confirmed
12 that spike through conversations with the owners of
13 Tobaccoville?

14 A. Yeah. What we did is we looked at several
15 data points. The first one was we had a
16 conversation with Tobaccoville and said, hey, the
17 opposing experts raised this issue. Did you have
18 any purchasing aberrations or sales aberrations that
19 occurred in 2005, or do you change your buying
20 trends as opposed to buying based on purely demand
21 because perhaps some opportunity presents itself,
22 and they say, yes, from time to time they may know a

03:29:36 1 I should be thinking that when people get close to
2 Christmas, perhaps they want to smoke more, but I
3 didn't really do that analysis in order to evaluate
4 if there was a seasonality in the sales because we
5 were looking at annual data. When Brent raised this
6 issue, my first question was, well, is there
7 seasonality, and there is seasonality. Ironically
8 people do apparently want to smoke more as they get
9 closer to the holidays by about 7 percent. And so
10 if you look at sales across time in that last
11 quarter, sales tend to peak every year, and it's not
12 because necessarily they're planning anything. It's
13 just sales pick up for whatever reason. That's when
14 demand is increasing.

15 But we were able to identify this
16 18 percent differential that occurred in 2005 versus
17 other years.

18 Q. Right.

19 And Claimants didn't apprise you of this
20 spike when you were preparing your initial report
21 either; correct?

22 A. No. When Mr. Kaczmarek raised it, it was

03:30:34 1 the first time that it was raised on our radar
 2 screen. And at that time we started immediately
 3 evaluating his argument, so...

4 Q. I see. Why don't we move on to the cause
 5 of lost sales. Let's turn to the on-Reservation
 6 lost sales where we have seen the big decreases in
 7 your Claimants' damages claim. If you could turn to
 8 Exhibit 7 Revised of your First Report, put that on
 9 the screen. This is titled "Impairment of
 10 on-Reservation Seneca sales due to the MSA measures
 11 Present Value Calculation Based on 15 Percent
 12 Growth."

13 So, this table addresses the growth
 14 scenario; correct?

15 A. That's correct.

16 Q. Let's start with California. You
 17 calculated about \$46.8 million in damages for lost
 18 profits in California; correct?

19 A. Yeah, that was based on a letter that we
 20 reviewed that indicated that GRE cigarettes were
 21 going to be banned from sale anywhere in the state
 22 of California, including on-Reservation. And based

03:32:38 1 So, your current valuation no longer
 2 includes any damages on-Reservation for California;
 3 is that correct?

4 A. Well, as I said, there is basically two
 5 pieces of information that impacted California. The
 6 first was when we got the updated 2008 data, which
 7 we obviously did not have available in 2008. There
 8 were sales in California. Being a reasonably minded
 9 person, I picked up the phone and called and said
 10 why are there sales in California because there's a
 11 letter that says they're banned? And we talked
 12 about it, and they explained to me that they had
 13 been fighting the ban, had been successful in
 14 convincing their customer to continue to sell the
 15 GRE cigarettes on-Reservation, and so they had not
 16 as of yet lost it.

17 The dilemma we found ourselves in is, we at
 18 that point in time felt that they were going to lose
 19 California at some point. We had a letter from the
 20 Attorney General that said you're contraband. You
 21 cannot sell cigarettes anywhere in the state of
 22 California. That's a pretty clear causation,

03:31:40 1 upon that information, we assumed a total loss of
 2 the market since it was going to be banned.

3 Q. I see.

4 Let's look at Exhibit 8 Revised in that
 5 same report. It's titled "Impairment of
 6 on-Reservation Seneca Sales Due to MSA Measures
 7 Present Value Calculation Based on No Growth." So,
 8 this table addresses the no growth scenario; is that
 9 correct?

10 A. That's correct.

11 Q. And for California and the no growth
 12 scenario you calculated about \$25 million in damages
 13 for lost profits; correct?

14 A. That's correct.

15 Q. Let's turn to Paragraph 43 of your second
 16 Report. You state, "In addition, I have received
 17 additional information from the Claimants regarding
 18 on-Reservation sales in the state of California."
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]

03:33:37 1 unless, of course, you can stop that from happening
 2 through legal action.

3 If they are ever unsuccessful in the future
 4 at fending off that action, then those damages would
 5 occur, and so the dilemma we ran into was I can't
 6 call that a damage because it hasn't occurred, but
 7 what I can do is measure what the impact would be if
 8 they were to lose California at some given point in
 9 time.

10 So, I kind of provided a hypothetical that
 11 just said I'm not claiming this as a damage. I'm
 12 not saying this is a damage because I can't in good
 13 faith call it a damage because the events that would
 14 be necessary for it to be, meaning that they had
 15 lost all of their legal recourses in trying to fight
 16 off the ban, and at that point in time the damages
 17 become real, we were talking about hypothetical
 18 damages, and I didn't want to include that.

19 And so, that's why we took that out. So,
 20 yes, all those were removed because they had these
 21 sales. Historically they have been successful in
 22 California, and I think California is a pretty good

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03:34:32 1 example of what happens if they're allowed to sell
2 in a market.
3 Q. Let's look at Exhibit N.
4 ARBITRATOR ANAYA: I might be getting a
5 little slow in the middle of the afternoon, so the
6 answer is, to the question--
7 THE WITNESS: We took California out of our
8 damages analysis. There are no damages claimed as
9 part of our calculation. We included as an exhibit
10 purely for the Tribunal's edification.
11 ARBITRATOR ANAYA: I understand.
12 THE WITNESS: So...
13 BY MR. SHARPE:
14 Q. Let's look at Exhibit N to Navigant's First
15 Report. Put that on the screen. It's titled "NWS
16 Sales Volume, 2000-2007."
17 If you look at the bottom at Footnote 1, it
18 says. "data from Wilson source documents-NWS state
19 sales reports, 2000 to 2007."
20 If you then look at the chart under sales
21 volume by state, cartons, you see California in the
22 second row.

03:36:26 1 the on-Reservation sales by actual sales? And I
2 said that we did not do that just because the time
3 kind of ran out, and we didn't get a chance to put
4 it in. That's one of the corrections that we made
5 that we should have made in the First Report but
6 didn't? That's why that wasn't included. It wasn't
7 an active decision. In fact, if you look at the
8 paragraph--it was not an active decision on my part
9 to say I don't want to offset. In fact, if you look
10 at the paragraph that discusses the on-Reservation
11 sales, the last line says it's reduced by the actual
12 sales.
13 So, this was merely a matter of not enough
14 time on the clock. We literally sent the report
15 within minutes of when we needed to have it in here.
16 Q. I see.
17 You also assumed zero sales in Nevada for
18 2005, 2006, and 2007; correct?
19 A. It would be true of all of the
20 on-Reservation sales.
21 Q. So, that was a mistake?
22 A. It was--we can call it a mistake. I mean,

03:35:29 1 Do you see that?
2 A. That's correct.
3 Q. [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 Do you see these figures?
8 A. I don't understand why the ASA would have
9 any bearing on on-Reservation sales.
10 Q. Well, let's leave that aside.
11 Do you see these figures? You had this
12 information when you prepared your First Report;
13 correct?
14 A. Yes.
15 Q. Did you review these figures before you
16 prepared your First Report?
17 A. Yes, I did.
18 Q. You nonetheless assumed zero sales in
19 California during those years; correct?
20 A. Well--oh, that--remember the conversation
21 that we had at the beginning of this
22 cross-examination where I said we intended to reduce

03:37:29 1 it was a matter of literally if we didn't get the
2 report in, there wasn't going to be a report, and we
3 had a significant change that occurred about three
4 hours before we had the on-Reservation sales offset
5 in there, and about three hours before we had a
6 significant change in the volumes because we got
7 additional information. And when we did that, when
8 we changed it, that offset fell out of our model, so
9 I will sit here and say, mea culpa, it was my
10 mistake, it's why we corrected it in the rebuttal.
11 We didn't argue with Mr. Kaczmarek about the offsets
12 because we should have offset it.
13 And, in fact, obvious from our original
14 report we intended to offset it, but we didn't, and
15 we would have in the revision, but we knew we would
16 have a rebuttal, so there was very little point in
17 just providing more documents that we knew would
18 likely change when we had to respond to
19 Mr. Kaczmarek's evaluations of our damages.
20 Q. I see.
21 So, when I read the statement in Paragraph
22 43 of your second report, I will read it again, "In

03:38:34 1 addition, I have received additional information
2 from the Claimants regarding on-Reservation sales in
3 the state of California. I understand you now to be
4 saying you aren't trying to mislead the Tribunal by
5 saying you received new information, but information
6 that existed previously that you hadn't put the
7 pieces together, so to say?

8 A. Both are true. The first--this data we had
9 and did not get it in. That's my fault.

10 The data when we are talking about 2008, I
11 did not have. I had--what I had was a letter that
12 said you're banned. You're contraband. And based
13 upon that, I said, well, that's when the damages are
14 going to occur, and we are going to assume they're
15 not going to have any sales beyond that period of
16 time because we didn't--one, we were not aware nor
17 could I think I would be aware that they would be
18 able to successfully fight off the ban and labeling
19 as contraband, number one.

20 Number two, based on that, we certainly
21 didn't expect there to be any subsequent sales in
22 California.

03:40:57 1 even though you have a letter from an Attorney
2 general that says you're banned, that doesn't
3 necessarily mean it's immediate. You may have a
4 fight on your hands. When you have that kind of
5 action that takes place, and you're listed as
6 contraband and cannot be sold in the state, also
7 another example would be Oklahoma where GRE is
8 banned, and you can't sell in Oklahoma.

9 And when you have that, the causation is
10 very clear. It's not because people stop smoking.
11 I know Mr. Kaczmarek kind of points to look at all
12 this other data, but if you look, there is plenty of
13 specific brands that have benefited in market share
14 and increased in sales in spite all the things that
15 we read in the press about how bad smoking is, and
16 all the medical evidence that we have.

17 So, it may not mean that the market share
18 of Philip Morris is going up, but it may mean that
19 the market share of a particular brand is going up
20 either because they positioned themselves
21 differently, because they're available in unique
22 places. It may be because of the branding is

03:39:36 1 In fact, both of those were true, and as a
2 result, that was new information that we received
3 when we filed our Rebuttal Report in '09 that simply
4 was not available when we filed in '08.

5 Q. Let's move on to a new topic, the issue of
6 causation. Let me put Paragraph 31 of your second
7 Report up on the screen. It says, in the last
8 sentence, "There is not a more clear causal link
9 between the decline in sales and the measures and
10 actions implemented by the states."

11 It's your opinion that the measures and
12 actions implemented by the states caused all of the
13 reduction in sales that the Claimants complain of?

14 A. Well, talk through this because there is a
15 few datasets here that I think are important. You
16 have states like New York and California where thus
17 far GRE, through NWS, has been able to compete and
18 sell cigarettes in those markets, and they have been
19 very successful.

20 When a state bans and isn't successfully
21 challenged--I will add that proviso because that's
22 something I've learned during this process, that

03:42:03 1 appealing because people will believe that if it's
2 native, then it must be natural; and if it's
3 natural, it must be better for you than if you buy a
4 pack of Marlboros.

5 And whatever those facts are the evidence
6 that we have seen is that GRE, NWS, and GRE through
7 Tobaccoville has been very successful in competing.
8 They have gained significant market share and had
9 significant growth, eclipsing any of the growth
10 numbers that we used until a state says you're
11 banned, you're contraband. You will not ever be
12 sold in our state again, and I don't know how it
13 could be more causal.

14 Mr. Kaczmarek later comes on to say, well,
15 they equalize. Well, if I'm banned, they equalize
16 at zero. I don't see that the equalization somehow
17 fixes the damages that occur. Yes, the sales
18 equalize. They equalize with no sales whatsoever or
19 they continue to decline until eventually they can't
20 compete in the market anymore, and there were some
21 states Tobaccoville wasn't immediately banned in,
22 North Carolina, South Carolina, and they have been

03:43:08 1 successful in fighting off assessments and--but
 2 based upon the affidavit filed by personnel by the
 3 owner of Tobaccoville, they can't continue that as a
 4 going business function without borrowing money
 5 unless they can somehow offset the escrow price, and
 6 they tried that through price increases and they
 7 still had market share, so there is some value
 8 obviously to the brand there.

9 Q. Let me just ask you a couple of questions
 10 about possible other elements of causation.

11 Is it your opinion that--

12 PRESIDENT NARIMAN: How much longer do you
 13 have? Roughly because at 3:45 I have a phone call.

14 MR. SHARPE: I think I still have 15
 15 minutes.

16 PRESIDENT NARIMAN: We can take our break
 17 at 4:00.

18 MR. SHARPE: Okay, that's fine.

19 BY MR. SHARPE:

20 Q. Is it your opinion that local and state
 21 smoking bans had no effect on the reduction in
 22 sales?

03:45:22 1 which is lower than the price Mr. Kaczmarek showed
 2 was the price for GRE. So, everybody is doing.
 3 Everybody is saying if we sell cigarettes cheaper,
 4 we can take market share out of pocket A and put it
 5 into pocket B. I can take some of your market
 6 share.

7 And it's not unique to cigarettes. IBM did
 8 the very same thing to Apple Computers in the 1980s.
 9 When they released the PC, they released it at
 10 hugely discounted prices to kill off the Apple, and
 11 it worked for almost 15 years. That's a basic
 12 strategy.

13 Q. Let me just ask you a series of questions.
 14 In areas where cigarettes have--these cigarettes
 15 have not been banned, is it your opinion that local
 16 and state smoking bans have had no effect?

17 A. No effect on--

18 Q. Sales?

19 A. Sales in total?

20 Q. Reductions in sales.

21 A. When you say reductions in sales, are you
 22 talking about reductions in sales on individual

03:44:10 1 A. Well, many of those smoking bans that I
 2 have observed in my travels happened in 2008 and
 3 2009, well after most of our damages occurred. So,
 4 if you ban a cigarette and then you ban smoking in a
 5 bar, I'm not sure that the banning the smoking in
 6 the bar a year later impacts banning the brand of
 7 cigarettes in terms of damages to--I mean, I'm sure
 8 that cigarette smoking has declined in total, but
 9 you can't take these gross numbers as NCI does and
 10 say well, because smoking as a whole has declined,
 11 everybody has declined. That's not true. Some
 12 brands have been very successful. Obviously those
 13 are brands that are more geared towards price
 14 sensitivity, not complete price sensitivity like
 15 Mr. Kaczmarek would lead you to believe, but try to
 16 be more sensitive to price, try to be a bargain
 17 cigarette while still having a great taste.

18 You know, when you go out on the Internet
 19 today, as an example of how you sell cigarettes to
 20 people, if you go out on the Internet and Google
 21 carton of cigarettes is all you type in, the first
 22 thing you get is Marlboro Lights at \$18 a carton

03:46:13 1 brand names or in total cigarettes? Because there
 2 is a difference between those. One brand may be
 3 negatively impacted while other brands may be able
 4 to gain market share. The overall volume.

5 I firmly believe that the bans--I would
 6 happily grant you that the bans of tobacco in bars
 7 and in public places has negatively impacted the
 8 overall sales volume of cigarettes in the states or
 9 cities where that has occurred, but to then
 10 extrapolate that to the impact on individual
 11 manufacturers and individual brands without any
 12 consideration of the actual performance historically
 13 of those brands I think is incredibly naive.

14 Q. Do you think that changes in consumer
 15 tastes and preferences have had an impact in the
 16 reduction of sales?

17 A. Well, I think that's purely a brand issue.
 18 We talk about that in our initial report, that
 19 branding for cigarettes is a matter of developing a
 20 taste and a package that appeals to a specific
 21 audience, and that taste does evolve from time to
 22 time as the taste of your consumers evolve.

03:47:16 1 The same way, you know, frankly if you
2 picked up a McDonald's hamburger from 30 years ago
3 and tasted it and a McDonald's hamburger today, I
4 can tell you, they don't taste much alike because as
5 I kid I ate them, and I liked them a lot better back
6 then.

7 Q. What about public advisory campaigns? Do
8 you think they've had any impact on reducing the
9 sales of cigarettes?

10 A. As a whole when we are talking about the
11 total volume of cigarettes in the United States? I
12 don't think there is any doubt that public
13 information has negatively impacted total volumes of
14 cigarettes sold in the U.S., but again you cannot
15 extrapolate from an overall trend to individuals
16 when, in fact, when you look at the individual
17 company and that company has been fabulously
18 successful because of its branding and its
19 positioning in the marketplace.

20 Q. Let's look at Seneca cigarettes in
21 particular, then.

22 Here is an article from the Buffalo News

03:49:15 1 A. Let's walk through your question because
2 the first part is you base it on the presumption
3 that an article in March 2009 retroactively impacted
4 the banning of cigarettes in 2006 and 2007, which I
5 find implausible. That's kind of number one.

6 So, it's a news article today.

7 Q. Seneca cigarettes aren't sold in New York?

8 A. No, that's not my point. We are not
9 claiming any damages within New York. But when you
10 talk about did it reduce, you leave this kind of
11 open, did it reduce the sales or did it have any
12 impact on the sales. We are not talking about sales
13 in 2009. We are talking about sales that occurred
14 in '06 and '07, long before the article.

15 Second, I was in Canada at GRE's
16 facilities, what, three or four weeks ago, I guess,
17 as kind of a final preparation process, and I asked
18 them about the article because we saw the article,
19 we read the article, it was in Kaczmarek's Rebuttal
20 Report, and I had a lot of questions about it.

21 There are some interesting points they
22 made. If you walked outside probably definitively

03:48:09 1 March 9th of last year. I will put it on the
2 screen. It's called "Indian made cigarettes seen as
3 cheap, toxic, and tax-free," and as you can see,
4 it's about Seneca cigarettes, and it begins: "In
5 Iroquois history, Seneca is a name of great pride,
6 the keepers of the western door, but to thousands of
7 smokers from California to Florida and from the
8 Caribbean to Mexico and especially in Upstate New
9 York, Seneca is something entirely different: A
10 cheap cigarette has prompted grave health concerns
11 and dozens of lawsuits."

12 If you look at Page 3 under the heading
13 "Metallic Elements," it states, "Where is the
14 tobacco for these products grown? Researchers at
15 Roswell Park Cancer Institute want to know, in part,
16 because higher than normal levels of two metallic
17 elements--strontium and barium--have been found in
18 some of the brands. Both of those elements can be
19 radioactive."

20 Do you think newspaper reports that Seneca
21 cigarettes may contain toxic and radioactive
22 elements might have a negative impact on sales?

03:50:16 1 in Washington, D.C., if you walked outside and you
2 reached down and took a handful of dirt and you did
3 a test, the odds are you would find stuff a lot
4 worse than that. That's number one.

5 Number two, it doesn't say--it's very loud
6 in what it doesn't say that every other cigarette
7 also has strontium and barium in it. In fact, most
8 products, most plants on the planet Earth have some
9 level of that, doesn't have anything to do with the
10 behavior of GRE. It has everything to do with the
11 fact that we have ignited nuclear weapons, we have
12 mined for heavily metals, we do a lot of things as a
13 species that's not particularly good.

14 And then finally, at no point in time in
15 any of this does it say that it is in excess of the
16 allowable amounts.

17 And, finally, it's an article that is in
18 the Buffalo News. I can't find any corroboration.
19 I have looked for this since Mr. Kaczmarek's
20 Rebuttal Report. I have a team that goes out about
21 once a week to see what, if anything, happens on
22 GRE. I would expect that if this had any real

03:51:18 1 validity, there would be 75 to 100 articles,
 2 including articles in The New York Times, the Wall
 3 Street Journal and the Financial Times, major press
 4 institutions highlighting the fact that these things
 5 will kill you, but that's not what this article
 6 says. It says where are they grown. Look, they're
 7 smuggling these things, and we don't know what the
 8 quality is of these, and when I asked about this
 9 specifically to my clients, the feedback I got
 10 wasn't, oh, we are really concerned about it because
 11 we have known about this for years, and we have been
 12 selling people radioactive cigarettes. It was, you
 13 know, if you go outside and pick up a handful of
 14 dirt, the odds are you going to find things just
 15 like that. We tested. They have explained to me
 16 they've tested their cigarettes, they've run them
 17 through tests on a regular basis, and we even walked
 18 through and looked at this real cool machine called
 19 the smoking machine that they actually plug all
 20 these cigarettes into so that it will smoke the
 21 cigarettes so that they can sample the air that you
 22 would get off the cigarette both externally and as

03:53:16 1 is it a continuing message, is this something that
 2 you see in the news a lot.
 3 And ultimately, nowhere in the quotes that
 4 you have shown me does it say that these are in
 5 violation of any laws.
 6 I mean, the reality is, you're sticking
 7 something in your mouth and lighting it on fire and
 8 consuming a product that as far as I know all the
 9 evidence says causes cancer. I don't know that's
 10 it's going to impact you that it may have some
 11 strontium and barium in it as well. I'd like to
 12 tell you it's going to make a big impact, but I'm
 13 not sure this is going to have a huge impact.
 14 Q. I see. So, your understanding is consumers
 15 understand that this is a deadly product in any
 16 event, so an normally high levels of toxic and
 17 radioactive elements then probably wouldn't impact
 18 their purchasing of cigarettes?
 19 A. Their purchasing of cigarettes?
 20 Q. Yes, purchasing of Seneca cigarettes.
 21 A. I have--given the way it's worded, the
 22 party that did the test, I'm not sure how much

03:52:15 1 the smoker to evaluate what chemicals are in it.
 2 So, I would expect, and they have to
 3 submit--they submit that to an external lab to
 4 evaluate.
 5 So, it's a fascinating article. I have
 6 read lots of fascinating articles in my life
 7 including some that Elvis Presley is still alive and
 8 well. I don't put a lot stock in this partially
 9 because of the source and partially because I have
 10 done a lot of questioning of my client as well as
 11 continuing to search the Internet to see if there is
 12 anything else, and I haven't found anything.
 13 Q. So, do I understand your testimony that you
 14 think newspaper articles reporting that Seneca
 15 cigarettes have abnormal levels of radioactive and
 16 toxic elements would not or might not--have no
 17 possibility of negatively impacting sales?
 18 A. I don't think they have any possibility of
 19 impacting sales in 2006, 2007, and 2008.
 20 Q. What about in 2009?
 21 A. I think a lot would depend on what GRE does
 22 as a response to this. I think a lot of it would be

03:54:24 1 weight--if I were a Seneca smoker, I'm not sure how
 2 much weight I would put in.
 3 Q. Let's move on.
 4 A. I think every consumer has to evaluate the
 5 source of the information, how it's worded, what the
 6 potential motivations are, and ask yourself do I see
 7 this repeatedly?
 8 Q. Thank you.
 9 Turn to the last slide.
 10 Using your--before we get there, sorry,
 11 using your exemption approach, you calculate the
 12 value of the exemptions I understand that you
 13 believe would have resulted had Claimants been
 14 treated, as you say, in a manner equal to the best
 15 treatment afforded Claimants' competitors. Is that
 16 fair?
 17 A. Well, it's a little more nuanced than that.
 18 And essentially what we did was we sat down. We
 19 read--there is a lot of kind of background reading
 20 on this case, more so than is usually the case
 21 because the voluminous MSA and then all the actions
 22 that took place and understanding all of the escrow

03:55:24 1 and exemptions, so we went through and looked at it.
 2 We looked at how companies that were in the
 3 marketplace and what we did is, and I'm not an
 4 attorney, so don't take this as some legal opinion,
 5 but what we did was said, there was a big law change
 6 that happened, the adoption of the MSA. It was a
 7 significant change in the marketplace.

8 And what happened when that occurred?
 9 Well, what happened was that the states granted, and
 10 the MSA in general granted exemptions to companies
 11 that were in the marketplace for their market share.
 12 Basically acknowledge we are going to charge you X
 13 amount more per carton of cigarettes, and we are
 14 going to give you an exemption for your market
 15 share. What we don't want you to do is to take
 16 advantage of this and grow market share, but because
 17 if you do, you are going to pay a big penalty. And
 18 if you lose in market share, then there is some
 19 benefit in terms of not having to pay as much, but
 20 it exempted you from the escrows. And what we did
 21 is said, well, we just had a major legal change, so
 22 what if we look at how they calculated that when

03:57:34 1 negatively impacted by the ASA, by the Allocable
 2 Share Amendments that wipe out the Allocable Share
 3 Release mechanism.

4 Now, there is a huge difference between
 5 those two because when we do our lost profits, we
 6 offset with sales where they continue to fight, and
 7 when we do the escrow analysis, the escrow
 8 exemption, we don't do any offset for that because
 9 if you keep in mind it's only off-Reservation, and
 10 in the off-Reservation markets, even if they
 11 continued to have sales, if they were having to pay
 12 escrow, they're incurring extra costs, so we didn't
 13 look for any kind of offset of actual sales, so
 14 there is going to be a big difference between the
 15 two, but that was the theory behind it. That's why
 16 we did it in terms of how we calculated this as an
 17 alternative damages number.

18 I don't want you to read some legal
 19 decision on my part because I'm not qualified to
 20 make those legal decisions. That's up to the
 21 Tribunal, but ultimately what I did was try to
 22 evaluate if they did the same thing they did the

03:56:27 1 they did the MSA, and we used those same parameters,
 2 you know, the previous year and the year before, the
 3 same percentages, 100, 125 percent, and we
 4 calculated what that exemption would be worth if
 5 they granted a similar treatment today, today being
 6 '06 and '07 when these things came into position,
 7 and actually they vary across states because states
 8 adopted them kind of an ad hoc across the country.

9 But as the state adopted it, if we said we are going
 10 to give you an exemption because you were treated in
 11 way A under the ASRM, and now we are going to treat
 12 you in way B. And it's a significant change. It's
 13 going to impact your business, and what we want to
 14 do is give you an opportunity to come in and you pay
 15 some of these other fees, but we'll give you an
 16 exemption on the escrow for your market share. If
 17 you grow market share, you are going to pay more.

18 And so, we did that calculation just as
 19 really an alternative measurement. What would have
 20 happened if the governments of these states had
 21 said, this is what we did last time. Why don't we
 22 do this again for the people who are going to be

03:58:29 1 last time they had a major legal change in the
 2 cigarette industry, what would that impact be in
 3 terms of cost savings to GRE, and this is what it
 4 would have been, so.

5 Q. In the last sentence that I have up on
 6 the--pulled out on that slide, you state the value
 7 of the exemption ranges from \$238.2 million to about
 8 \$267.9 million; is that correct?

9 A. That's correct.

10 Q. So, I think if I understand your testimony,
 11 the reason that this alternative valuation is more
 12 than five times greater than your primary is because
 13 you were not seeking to find a corroborative
 14 methodology; is that correct?

15 A. Well, I think if we didn't include any
 16 offset--you can't corroborate because, frankly, in
 17 one methodology, to be precise, if you say that--we
 18 ultimately put it to the Tribunal, at least this is
 19 how I would put it to the Tribunal, is if on one
 20 hand you believe that a fair measure of the damages
 21 to the Claimants is the lost profits that they have
 22 suffered on-Reservation and off-Reservation, then

03:59:39 1 lost profits are the right numbers, and they
2 measure, and they have offsets for where they have
3 been able to continue to make sales, so it doesn't
4 punish anybody for their ability to continue to
5 compete other than them, because they are continuing
6 to compete and having to pay huge legal costs on top
7 of that.

8 If, on the other hand, the view of the
9 arbitration Tribunal is that, you know, they should
10 have been treated in a way consistent with how
11 companies were treated when the MSA happened, not in
12 the same way, not with the same exemptions, not with
13 some hypothetical exemption, but take the
14 methodology that we did in the MSA and apply it to
15 when we did the ASA and calculate what the impact
16 is. And if that happened, what would those damages
17 be?

18 I wouldn't say they are interchangeable.
19 They are alternative damages, but they're done in
20 such different ways, and because you don't have
21 offsets in the exemption, but it ultimately depends
22 on what the Tribunal feels is the more reasonable

04:19:42 1 had really just two questions for you.

2 First, at several points in your report,
3 you say that Respondent's expert did things that
4 were inconsistent with the Tribunal's instructions,
5 and you, yourself, said that you would refrain from
6 doing some things in order to honor the Tribunal's
7 instructions.

8 Can you clarify for the Tribunal which of
9 its instructions you had in mind there.

10 THE WITNESS: I apologize that we never
11 actually had the conversation, so I kind of had that
12 understanding from legal counsel in terms of your
13 directions. But generally speaking, that limitation
14 was that the MSA was not an issue, the adoption of
15 the MSA. That the damages off-Reservation were
16 limited to adoption of the ASA, so that was only on
17 the specific states that were impacted, and then the
18 MSA was really only on States in places where they
19 were impacted. So...

20 ARBITRATOR CROOK: Okay. So, you're
21 referring to our jurisdictional decision?

22 THE WITNESS: That's right. And I

04:00:35 1 and more fair measure of damages to the Claimants.

2 Q. Thank you, Mr. Wilson.

3 Thank you, Members of the Tribunal.

4 ARBITRATOR CROOK: I had a couple of
5 questions for Mr. Wilson. I wondered, is it
6 envisioned that the Tribunal would be able to ask
7 some questions of him?

8 MR. SHARPE: Yes, that's my understanding.
9 We have no further questions.

10 ARBITRATOR CROOK: When we come back from
11 the break, we could trouble Mr. Wilson to be back
12 with us for a few minutes?

13 THE WITNESS: I would be happy to.

14 PRESIDENT NARIMAN: Okay. Let's break.

15 MR. SHARPE: Mr. President, we would also
16 like to reserve the right to recross.

17 PRESIDENT NARIMAN: Yes.

18 MR. SHARPE: Thank you.

19 (Brief recess.)

20 PRESIDENT NARIMAN: Let's go.

21 There is a question here.

22 ARBITRATOR CROOK: Thanks, Mr. Wilson. I

04:20:47 1 apologize because--I'm not an attorney, so, you
2 know, I read it it as a layperson and asked for
3 guidance, and that was more or less the guidance
4 that I got.

5 ARBITRATOR CROOK: Okay. That's good,
6 thank you.

7 Now, secondly, your lost profits valuation,
8 part of what we've got here is an expropriation case
9 where we are looking at the value of an asset that
10 was either taken or substantially impaired, and you
11 valued that by basically arriving at the present
12 value of projected lost sales or lost profits,
13 rather.

14 THE WITNESS: That's correct.

15 ARBITRATOR CROOK: And you included as well
16 investment in the income generating property.

17 THE WITNESS: Correct.

18 ARBITRATOR CROOK: Now, I have always been
19 taught by experts like you that you can't do that;
20 that you can either claim for the discounted value
21 of lost profits or you can claim for loss of
22 investment, but to do otherwise is double counting.

04:21:54 1 Now, can you explain to me why it's not
2 double counting here?
3 THE WITNESS: Well, I will tell you that
4 for probably 99 percent of the time I would be right
5 in line with the other experts.
6 The first and easiest answer is I was
7 instructed by counsel that they needed that number,
8 that that was part of the legal claim that I
9 referred to probably quite inarticulately as being
10 their personal investment, and I can't really take
11 it beyond. I'm sorry, Mr. Crook, I don't have any
12 ability to articulate the legal argument. The
13 attorneys asked me to determine that, so that's kind
14 of, number one. As my lawyer friends would tell me,
15 that's the number one copout.
16 Number two is, frankly, when we do our lost
17 profits, we also take out accumulated depreciation.
18 So, while it's not a dollar-for-dollar swapout,
19 there is a percentage that is being taken out of our
20 lost-profits calculation of the very assets that we
21 are counting. So, you're right, they're income
22 generating assets. As a general rule, if I

04:23:54 1 lost. And it's just impossible because I can't
2 evaluate from the Tribunal's standpoint what
3 percentage of that value is relevant to the loss of
4 the Arizona market, of the Nevada market, of the
5 Idaho market, of the five original states
6 off-Reservation.
7 But the short of it is I would typically
8 agree with you if you do a valuation of a business
9 because you're basically taking the fixed asset that
10 is part of that present value of business, but we
11 are not really valuing a business here. We are
12 valuing the lost profits of a business, and there is
13 a little nuance there that's fundamentally different
14 from valuing the overall business of the North
15 American operations that GRE was investing in. I
16 hope that answers.
17 ARBITRATOR CROOK: That does and I
18 appreciate that.
19 Two quick questions actually. When I
20 looked at your CV, you're obviously a man of wide
21 experience. Have you ever been involved in an
22 expropriation case where you were asked to value

04:22:53 1 did--it's a little bit of a difference here because
2 we are not calculating the present value of all of
3 the income. We are not calculating the value of all
4 of the U.S. business. What we are calculating is
5 just the lost profits that they experienced in
6 specific markets, but they made an investment
7 assuming that they could reap the benefits of all of
8 these markets. And, in fact, they're not going to
9 be able to.
10 And I would go so far as to say I think the
11 arbitration should probably look at that \$24 million
12 roughly and evaluate what amount that you feel is
13 relevant to what they don't have anymore. In other
14 words, relevant to the markets that they lost.
15 It's virtually impossible for me to do that
16 because, for instance, the hundreds maker that I
17 talked about earlier that makes hundreds cigarettes,
18 you sell those in New York, but you also sell them
19 in Arizona.
20 Clearly you can't sell them in Arizona
21 anymore, but you're still selling them in New York,
22 so some portion of that asset probably hasn't been

04:24:48 1 only a piece of an investment?
2 THE WITNESS: It was a very unique case, I
3 have to give you that, and that was, you know,
4 frankly, one of the reasons I was initially
5 contacted was that I tend to look at things a little
6 bit different.
7 I didn't want to do--when I looked at this
8 case, the short answer is no, I have never seen a
9 case like this before because usually when we are
10 talking about expropriation, we are talking about a
11 situation where you had a factory, the government
12 came and took the factory, and now you don't have
13 the factory, so you value the factory.
14 And, in fact, that's more or less what
15 Navigant has done. It said let's value what the
16 value was of this asset, the brand at the beginning
17 of time and at the end. And the problem with that
18 is there are places where not only were we not--was
19 the Claimants not negatively impacted, but where
20 they actually succeeded because they haven't had the
21 MSA applied on-Reservation.
22 And so, from that perspective, I couldn't

04:25:43 1 do what was the most comfortable thing for all of us
 2 to do because in international--in Bilateral
 3 Investment Treaty cases where we are dealing with
 4 expropriation, you are exactly--I think your point
 5 is exactly right. That's what we do. We value
 6 beginning and ending, and I think what Brent brings
 7 up is very valid. We value beginning and ending.
 8 The difficulty is, like you said, I have
 9 never seen an animal like this before where it only
 10 happened in specific states. It didn't happen to
 11 the market as a whole. They haven't lost the whole
 12 market. They're still in New York. They're still
 13 in North Carolina and South Carolina, and they're
 14 competing favorably in these states and being able
 15 to reposition their business. But the actions did,
 16 if you look at Arizona where there are no sales or
 17 you look at Oklahoma where they're banned, those are
 18 clearly expropriations, but not like you said, an
 19 expropriation of the entire business.
 20 So, the short answer is, no, I have never
 21 seen anything where it was just one or was a subset
 22 of assets, and it's really difficult to build that

04:27:45 1 THE WITNESS: Thank you very much.
 2 MR. LUDDY: I have--
 3 THE WITNESS: Oh, you have some for me?
 4 MR. LUDDY: No, I don't.
 5 (Witness steps down.)
 6 PRESIDENT NARIMAN: What do we do now?
 7 (Pause.)
 8 MR. FELDMAN: Mr. President, we would like
 9 to pick up on the discussion from yesterday
 10 regarding recent developments in U.S. court, and we
 11 have five documents concerning recent developments
 12 in U.S. court that we would like to supplement the
 13 record with at this time.
 14 MR. VIOLI: Basically the Claimants'
 15 position is we just wanted a little bit of
 16 clarification because I was of the same view as the
 17 President in that Legal Opinions and the law is
 18 something that is always a matter of public record
 19 or is always looked at in determining what the law
 20 is. And one of these opinions involves Grand River
 21 is my understanding.
 22 MR. FELDMAN: Two are from Grand River

04:26:50 1 as a business and do what we would traditionally do
 2 which is basically the value before and the value
 3 after.
 4 And so we said, well, there is a way in
 5 intellectual property to measure that impact what we
 6 would ultimately get to, and that's lost profits.
 7 It's pretty widely used in the U.S. in intellectual
 8 property cases. If someone infringes on your
 9 property or does a knockoff, if someone makes a
 10 knockoff iPod and sells it, the damages Apple is
 11 going to seek are lost profits. And that's a
 12 measure of the negative impact to their brand, to
 13 their investment in that brand. And so, from that
 14 perspective we thought, well, if you can't observe
 15 the way we always do it, which is find before and
 16 find after and take the difference, we can at least
 17 observe the difference, and so that was the way we
 18 had to do it.
 19 But the short of it is, no, I have not seen
 20 cases like this in my career.
 21 ARBITRATOR CROOK: Thank you, sir.
 22 PRESIDENT NARIMAN: Thank you very much.

04:29:27 1 challenges to the Allocable Share Amendment.
 2 MR. LUDDY: One decision.
 3 MR. FELDMAN: One decision and one
 4 affidavit from the New York case.
 5 MR. VIOLI: That's right. And there are
 6 other opinions which don't involve Grand River and
 7 just generally on the law, the topic of the law; is
 8 that?
 9 MR. FELDMAN: There is a decision from
 10 Idaho which concerns application of the Idaho
 11 complementary legislation to a member of the Seneca
 12 Nation.
 13 MR. VIOLI: Okay. So, you're preferring
 14 that for the law; correct?
 15 MR. FELDMAN: Yes.
 16 MR. VIOLI: Okay.
 17 And I just wanted some clarification from
 18 the Tribunal, matters of law, there is no limitation
 19 to what the Tribunal could consider. I mean, it's
 20 not something that should have been in evidentiary
 21 material or a Memorial. If there is a a development
 22 or recent development in the law, then the Tribunal

04:30:16 1 would wish to have that brought to its attention, I
2 would think.
3 I don't know the relevancy of the opinions.
4 PRESIDENT NARIMAN: We will deal with that
5 later--I did--saw that we understand what it is and
6 its relevance. We can decide later. The question
7 is only at the moment of whether we should entertain
8 it or not.
9 MR. LUDDY: My only concern, and I agree
10 with that take on that. The law is the law. It is
11 what it is. My only concern is if Mr. Feldman
12 intends to redirect, as it were, Mr. Eckhart on
13 these cases. Then I'm at a little bit of
14 disadvantage on that. There's hundreds of pages of
15 cases that he gave me this morning. We spent the
16 courtesy giving them to me last night so I would
17 stay up all night reading them.
18 MR. FELDMAN: Of the five documents, there
19 is only one document that may come up during
20 Mr. Eckhart's testimony which is a four-page
21 California court decision, and the Claimants were
22 given that decision this morning, and so they have

04:32:18 1 that since it looks like it's snowing tomorrow, can
2 we sit an hour more today, if it's possible, by
3 agreement of parties, of course?
4 MR. LUDDY: I think we are going to be out
5 of witnesses.
6 PRESIDENT NARIMAN: No, because
7 tomorrow--you see the problem is of the weather.
8 Tomorrow we may be totally snowbound, according to
9 our information. Going to be like Tuesday. That's
10 the forecast.
11 MR. LUDDY: Well, at least we will be
12 snowbound together.
13 PRESIDENT NARIMAN: In different parts of
14 the city.
15 DENNIS ECKHART, RESPONDENT'S WITNESS, CALLED
16 PRESIDENT NARIMAN: Good evening,
17 Mr. Eckhart. We should have said good morning to
18 you outside, but I didn't know that you were
19 Eckhart.
20 THE WITNESS: Good afternoon, sir.
21 PRESIDENT NARIMAN: You have been sitting
22 all day.

04:31:26 1 now had about eight hours to review the four-page
2 decision.
3 MR. LUDDY: Except we didn't know it was
4 just four pages until before five minutes before
5 Mr. Wilson.
6 MR. VIOLI: As far as evidence, you're
7 submitting the affidavit for an evidentiary
8 submission; is that right?
9 MR. FELDMAN: That's correct.
10 MR. VIOLI: Okay.
11 MR. LUDDY: That's kind of a different
12 annual.
13 MR. VIOLI: That's a different animal, so
14 we may speak on that issue.
15 PRESIDENT NARIMAN: Let's deal with it as
16 it gets on.
17 MR. LUDDY: Note the precedent they set.
18 PRESIDENT NARIMAN: So, what do you want to
19 do now?
20 MR. LUDDY: We are going to get
21 Mr. Eckhart.
22 PRESIDENT NARIMAN: I was just wondering

04:34:20 1 THE WITNESS: But I tried to stay busy.
2 PRESIDENT NARIMAN: Good.
3 MR. LUDDY: This is going to involve the
4 California decisions which I had handed out
5 yesterday.
6 PRESIDENT NARIMAN: Yes, you did.
7 These are the decisions?
8 MS. CATE: If I may, I would like to first
9 introduce the witness briefly.
10 PRESIDENT NARIMAN: Yes, please go ahead.
11 MS. CATE: Thank you very much. Just sort
12 of as a point of sort of procedure, I sort of
13 noticed in the proceedings that the
14 cross-examination has not been limited to the scope
15 of the direct testimony.
16 PRESIDENT NARIMAN: Yes.
17 MS. CATE: For example, Mr. Hering's
18 declaration was a total of three paragraphs, and the
19 entire cross-examination lasted approximately four
20 hours.
21 So, I wanted to sort of get some sort of a
22 clarification, if I could. The declaration of

04:35:52 1 Mr. Eckhart is a total of 25 paragraphs, and I was
2 wondering if we could somehow have some sort of
3 ruling as to whether or not we can have a limitation
4 as to the scope of the cross-examination?
5 PRESIDENT NARIMAN: I'm against any
6 limitation on cross-examination.
7 MS. CATE: Okay, I understand.
8 PRESIDENT NARIMAN: Unless it's totally
9 irrelevant, you can object on the grounds it's
10 irrelevant, but not because it's something outside
11 your examination-in-chief, no.
12 MS. CATE: Okay.
13 And with regard to the--pardon me,
14 redirect, the scope there, is that also--
15 PRESIDENT NARIMAN: Yes, you can--
16 MS. CATE: I appreciate that.
17 Okay, in light of that, I will begin.
18 DIRECT EXAMINATION
19 BY MS. CATE:
20 Q. Please state your name in full.
21 A. Dennis Eckhart.
22 Q. And where are you currently employed?

04:37:25 1 to the ground rules.
2 PRESIDENT NARIMAN: Ask anything in
3 addition. If you say something, if you want to.
4 The same thing. You are on the record now.
5 MS. CATE: I'm asking him to briefly state
6 what we was--
7 PRESIDENT NARIMAN: That's not necessary.
8 MS. CATE: Okay.
9 PRESIDENT NARIMAN: That's all there.
10 MS. CATE: All right.
11 Your witness.
12 MR. LUDDY: Thank you.
13 CROSS-EXAMINATION
14 Q. Good afternoon, Mr. Eckhart.
15 A. Good afternoon, sir.
16 Q. I have 56 in front of me.
17 A. Okay.
18 Q. If you could turn to Page 2, Paragraph 3.
19 A. Okay.
20 MS. CATE: For the record, what is this
21 document?
22 MR. LUDDY: It's core Document 56. And it

04:36:40 1 A. At the California Attorney General's
2 Office.
3 Q. And what is your current title or position?
4 A. I'm Senior Assistant Attorney General. I
5 head the Tobacco Litigation and Enforcement Section.
6 Q. And how long have you been working at the
7 Office of the Attorney General for the State of
8 California?
9 A. Since July 1st, 1980.
10 Q. And how long have you been in your current
11 position?
12 A. Since July 1st, 1999.
13 Q. And you submitted one declaration in this
14 case; correct?
15 A. Yes.
16 Q. And can you briefly address what you stated
17 in that declaration.
18 MR. LUDDY: Objection, Your Honor. The
19 ground rules from the very beginning that we worked
20 out with Mr. Feldman in July was that there were
21 going to be three our four introductory questions
22 and move to cross, and I would request that we stick

04:38:35 1 is Mr. Eckhart's declaration.
2 MS. CATE: Thank you.
3 MR. LUDDY: Dated 12/18/08.
4 BY MR. LUDDY:
5 Q. I'm going to read for you--the third
6 paragraph I take it is addressing the California
7 Escrow Statute; correct?
8 A. Well, it addresses the Escrow Statute, but
9 in addition the complementary legislation would also
10 apply.
11 Q. Okay. The third sentence reads as follows,
12 "A primary purpose of that statute is to prevent
13 manufacturers such as GRE from exploiting the
14 significant cost advantage they have over
15 manufacturers that participate in the Master
16 Settlement Agreement and undermine the public health
17 benefits the states derive from lower cigarette
18 consumption driven by higher cigarette prices."
19 I'm going to try to go through this quickly
20 since this is ground we have covered before, but
21 this is the same formulation that we consistently
22 see from Respondent on these documents. And I would

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04:39:55 1 ask you, sir, do Non-Participating Manufacturers
 2 have a significant cost advantage over exempt SPMs?
 3 A. I don't understand the question.
 4 Q. What is an exempt SPM?
 5 A. I assume by that you mean an SPM that has a
 6 grandfathered share?
 7 Q. Correct. I'm sorry.
 8 A. They're not exempt. They just have a
 9 certain market share that does not--if they sell up
 10 to that market share, they do not have an MSA
 11 payment obligation.
 12 Q. Right. So, NPMs do not have a significant
 13 cost advantage or any cost advantage over
 14 grandfathered SPMs in California, do they, sir?
 15 A. I'm not an economist. I don't know the
 16 full cost structure of the various companies. They
 17 do not--to the extent that an SPM that has a
 18 grandfathered share does not make a payment on
 19 cigarettes that it sells that are within that--up to
 20 that amount, they don't make an MSA payment. An NPM
 21 needs to make an escrow payment.
 22 Q. So that would be the grandfathered SPM has

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04:42:11 1 MS. CATE: I actually would like to note
 2 that we've hired an expert on this issue, and that
 3 really should be cross-examination for him.
 4 BY MR. LUDDY:
 5 Q. Let's explore it. Maybe it's more
 6 confusing than I anticipate.
 7 You have a grandfathered SPM that does not
 8 exceed his grandfather exemption; correct?
 9 A. Well, that's the assumption you're asking
 10 me to make, yes.
 11 Q. Yes. All right. So, he pays how much on
 12 those sticks?
 13 A. He pays Federal excise tax and he pays--
 14 Q. Just on MSA payments?
 15 A. He does not make an MSA payment.
 16 Q. Zero, okay?
 17 A. That's correct.
 18 Q. And over here we have an NPM who sells
 19 sticks and has to pay escrow on each stick; correct?
 20 A. Yes, each stick that he sells in
 21 California--doesn't have to pay escrow. He deposits
 22 escrow into an escrow fund. It's not paid to the

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04:41:07 1 a cost advantage over the NPM; correct?
 2 A. Well, they have different costs, I guess
 3 that--I guess you could say it's a cost advantage.
 4 Again, I think this is a matter that's in dispute.
 5 It's an ultimate issue in this case.
 6 Q. Is it really? What's the ambiguity here?
 7 If a grandfathered SPM sells below--take the
 8 example. If it sells below its grandfathered share,
 9 it pays how much under the MSA?
 10 A. On the cigarettes that are below its
 11 grandfathered market share, it pays nothing.
 12 Q. Zero; correct?
 13 A. Yes.
 14 Q. And an NPM is required to pay the escrow
 15 under California statute; right?
 16 A. Yes.
 17 Q. Is there something about that that requires
 18 the economist to say who has the cost advantage
 19 there? And I don't mean to be sarcastic, but is
 20 there?
 21 A. Well, I think you've answered your own
 22 question.

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04:43:05 1 state like an MSA payment.
 2 Q. Okay. It's his cost, though. He has to
 3 cut a check for that. Is that amount greater than
 4 zero?
 5 A. Yes, it's greater than zero.
 6 Q. Now, we see here that you say a primary
 7 purpose of the Escrow Statute is to prevent NPMs
 8 from undermining the public health benefits.
 9 I take it from your formulation there of
 10 referencing a primary purpose that there is another
 11 purpose for the Escrow Statute, is there not?
 12 A. There are a number of purposes that are set
 13 forth expressly in the statute as adopted by the
 14 California legislature, and one could also look to
 15 what the statute does in effect as to determine what
 16 its purpose is.
 17 Q. Okay. And I take it you would not disagree
 18 that one of its purposes is to protect California's
 19 MSA payments from the OPMS; correct?
 20 A. I wouldn't--not exactly. Enactment of the
 21 statute is a condition of protecting the State of
 22 California from an NPM adjustment.

04:44:20 1 Q. Right.
 2 A. The statute itself is--I guess the
 3 existence of the statute is a way of protecting,
 4 yes.
 5 Q. That's what I meant.
 6 A. Okay.
 7 Q. Is there any reason that you decided to
 8 include in your affidavit here one primary purpose
 9 being the health benefits and not the other primary
 10 purpose of protecting California from losing MSA
 11 payments?
 12 A. Well, because the--I don't specifically
 13 remember why it mentioned this purpose and not other
 14 purposes. I don't necessarily agree that a primary
 15 purpose is protecting California's payments.
 16 Q. You don't think that's a primary purpose?
 17 A. Well, I think it's a matter of debate.
 18 This is certainly a primary--stated in the statute.
 19 The statute states what its purposes are. It does
 20 not state the other purpose which you mentioned as a
 21 purpose.
 22 Q. Okay. The statute says what it says.

04:46:35 1 to get rid of that provision?
 2 A. Well, we didn't get rid of it it. We
 3 amended it.
 4 Q. You amended it. Even though you hadn't
 5 released any dollars to NPMs, correct?
 6 A. It was still a possibility that those--
 7 PRESIDENT NARIMAN: Sorry to interrupt, but
 8 do we have the California statute on record?
 9 MR. LUDDY: I believe they all are.
 10 PRESIDENT NARIMAN: No, no, I have not seen
 11 it.
 12 MS. CATE: They're referred to in
 13 Mr. Eckhart's declaration.
 14 PRESIDENT NARIMAN: Referred to i know, but
 15 I read the statute.
 16 MR. LUDDY: I know that we have in our Core
 17 Documents--
 18 PRESIDENT NARIMAN: If you can supply it--
 19 MS. CATE: Happy to do so.
 20 PRESIDENT NARIMAN: Thank you. That's all
 21 I meant.
 22 MR. LUDDY: I thought that was actually in

04:45:21 1 A. That's correct.
 2 Q. And my question is, beyond what the text of
 3 the statute says, there is another purpose, right?
 4 If you don't have that statute, and you don't--you
 5 being California, forgive me. If you don't have
 6 that statute and you don't diligently enforce it,
 7 California is subject to losing dollars because of
 8 the NPM adjustment, correct?
 9 A. That's correct.
 10 Q. Can you go back to Page 1 for a minute.,
 11 please.
 12 You say here--by the way, real quick on the
 13 Escrow Statutes, California adopted an Allocable
 14 Share Amendment, did they not?
 15 A. Yes.
 16 Q. Had California prior to the adoption of its
 17 Allocable Share Amendment released any monies to
 18 NPMs under the--what was then the prior Allocable
 19 Share Release mechanism?
 20 A. No.
 21 Q. But you still thought it was necessary to,
 22 and the legislature still thought it was necessary

04:47:15 1 your evidentiary submissions.
 2 MR. FELDMAN: I don't know the number off
 3 the top.
 4 MR. LUDDY: Between one of us, we will get
 5 it to you, Mr. Chairman.
 6 PRESIDENT NARIMAN: Thank you.
 7 (Comments off microphone.)
 8 BY MR. LUDDY:
 9 Q. Paragraph 2, sir, in early 2007--I'm
 10 reading and choking. In early 2007, I received
 11 information that for some time Native Wholesale
 12 Supply Company, a corporation headquartered in New
 13 York, had been importing cigarettes from Canada into
 14 the United States by way of a Foreign Trade Zone in
 15 Las Vegas.
 16 Do you see that?
 17 A. Yes.
 18 Q. Where did you receive that information?
 19 A. I'm afraid that's attorney work product. I
 20 can't reveal that.
 21 Q. Can you tell me who you received it from?
 22 A. That would breach the attorney work product

04:48:18 1 as well. It was provided to me on a confidential
2 basis.
3 Q. A confidential basis or privileged basis?
4 A. I said attorney work product.
5 Q. Okay. Had you at any time prior to 2007
6 received this information concerning NWS sales
7 through the FTZ in Nevada?
8 A. No.
9 Q. I'm going to reserve my rights to--I'm
10 going to proceed with the cross-examination in the
11 face of the declaration of privilege on a matter
12 that he has testified about,, and I'm going to see
13 where it goes, quite frankly. If I could deal with
14 it in the face of the claim of privilege, I'm happy
15 to do so. If it thwarts my cross-examination, I'm
16 going to reserve the right to circle back and ask
17 that the declaration be stricken from the record.
18 Let's look at Paragraph 3 again. You say
19 that GRE cigarettes in California are not lawful for
20 sale; correct?
21 MS. CATE: Counsel, may I have a moment
22 with the witness privately?

04:57:07 1 provided, and I hope that alleviates any of your
2 concerns. I do not believe it's necessary to strike
3 Mr. Eckhart's declaration as a result of his not
4 revealing the source of the information.
5 PRESIDENT NARIMAN: He's not revealing the
6 source?
7 MS. CATE: He will not reveal the source.
8 It is attorney work product information.
9 PRESIDENT NARIMAN: Okay. So, there you
10 have it. He's not revealing.
11 BY MR. LUDDY:
12 Q. Did the answer to any of my prior questions
13 change as a result of that discussion outside?
14 A. No.
15 Q. I got the impression something was
16 changing, but no?
17 A. If it would help, my understanding is that
18 I will talk about the information that was provided
19 to me, but not tell you who told me or where it came
20 from.
21 MR. LUDDY: I request that my prior
22 Reservation stand. I'm not going to terminate the

04:50:39 1 PRESIDENT NARIMAN: He's in the box just
2 now.
3 MS. CATE: Okay.
4 MR. LUDDY: If it's on the privilege issue,
5 I have no objection. I'd like it to go away. If
6 it's on the privilege issue, if counsel will
7 represent it's on the privilege issue.
8 PRESIDENT NARIMAN: Go ahead.
9 MR. LUDDY: I have no objection if she
10 wants to consult with the witness on the privilege
11 issue.
12 MS. CATE: That's exactly it. That's
13 correct.
14 MR. LUDDY: I have no objection.
15 PRESIDENT NARIMAN: Okay.
16 MS. CATE: Thank you.
17 (Counsel for Respondent confers with the
18 witness outside the room.)
19 MS. CATE: Mr. Chairman, we've conferred
20 with the witness, and the source of the information
21 is, indeed, attorney work product. However, he is
22 able to talk about the information that was

04:58:15 1 cross. I'm going to continue, but I reserve the
2 right to strike until a later time.
3 MS. CATE: May I just again state the
4 source of the information is irrelevant. It was the
5 information that was provided that is relevant here.
6 MR. LUDDY: I was just reserving the right
7 to request. We don't have to argue it..
8 BY MR. LUDDY:
9 Q. Okay. What was the information?
10 A. As stated in my declaration, that
11 essentially was the information, that--the end of
12 Paragraph 2, I was informed that the cigarettes in
13 question were manufactured by Grand River
14 Enterprises Six Nations Limited (GRE) in Canada, and
15 that shipments of such cigarettes into the FTZ had
16 double ed from approximately 300 million cigarettes
17 in 2006 to over 600 million cigarettes in 2007.
18 Q. Okay. So, you're not giving me anything
19 that I don't already have here; right? You're not
20 giving me any new information after that discussion
21 outside; right? I want to make sure I don't have to
22 go back and ask you every question I've asked you.

04:59:16 1 A. What I'm telling you is that this is the
2 extent of the information that I received, so that
3 is new.
4 Q. Okay. Thank you. I appreciate that.
5 I have lost my train of thought.
6 Paragraph 3, you indicate there that the
7 California Attorney General had sued GRE three times
8 for noncompliance with the Escrow Statute and been
9 awarded substantial civil penalties in that regard;
10 correct?
11 A. Yes.
12 Q. Those were three separate lawsuits?
13 A. Yes.
14 Q. And they were reduced to judgment?
15 A. Yes.
16 Q. What's the status of those judgments now?
17 A. The judgments were the subject of a motion
18 to vacate made by Grand River. The trial court
19 granted that motion as to each judgment at the end
20 of November 2009. We have filed a Motion for
21 Reconsideration which is scheduled for hearing on
22 March 6th, I believe. So, the order is not--the

05:01:47 1 from an as yet unidentified source in February of
2 '07, early '07. Then in--later I guess in February
3 you said somebody from the BOE. What is the BOE?
4 A. Board of Equalization? It's the California
5 state agency which collects, among other things,
6 cigarette excise taxes.
7 Q. Before I forget, I skipped one note on
8 follow-up on the Escrow Statute.
9 Before California adopted its allocable
10 share appeal, did it have any economic studies
11 prepared to determine whether or not the NPMs had a
12 cost advantage over any other manufacturers under
13 the MSA?
14 MS. CATE: Mr. Chairman, objection. This
15 is not necessarily information that the witness
16 would have.
17 PRESIDENT NARIMAN: Let him say that.
18 THE WITNESS: I'm not aware of any economic
19 studies of that.
20 BY MR. LUDDY:
21 Q. Are you aware of any economic studies at
22 any time prepared by NAAG on that subject prior to

05:00:35 1 order vacating each of those judgments is not final,
2 and if the Motion for Reconsideration is denied, we
3 have the right to appeal the decision vacating the
4 judgments.
5 Q. The motion to vacate was granted by the
6 trial court; correct?
7 A. That's what I said, yes.
8 Q. And as of now, on the basis of that
9 judgment--on the basis of that decision, the
10 judgments have been vacated; correct, subject to
11 your right to appeal.
12 A. It's not a final order. The judgments--the
13 court has ruled that the judgments are vacated, but
14 that's not final.
15 Q. And the court in that case determined that
16 you did not--that California did not have personal
17 jurisdiction over Grand River Enterprises to obtain
18 those judgments; correct?
19 A. That's correct, but we disagree with that
20 finding.
21 Q. Now, let's go back to the information.
22 You said you first got some information

05:02:59 1 the passage of the Allocable Share Amendments?
2 A. I can't remember specifically. I know that
3 there had been studies done by experts in litigation
4 pending in New York, and perhaps in other states
5 relating to the--and then with regard to the
6 significant factor proceeding between the OPMS and
7 the states. There had been studies--a number of
8 studies done. I'm not--I can't tell you the exact
9 chronology when they were prepared or what they
10 covered, but I know that that is the subject of a
11 number of studies since then.
12 Q. Well, the ones that were done in connection
13 with the New York litigation certainly postdated the
14 adoption of the Allocable Share Amendments; correct?
15 A. I don't know the answer to that.
16 Q. And the ones that were done in connection
17 with the significant factor proceeding, those were
18 done in the context of those proceedings, and those
19 proceedings are subject to confidentiality
20 constraints, are they not?
21 A. They are.
22 Q. Okay. So, none of those studies, to the

05:04:16 1 extent there were any studies done, were provided to
2 a legislature, were they?
3 A. I don't believe so.
4 Q. So, you sent the BOE investigator out to
5 the FTZ in February, and why did you do that?
6 A. Because I wanted him to find out if he
7 could--
8 (Sirens.)
9 A. I wanted to find out if any of the
10 cigarettes that were going into the FTZ that were
11 reported to me as having come from Native Wholesale
12 Supply manufactured by Grand River Enterprises were
13 coming into California.
14 Q. And he determined that NWS was--that FTZ
15 was sending cigarettes to Big Sandy Rancheria;
16 correct?
17 A. Yes, and possibly other locations. I'm
18 trying to remember whether he determined from the
19 records that he obtained that they were--I believe
20 he came into information that cigarettes were being
21 shipped to Big Sandy and to at least one other
22 location in California called Huber Enterprise.

05:06:59 1 recent along the lines of Mr. Feldman's
2 supplementation with the affidavit of Mr. Williams
3 in the New York case, but we will bring it to the
4 Tribunal's attention tomorrow and deal with it then.
5 MS. CATE: Mr. Chairman, may we have the
6 right to review the document as well?
7 MR. LUDDY: Absolutely, and I will even
8 give it to you in advance.
9 MS. CATE: Thank you.
10 MR. LUDDY: A day in advance.
11 BY MR. LUDDY:
12 Q. And what does BSR do, Big Sandy Rancheria?
13 Maybe look at--this will be a memory test. Take a
14 look at Paragraph 10 of your declaration.
15 You say here that they are a tribal
16 business that distributes cigarettes to tribal
17 casinos, smoke shops, and other retail businesses
18 located on Indian reservations in California;
19 correct?
20 A. That's what I said about BSR Distributing.
21 Big Sandy Rancheria is a Tribe. They have a tribal
22 government, they run tribal programs, they operate a

05:05:43 1 Q. Okay. Let's take Big Sandy. What is Big
2 Sandy Rancheria?
3 A. Big Sandy Rancheria is a federally
4 recognized California Indian Tribe. They operate a
5 business called BSR Distribution.
6 Q. And as a sovereign Nation in California,
7 they don't require a distributor's--state license to
8 distribute or sell cigarettes, do they?
9 A. Well, I think that's a matter of legal
10 debate. They are not licensed as a distributor,
11 that's correct.
12 Q. Do you know whether the BOE has ever--The
13 Board of Equalization in California, do you know
14 whether the BOE has ever given Big Sandy Rancheria a
15 written notification that they as a sovereign Nation
16 do not require the license that we are talking
17 about?
18 A. I'm not aware of that.
19 Q. Have you ever--
20 (Pause.)
21 Q. We are going to reserve the right to
22 supplement with that document because it's very

05:08:03 1 casino, they operate a smoke shop and a number of
2 other things, so that's why I was confused by your
3 question.
4 Q. And I appreciate you correcting me because
5 I had that wrong myself.
6 And what were the other entities that you
7 determined that cigarettes went from the FTZ to in
8 California?
9 A. At that time, at the time Mr. Lamberth, the
10 BOE investigator went to the Foreign Trade Zone and
11 obtained information, my understanding was that the
12 other location was--the other entity was called
13 Huber Enterprise.
14 Q. Is that on Indian--is that on-Reservation
15 in California?
16 A. It is on Reservation land in the far
17 northwest portion of California.
18 Q. And it's owned by the Indians on that
19 Reservation?
20 A. I believe it's owned by Indians. It's not
21 owned by the Tribe.
22 Q. Okay. Is that a distinction in your mind?

05:09:03 1 A. Yes.
 2 ARBITRATOR ANAYA: Excuse me, Mr. Eckhart.
 3 When you say it's owned by Indians, you mean members
 4 of that Tribe?
 5 THE WITNESS: I believe at least one
 6 members of the owners is a member of the Wyatt Table
 7 Bluff Indian Tribe.
 8 ARBITRATOR ANAYA: Which is the owner of
 9 the land?
 10 THE WITNESS: Yes. It's their Reservation.
 11 I actually don't know who owns the land. It's on
 12 their Reservation.
 13 ARBITRATOR ANAYA: That's what I meant to
 14 say. Thank you.
 15 BY MR. LUDDY:
 16 Q. And then at some point, if you could turn
 17 to Core Document 56 in your package there.
 18 A. I am in 56. Is that what you meant? My
 19 declaration?
 20 Q. Oh, yeah, it's actually--your complaint is
 21 an attachment to the affidavit--no, one second.
 22 MS. CATE: There are two attachments.

05:11:36 1 that correct?
 2 A. That's correct.
 3 PRESIDENT NARIMAN: I don't have that.
 4 (Comment off microphone.)
 5 MR. LUDDY: Correct. I probably misspoke.
 6 BY MR. LUDDY:
 7 Q. And that's a letter that you had written to
 8 Mr. Montour. You had also written, and I believe
 9 it's Exhibit Core Document Number 40, you had also
 10 written by letter dated August 12th, 2008, it's Core
 11 Document 40, the next document, to the FTZ in
 12 Nevada; correct?
 13 A. Yes.
 14 Q. And the FTZ was the entity that was
 15 shipping the cigarettes to Big Sandy Rancheria;
 16 correct? That's where they were coming from?
 17 A. That's where they were coming from. I
 18 don't know--
 19 Q. I don't want to get into that issue.
 20 A. That's where they were coming from, yes.
 21 Q. Fair enough.
 22 And in this letter, in the last paragraph,

05:10:07 1 MR. LUDDY: I messed up. One second.
 2 It's Core Document 39. My mistake. I'm
 3 sorry.
 4 THE WITNESS: Okay. I have it in front of
 5 me.
 6 BY MR. LUDDY:
 7 Q. And this is a complaint that California
 8 filed against NWS; correct?
 9 A. Yes.
 10 Q. And in this complaint, you sought to stop
 11 NWS from selling Seneca brand cigarettes to Big
 12 Sandy Rancheria and Huber; correct?
 13 A. As far as we know, it was not--Native
 14 Wholesale was not selling to Huber. The cigarettes
 15 were being purchased by Big Sandy but shipped to
 16 Huber, but we did--one of the purposes of the
 17 complaint was to stop that--those sales, yes.
 18 Q. Okay. And look at--there is a March 7th,
 19 2008, letter attached to your complaint.
 20 A. Yes.
 21 Q. And you were the author or at least
 22 signatory of this letter, signer of this letter; is

05:13:10 1 you request--I will read the language.
 2 "Consequently, we request that you immediately cease
 3 and desist from releasing any cigarettes for
 4 shipment via common or private carrier into the
 5 state of California unless the manufacturer of the
 6 cigarettes and the cigarettes brands are lawful for
 7 sale in this state."
 8 Do you see that?
 9 A. Yes, and we are talking about Core
 10 Document 40.
 11 Q. Correct.
 12 A. Okay.
 13 Q. Now, did you have the authority as the
 14 Attorney General, did the California's Attorneys
 15 General Office have authority to direct the FTZ to
 16 cease and desist?
 17 A. I don't know. I chose the words I chose I
 18 suppose for a reason. I don't remember what the
 19 reason was.
 20 Q. Well, did you do any due diligence before
 21 you wrote this letter as to whether or not your
 22 office had any jurisdiction at all over the FTZ in

05:14:15 1 California?
 2 A. Yes, we had done some research, yes.
 3 Q. And you determined that you had
 4 jurisdiction over them?
 5 A. We determined that we had the right to ask
 6 them to stop releasing cigarettes that were not
 7 lawful for sale in the state of California, yes.
 8 Q. But you did not determine that you had the
 9 right to direct them to stop?
 10 A. Frankly, I don't remember.
 11 Q. Do you know that the FTZ stopped doing
 12 business with NWS as a result of this letter?
 13 A. I do not know that, no.
 14 Q. At some point?
 15 A. I don't--I do know that they stopped doing
 16 business with NWS. I do not know that it was as a
 17 result of this letter. There were many other
 18 actions. Other States wrote letters to the FTZ.
 19 Q. We will get to that.
 20 A. And so on.
 21 PRESIDENT NARIMAN: Just for my
 22 information, Mr. Luddy, is the letter of 7th March

05:16:19 1 States to the FTZ.
 2 And when you say they, you mean the FTZ?
 3 Q. I do. Thank you.
 4 A. Yes.
 5 Q. And those letters or at least two of those
 6 letters are Core Document 36, letter from Idaho
 7 dated August 14th. You will correct me if I'm
 8 wrong.
 9 A. That letter I have seen before, and I was
 10 aware of that letter.
 11 Q. Okay. And also in the record is the Core
 12 Document Number 38, which is a letter from New
 13 Mexico to the FTZ.
 14 A. Yes.
 15 Q. Now, I assume so that it was not a
 16 coincidence that all three of these states,
 17 California, Idaho, and New Mexico, all wrote to the
 18 FTZ in August of 2008 requesting that FTZ cease and
 19 desist shipping cigarettes; correct?
 20 A. I believe that, yes, that's a correct
 21 assumption. It was not a coincidence, if I
 22 understand your question.

05:15:11 1 March an admitted letter that you received?
 2 MR. LUDDY: To be honest with you, Your
 3 Honor, I'd have to check that date.
 4 Yes, I have been advised we did.
 5 PRESIDENT NARIMAN: I just wanted to know.
 6 MR. LUDDY: Fair enough.
 7 BY MR. LUDDY:
 8 Q. And it was your intention to take FTZ out
 9 of the chain of commerce between NWS and Big Sandy
 10 Rancheria; correct? If you could.
 11 A. It was my intention to stop the flow of
 12 cigarettes into California that were not lawful for
 13 sale in the state of California because cigarettes
 14 were not listed on the California Tobacco Directory.
 15 They were not certified as fire safe, and the
 16 manufacturer of those cigarettes had been enjoined a
 17 number of times by the Superior Court from selling
 18 either directly or indirectly any cigarettes it
 19 manufactured in the state of California.
 20 Q. Okay. You had mentioned that they had
 21 received other letters from other States; correct?
 22 A. Yes, I'm aware of other letters from other

05:17:20 1 Q. Yes, that was awkward question.
 2 And you know Brent DeLange, the author of
 3 the letter from Idaho?
 4 A. I do.
 5 Q. And you know Mr. Thompson, the author of
 6 the letter from New Mexico?
 7 A. I do.
 8 Q. And you had spoken to each of them prior to
 9 these letters being written; correct? About the
 10 letters.
 11 A. Yes.
 12 Q. Okay. Tell me about the context in which
 13 these discussions first began.
 14 MS. CATE: Objection. Relevance.
 15 PRESIDENT NARIMAN: What's your objection?
 16 MS. CATE: The relevance of what these
 17 discussions were is not relevant here.
 18 MR. LUDDY: I would like to know when they
 19 started, when they decided to gang up on NWS and--
 20 PRESIDENT NARIMAN: Ask him.
 21 MS. CATE: I would assume that any
 22 discussions between Attorneys General in different

05:18:11 1 states would be privileged information.
 2 MR. LUDDY: I share no such assumption. If
 3 you want to make a privilege objection, I'd ask you
 4 to make it on the record.
 5 MS. CATE: I would like to make a
 6 privileged objection.
 7 MR. LUDDY: What's the--why don't I ask you
 8 a question and then you can object to it.
 9 MS. CATE: I just did.
 10 PRESIDENT NARIMAN: Ask, and you could
 11 answer. Ask it.
 12 BY MR. LUDDY:
 13 Q. Okay. When did you first discuss with
 14 Mr. DeLange and Mr. Thompson the idea of each of
 15 you--withdrawn.
 16 When was the first time you discussed with
 17 Mr. DeLange and Mr. Thompson the FTZ in Nevada?
 18 MS. CATE: Objection. Privilege.
 19 PRESIDENT NARIMAN: You could answer it.
 20 THE WITNESS: He's asking for the time
 21 frame, and I understand.
 22 The substance of the discussion is another

05:20:09 1 would you agree with that?
 2 MR. WEILER: They would be the applicable
 3 international law rules. The parties still have
 4 agreed the IBA Rules can be used as a guideline in
 5 that regard.
 6 ARBITRATOR CROOK: I believe the parties
 7 agreed that they would not be used as a guideline,
 8 but that they would govern, did they not, in our
 9 original meeting in March of 2005?
 10 MR. WEILER: But to the extent that they
 11 involve areas of privilege which might not be--I
 12 mean, the bottom line is that those IBA Rules are
 13 not going to give us all of the answers on some
 14 difficult questions of privilege. At some point the
 15 source law we go behind is not domestic law but
 16 rather international law, and there is international
 17 law that can assist us on issues of privilege,
 18 though I should mention they're not that different
 19 from--I mean, they obviously--we both--as
 20 international lawyers, we know it's comparative law,
 21 so probably end up in the same place.
 22 ARBITRATOR CROOK: So, it's the submission

05:19:11 1 matter, but the time frame is sometime between
 2 February of 2008 and August of 2008. I don't
 3 remember specifically.
 4 Q. And who initiated those conversations?
 5 A. I don't remember.
 6 Q. And who else was a party to those
 7 conversations?
 8 A. That would be work product, attorney work
 9 product as to who was a party to those discussions.
 10 MR. LUDDY: Well, I have to tell you, Your
 11 Honor, if there were not attorneys involved, the
 12 privilege just went out the window, so we kind of
 13 need to know who else was there.
 14 ARBITRATOR CROOK: Mr. Luddy and Ms. Cate,
 15 we are hearing a lot of discussions about privilege.
 16 Would someone please tell us what law we're supposed
 17 to be applying to make such judgments.
 18 MS. CATE: The IBA Rules of evidence.
 19 ARBITRATOR CROOK: You're saying the IBA
 20 Rules should control here?
 21 MS. CATE: Right.
 22 ARBITRATOR CROOK: Okay. And, Mr. Luddy,

05:21:07 1 of the Claimants that--well, I won't belabor the
 2 point, but I think as we throw around these claims
 3 of privilege, it would be helpful to the Tribunal if
 4 parties could kindly indicate to us why they think
 5 their particular claim is somehow consistent with
 6 the law applicable in this Tribunal.
 7 MR. LUDDY: Can I--why don't I voir dire
 8 the witness a little bit on the scope of the
 9 privilege, and maybe once we know the contours of
 10 what's involved, we could have a more substantive
 11 discussion.
 12 PRESIDENT NARIMAN: What's your case,
 13 Mr. Luddy, apart from all this privilege and so on?
 14 I mean, he says that he spoke to Mr. DeLange at a
 15 particular point in time.
 16 MR. LUDDY: Fair question, Mr. Chairman.
 17 I want to know when whether NAAG was
 18 involved, which I assume they were, whether--when it
 19 was that various states, three, and there is a
 20 fourth--
 21 PRESIDENT NARIMAN: Then ask you him that.
 22 MR. LUDDY: That's what I'm trying to do.

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05:22:10 1 PRESIDENT NARIMAN: No, no, you didn't.
 2 MR. LUDDY: That's what I'm suggesting.
 3 PRESIDENT NARIMAN: You ask him then.
 4 Don't say where else and all that. Put it to him,
 5 anybody from NAAG, if that's your case. That's a
 6 legitimate question.
 7 MR. LUDDY: You guys ready?
 8 MS. CATE: Yes.
 9 BY MR. LUDDY:
 10 Q. Was anyone from NAAG involved in those
 11 discussions?
 12 A. Yes.
 13 Q. Who?
 14 A. Michael Hering at least, possibly others. I
 15 don't really recall.
 16 Q. Were there any AG's offices involved other
 17 than Idaho and New Mexico?
 18 A. Oklahoma, possibly Washington. I'm not
 19 remembering any others than those, but there may
 20 have been others.
 21 Q. Were there--were there in person meetings
 22 or telephone meetings, conferences?

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05:24:13 1 information from any tobacco manufacturers about Big
 2 Sandy Rancheria. And that would not--that
 3 information could not be privileged, in my view.
 4 BY MR. LUDDY:
 5 Q. And what was the decision that came from
 6 these conversations between you and Messrs. DeLange
 7 and Hering and Thompson? What was decided in those
 8 conference calls?
 9 A. Each state made their own decision. It was
 10 not a common decision, and my decision was to send
 11 this letter to the Foreign Trade Zone.
 12 Q. Well, it was a common decision. Did they
 13 each send letters?
 14 A. Each state made their own decision.
 15 Q. Okay. Was there a recommendation from NAAG
 16 in that conference?
 17 A. I don't remember.
 18 Q. And each state ultimately filed suit as
 19 well; correct? Idaho and New Mexico and Oklahoma?
 20 A. And California, yes.
 21 Q. And California.
 22 Do you know what happened to the Oklahoma

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05:23:22 1 A. These were telephone conferences.
 2 Q. Do you recall how many?
 3 A. No.
 4 Q. And do you recall who it was that initiated
 5 them? I think I asked this to you, but I'm not
 6 sure.
 7 A. I do not remember.
 8 Q. Okay. Were there any representatives of
 9 other tobacco manufacturers involved in these
 10 conference calls?
 11 A. No.
 12 Q. Were there--was the information--was any
 13 information with respect to the Big Sandy Rancheria
 14 sales provided to you by representatives of other
 15 tobacco manufacturers?
 16 MS. CATE: Objection. The actual contents
 17 of the discussions is privileged.
 18 MR. LUDDY: That's source.
 19 THE WITNESS: I understand. I think there
 20 was a misunderstanding of the question.
 21 MS. CATE: I apologize.
 22 THE WITNESS: No, I don't recall any

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05:25:21 1 case?
 2 A. I believe I do, yes.
 3 Q. What happened to it?
 4 A. It was--the first complaint was dismissed.
 5 There was an amended complaint; I think that was
 6 dismissed on personal and--no, on subject-matter
 7 jurisdiction grounds, I believe, and then that
 8 decision is on appeal.
 9 Q. And the subject-matter jurisdiction, what
 10 was the basis of the court's finding that it had no
 11 subject-matter jurisdiction because it involved
 12 Nation-to-Nation trading; correct?
 13 A. I would have to review the decision to
 14 remind myself specifically. I believe it had
 15 something to do with the Indian Commerce Clause and
 16 the Indian Trader Statutes, but I'm not absolutely
 17 certain because I haven't reviewed that in quite a
 18 while.
 19 Q. Are you a member or have you ever been--and
 20 it's not going to be a Communist Party. Are
 21 you--have you ever been involved with the GRE
 22 Working Group?

05:26:21 1 MS. CATE: Objection.
 2 THE WITNESS: Yes.
 3 BY MR. LUDDY:
 4 Q. Yes.
 5 A. Yes.
 6 Q. In what regard?
 7 A. Well, the--Working Groups that involve the
 8 State Attorneys General and the--as facilitated and
 9 as assisted by NAAG are part of a common interest
 10 agreement which the states have among themselves.
 11 NAAG is an association of Attorneys General. Those
 12 discussions typically are part of that common
 13 interest agreement. We are all law enforcement
 14 agencies. We are all--many of us are defendants in
 15 the litigation that Grand River has filed against
 16 the state Attorneys General and so those discussions
 17 and the information that's exchanged in those
 18 discussions, the strategy discussions would all be
 19 covered by a common interest agreement and would
 20 therefore be attorney work product.
 21 Q. And was the idea of trying to shut down
 22 NWS's on-reserve sales through the complementary

05:29:12 1 A. That's my understanding.
 2 Q. And the same in Oklahoma?
 3 A. Yes, that's my understanding.
 4 Q. And the same in New Mexico?
 5 A. Yes.
 6 Q. And California, obviously?
 7 A. Yes.
 8 Q. Was it your expectation that the fact that
 9 FTZ would be receiving a cease and desist letter
 10 from not just California but also your colleagues in
 11 New Mexico and Idaho, that that would help in them
 12 deciding to not deal with NWS?
 13 A. It wasn't our intention to have them not
 14 deal with NWS. It was our intention to keep
 15 cigarettes that were not legal for sales in our
 16 states out of our states.
 17 Q. And it was your intention that the three of
 18 you writing together would improve the chances that
 19 they would stop sending Seneca cigarettes to
 20 California; correct?
 21 A. Each of us had jurisdiction over our own
 22 states and responsibility to enforce the laws

05:27:33 1 litigation--legislation, was that ever discussed
 2 within the GRE Working Group?
 3 A. I really can't answer that because it's
 4 privileged.
 5 Q. Are any members of the representatives of
 6 the Federal Government involved in the GRE Working
 7 Group?
 8 A. No.
 9 Q. Have you ever had communications
 10 with--withdrawn.
 11 Is it your understanding from the
 12 discussions with Messrs. DeLange and Thompson that
 13 all of the sales of Seneca coming out of the FTZ in
 14 Nevada were going to Indian lands in one of the
 15 various states; correct?
 16 PRESIDENT NARIMAN: I didn't follow that
 17 question.
 18 MR. LUDDY: Yeah. Thank you, Mr. Chairman.
 19 BY MR. LUDDY:
 20 Q. Do you know whether the FTZ sales, the
 21 sales from the FTZ in Idaho were going to Indian
 22 land in Idaho?

05:30:24 1 applicable to our own states. I could not write a
 2 letter for New Mexico or Idaho, and they couldn't
 3 write one for me. We each had to write our own
 4 letter.
 5 Q. But it was nevertheless a coordinated
 6 strategy, wasn't it?
 7 A. I think the timing of the letters, you can
 8 draw whatever inference you want. I'm not--I said
 9 each state made its own decision.
 10 Q. And you ultimately did file that case
 11 against NWS, and the court issued a decision in that
 12 case in September; correct?
 13 PRESIDENT NARIMAN: Speaking of California?
 14 MR. LUDDY: Correct.
 15 THE WITNESS: Yes. The end I think was
 16 September 23rd, 2009.
 17 MR. LUDDY: I gave you two, Mr. Chairman.
 18 It is one of the two that I gave you, yes. There's
 19 two there, or if there isn't, I messed up.
 20 (Comment off microphone.)
 21 BY MR. LUDDY:
 22 Q. Okay. Now, you took the position in that

05:32:44 1 case that--in the California case that--well, for
2 starters, the California court granted a motion
3 dismissing that case, did it not?
4 A. For lack of personal jurisdiction, correct.
5 Q. Okay. And you took the position in that
6 case that NWS--that the shipment of cigarettes from
7 FTZ to Indian land in California constituted minimum
8 contacts by NWS with California; correct?
9 A. Yes.
10 Q. And if you could look at Page 2 of the
11 decision.
12 PRESIDENT NARIMAN: Which one? The
13 September 1?
14 MR. LUDDY: The September 1, yes,
15 Mr. Chairman.
16 BY MR. LUDDY:
17 Q. I'm going to read the second--third full
18 paragraph: "Plaintiff has cited no authorities, and
19 the court is aware of none, holding that sales by an
20 out-of-state corporation to an Indian Tribe on a
21 Reservation located in this state constitute minimum
22 contact with this state that will support personal

05:35:28 1 a tax that could be passed along to non-Indian
2 consumers," cites a revenue code section. "It
3 imposes an absolute ban on the sale of certain
4 brands of cigarettes that are not listed on the
5 Attorneys General directory," and then it jumps to
6 the last section.
7 The last sentence of that paragraph: "The
8 legal incidence of this ban, if applied here, would
9 fall directly on Big Sandy as an importer as well as
10 NWS as a seller of unregistered cigarettes."
11 Do you see that?
12 A. Yes.
13 Q. So it's your understanding from what the
14 court is saying here is that California cannot apply
15 the complementary legislation to NWS's unreserved
16 commerce to try to shut down the Seneca brand;
17 correct?
18 A. That's what--that's what the court wrote
19 here. I think it's wrong.
20 Q. Okay.
21 A. On the law.
22 Q. And--

05:34:10 1 jurisdiction over the out-of-state corporation.
2 Indeed, the court has found no California
3 authorities applying minimum contacts analysis where
4 any activities on an Indian Reservation were
5 involved."
6 Do you see that?
7 A. Yes.
8 Q. You also sought to impose--and this really
9 goes to the heart of what you were trying to do in
10 the California case. You were trying to apply to
11 NWS's sales that were ultimately going to Big Sandy
12 on-reserve the California complementary legislation
13 because GRE products are, in your view, not legal in
14 California; correct?
15 A. Yes.
16 Q. Okay. And the court addressed that attempt
17 to do that, didn't it?
18 A. Yes.
19 Q. And if you look at Page 3, I'll read the
20 paragraph: "Here, the legal incidence of the
21 statute at issue in this case would not fall on
22 non-Indian consumers. These statutes do not impose

05:36:28 1 ARBITRATOR ANAYA: Can I ask--
2 THE WITNESS: And this decision is under
3 appeal.
4 ARBITRATOR ANAYA: Excuse me. Excuse me.
5 Absolutely. Can I just hear briefly what your
6 Rejoinder is to that argument, that legal argument?
7 THE WITNESS: Professor, it's basically
8 that the--as the previous quote indicated, there is
9 no California law essentially one way or the other
10 about what constitutes minimum contacts when the
11 contact is with a business or a Tribe that's on--or
12 a Tribe or a business that's on-reservation in
13 Indian Country on Reservation land. And it was our
14 expectative that under the, you know, existing
15 Federal-tribal-state balancing test for regulation
16 of activities that take place on a reservation that
17 are significant off-reservation interests of the
18 state are implicated and there is no absolute
19 preemption by Federal law or no long-term
20 traditional regulation of this subject by the Tribe
21 in question that the state can and--can have
22 jurisdiction over those activities in certain

05:37:36 1 instances.
 2 ARBITRATOR ANAYA: As a matter of Federal
 3 law.
 4 THE WITNESS: Excuse me.
 5 ARBITRATOR ANAYA: As a matter of Federal
 6 law.
 7 PRESIDENT NARIMAN: As a matter of Federal
 8 law.
 9 THE WITNESS: Yes.
 10 I think if I'm understanding what you mean
 11 by "as a matter of Federal law"--
 12 ARBITRATOR ANAYA: I meant this balancing
 13 test you're talking about--
 14 THE WITNESS: Yes.
 15 ARBITRATOR ANAYA: --is the Federal law
 16 test.
 17 THE WITNESS: Yes, it is. Under the
 18 Bracker case and the Mescalero case as well.
 19 ARBITRATOR ANAYA: Thank you.
 20 BY MR. LUDDY:
 21 Q. Okay. And you also tried to, through your
 22 court pro--your complaint, you tried to regulate

05:39:16 1 regulate Indian commerce."
 2 Did I read that accurately, sir?
 3 A. I actually didn't--couldn't find where you
 4 were reading from and so I--
 5 PRESIDENT NARIMAN: Right at the top.
 6 THE WITNESS: At the top. I think you read
 7 it accurately.
 8 And I would--and let me make a
 9 clarification, Professor Anaya. I did--just for my
 10 own benefit, I don't consider myself an expert in
 11 Indian law. I've learned some amount of Indian law
 12 for purposes of this litigation that we're talking
 13 about now and other litigation that has come
 14 subsequent to this, so I--and I--but I'm giving you
 15 what my best recollection of the argument
 16 essentially that we would make--we did make in the
 17 trial court and that we would make on appeal.
 18 ARBITRATOR ANAYA: That's interesting that
 19 you say that because I assume from your testimony
 20 that you are making determinations about these very
 21 questions of Federal Indian Law.
 22 THE WITNESS: I--we are.

05:38:11 1 interstate commerce between tribal--and I'm using
 2 the term "Tribe" because that's the term the court
 3 uses. I mean our view is that these are sovereign
 4 Indian Nations, but to conform it to the language
 5 that the court uses, I'm going to refer to them as
 6 Tribes. You tried to regulate the commerce between
 7 the tribal entity NWS and the Tribe in California,
 8 Big Sandy Rancheria; correct?
 9 A. Well, I don't consider NWS--I don't
 10 understand NWS to be a tribal entity.
 11 Q. Okay. But you understand Big Sandy
 12 Rancheria to be an Indian Tribe or a tribal entity--
 13 A. Yes, I do.
 14 Q. Correct?
 15 A. I do.
 16 Q. And the court had this to say, "Plaintiff
 17 has not cited"--this is Page 4--"Plaintiff has not
 18 cited, and this court is not aware, of any authority
 19 permitting a state to regulate interstate commerce
 20 between Indian tribes or tribal entities. Such
 21 activities are more properly subject to
 22 congressional regulation which has plenary power to

05:40:09 1 ARBITRATOR ANAYA: Or someone in your
 2 office is under your authority I assume.
 3 THE WITNESS: Yes, and we, you know, as a
 4 lawyer, we have an ethical response--
 5 ARBITRATOR ANAYA: Right.
 6 THE WITNESS: As lawyers we have an ethical
 7 responsibility to learn the law. I do--there are
 8 experts in our office in Indian law that I have
 9 consulted with, and, you know, we read the cases.
 10 We read the hornbooks. We read Cohen. We read
 11 other books that tell us what the law is, and we
 12 enforce our law as we see it.
 13 ARBITRATOR ANAYA: No, I understand. But I
 14 just--I guess what I just find interesting is for
 15 you to say that you're not an expert, but you do
 16 stand behind the position you're taking.
 17 THE WITNESS: I do. I do.
 18 ARBITRATOR ANAYA: Okay, based on whatever
 19 expertise or...
 20 THE WITNESS: It's a--
 21 ARBITRATOR ANAYA: I understand. Okay.
 22 And to get back to your question about--and

05:40:55 1 maybe I've missed--I've lost track of the question
2 specifically. You did read that correctly. I do
3 think the court went beyond the issues made by the
4 motion to quash for lack of personal jurisdiction
5 and went beyond it into the areas of subject matter
6 jurisdiction in order to make her decision on
7 personal jurisdiction. So that there are some
8 aspects of the decision where I think she went into
9 areas that were brought up in the briefing,
10 understandably by the attorneys for NWS, but I do
11 think that that--it confused the question that was
12 raised here, which was purely a question of personal
13 jurisdiction.

14 BY MR. LUDDY:

15 Q. And then when she got there, she got it
16 wrong, too, is your position, right?

17 A. Yes.

18 Q. She was not only wrong to go there, but
19 having gone there, she got it wrong.

20 A. I believe she got it wrong. Obviously
21 reasonable minds can differ, and attorneys and
22 judges differ all the time.

05:42:50 1 A. Yes.

2 Q. Yes?

3 A. Yes.

4 Q. And who was that? Who did you make that
5 recommendation to?

6 A. Ultimately I made that recommendation to
7 the Attorney General. It was reviewed by my
8 Division Chief and after him by the Chief Deputy
9 Attorney General.

10 Q. Is your Division Chief an Indian law
11 expert?

12 A. I don't know.

13 Q. Does he have any more Indian law expertise
14 that you, for instance?

15 PRESIDENT NARIMAN: What's the relevance
16 about this?

17 Nobody has said this is an unauthorized
18 filing.

19 MR. LUDDY: No, I know. You know what?
20 It's interesting, Your Honor, and frankly in
21 following up on Professor Anaya's question because
22 the same thing had occurred to me. If a state is

05:41:55 1 Q. Who--agreed.
2 Who made the final authority to file this
3 complaint?

4 A. The Attorney General.

5 Q. You--which at the time was who?

6 A. Edmund G. Brown, Jr.

7 Q. Did you personally consult with him on the
8 matter?

9 A. We have a process by which we--any time
10 where we're going to file an action in the name of
11 the Attorney General--and this action is filed on
12 behalf of the people on the information of the
13 Attorney General--we have to get his permission.

14 Q. And who--I assume that process contemplates
15 some type of recommendation from a senior person
16 within the AG's office?

17 A. It is reviewed by several people above me,
18 yes.

19 Q. Okay. And who are those people? Who
20 make--did you make--I'm just trying to get at the
21 process. Did you make a recommendation to somebody
22 that the complaint be filed?

05:43:31 1 going to start throwing its weight around and go
2 after Indian commerce, it seems to us that they
3 should know what they're doing, and that they should
4 have a genuinely competent, well-versed expert in
5 Indian law giving somebody advice as to--before you
6 go out and try to send letters to FTZ to try to shut
7 down millions of dollars worth of commerce. It
8 shouldn't be undertaken lightly, Mr. Chairman, and
9 I'm suggesting to you that it was, and I'd like to
10 follow up on this line of questioning.

11 PRESIDENT NARIMAN: Okay.

12 ARBITRATOR ANAYA: But perhaps you could
13 help me with that. At some point, at some point, it
14 would help to relate that to the NAFTA claim.

15 MR. LUDDY: I will do that, yeah.

16 ARBITRATOR ANAYA: That would help. And I
17 just found it curious, and I just wanted to make
18 sure in my questioning of Mr. Eckhart that it was,
19 in fact, a position that his office, the Attorney
20 General's Office, was standing behind, the
21 substantive position, legal position that was being
22 taken on the question of Indian law or Federal law.

05:44:31 1 THE WITNESS: And we do stand behind it to
 2 this day, and I--perhaps my comment earlier was
 3 perhaps out of line that I indicated that I was not
 4 an expert. I don't consider myself an expert in
 5 Indian law. I am a--I have been a Deputy Attorney
 6 General since 1980. I take my responsibilities very
 7 seriously. I do not file complaints frivolously.
 8 ARBITRATOR ANAYA: And I don't want to
 9 suggest that you have to represent yourself as an
 10 expert in the area to take a position on that
 11 particular area of law. I would just--I wanted to
 12 make--in light of what you said, I just wanted to
 13 make sure I understood that your office was--in fact
 14 stood behind the legal position that was being
 15 advanced.
 16 THE WITNESS: And we do.
 17 ARBITRATOR ANAYA: Thank you.
 18 BY MR. LUDDY:
 19 Q. I'll move on.
 20 Let me draw your attention to Paragraph 15.
 21 A. Paragraph 15 of?
 22 Q. I'm sorry, of your declaration.

05:46:59 1 Do you see that?
 2 A. Yes.
 3 Q. Were you suggesting to the Tribunal at the
 4 time you executed this declaration that you thought
 5 that Mr. Montour had been untruthful in his
 6 affidavit in the California litigation?
 7 A. Well, I--
 8 Q. That was the purpose of that phrase, wasn't
 9 it?
 10 A. The purpose of the phrase was to indicate
 11 that records we had reviewed seemed to indicate and
 12 tell a different story.
 13 Q. And you didn't believe Mr. Montour's
 14 statement, did you?
 15 A. No, because of the documents that we had
 16 reviewed, and because of the--of information that we
 17 had received during the deposition of the FTZ's
 18 President, which I had taken about a
 19 month-and-a-half before this declaration was signed.
 20 Q. Can I draw your attention to Paragraph 5 of
 21 the opinion, sir.
 22 PRESIDENT NARIMAN: Of the excerpt?

05:45:24 1 A. Okay.
 2 Q. 15 of Core Document 56 which is
 3 Mr. Eckhart's declaration.
 4 A. Okay. I have it in front of me.
 5 Q. I'm going to read this. It's a little
 6 lengthy, so bear with me.
 7 (Reading) "Despite a sworn statement by
 8 Mr.--or by Arthur Montour, filed in support of NWS's
 9 motion to dismiss California's action for lack of
 10 personal jurisdiction, that 'NWS does not exercise
 11 any control over its products subsequent to their
 12 sale to third parties' and that 'any transport of
 13 products to California occurs solely as a result of
 14 a third party's conduct or direction'...Not one of
 15 the 234 shipment records reflect any contact between
 16 Big Sandy and the FTZ or between BSR and Conway
 17 other than BSR's being listed as the purchaser and
 18 cosignee of the cigarettes."
 19 Do you see that?
 20 A. Yes.
 21 Q. Your opening clause to that paragraph,
 22 despite a sworn statement by Arthur Montour.

05:47:52 1 MR. LUDDY: Of the opinion. The paragraph
 2 right below "transportation of cigarettes over state
 3 highway." The second sentence begins as follows--or
 4 reads as follows: "However, there is no evidence in
 5 this case on which"--"there is no evidence in this
 6 case"--
 7 PRESIDENT NARIMAN: Page?
 8 MR. LUDDY: It's Page 5, the paragraph
 9 right below "transportation of cigarettes over state
 10 highway." It's the second sentence.
 11 PRESIDENT NARIMAN: Yes.
 12 PRESIDENT NARIMAN: Yes.
 13 BY MR. LUDDY:
 14 Q. "However," and there is--the sentence is
 15 poorly written, so I'm going to read it as is,
 16 recognizing that I could read, "However, there is no
 17 evidence in this case to on which the court may find
 18 that defendant," NWS, "defendant has directed the
 19 shipments on California's roadways. Rather, the
 20 evidence shows only that defendant has sold
 21 cigarettes to a California Indian Tribe, and at the
 22 Tribe's direction, has shipped the cigarettes

05:48:50 1 primarily to the Tribe itself and occasionally to
2 consignees."
3 So, apparently the court looked at the same
4 evidence that you looked at and believed
5 Mr. Montour's statement, did it not?
6 A. She came to the different conclusion based
7 upon the evidence that she had.
8 Q. You know, that's interesting that you
9 talked about not believing Mr. Montour on a
10 statement on the subject. Have you ever been in
11 communication with the authorities, Federal
12 authorities, in Seattle?
13 A. Well, let me go back to your assumption of
14 that question, which is I didn't believe
15 Mr. Montour.
16 Q. I thought you said that.
17 A. I believe what I said was that the document
18 seemed to tell a different story, and that--and that
19 perhaps there was something that he was leaving out,
20 perhaps that was something that he was--I never did
21 get a chance to take his deposition. The court
22 stayed discovery, and so--

05:50:59 1 quantities, what freight company was to be used, and
2 where they were to be sent, that all that
3 information came from NWS, that none of it came from
4 Big Sandy Rancheria.
5 So, I was faced with conflicting evidence.
6 Q. And on the face of that evidence, the court
7 reached a factual conclusion that the shipments were
8 at the Tribe's direction, and not NWS's; correct?
9 A. I'm not going to second-guess what the
10 court did when she reviewed the record. The record
11 in this instance was quite voluminous. I think she
12 missed some of the evidence and did not understand
13 its significance, and that's why we are appealing
14 the decision.
15 Q. You were going to say something about
16 discussion or--I don't want to put words in your
17 mouth. I will rephrase the question.
18 Have you ever had discussions with the
19 Federal authorities in Seattle in connection with
20 Mr. Montour?
21 MS. CATE: Objection.
22 PRESIDENT NARIMAN: Why do you object?

05:49:52 1 Q. And I'm sure all is that is true, but let's
2 go back to the phrase "despite a sworn statement by
3 Arthur Montour."
4 I mean, you're a lawyer; right, sir?
5 Correct?
6 A. Yes.
7 Q. When you put that phrase in a brief or a
8 declaration that you're giving to a court or a
9 tribunal, aren't you usually signaling to somebody
10 that you don't think somebody is telling the truth?
11 A. As a lawyer, my job is to present the
12 evidence to the court and let the court decide that
13 that statement is made to contrast--that phrase,
14 contrast what Mr. Montour said in his declaration
15 with what documents that I had in my possession that
16 I submitted to the court and appeared to show and
17 that the operator of the Foreign Trade Zone
18 testified at her deposition was not the case, that
19 she testified that she never had any contact
20 whatsoever with Big Sandy Rancheria, that all of the
21 instructions came from NWS as to where--how many
22 cigarettes were to be shipped out, what brands, what

05:51:52 1 MS. CATE: Again, wouldn't discussions
2 between two attorneys be a privilege?
3 MR. LUDDY: Depends on what they talked
4 about.
5 MS. CATE: If you are going to continue
6 along those lines...
7 MR. LUDDY: I know, but this was the
8 problem we ran into the last time. Until I know
9 what the scope of the privilege is, it's premature.
10 THE WITNESS: Your question is did I have
11 discussions with?
12 BY MR. LUDDY:
13 Q. Yeah.
14 Have you ever talked to Federal
15 authorities--
16 PRESIDENT NARIMAN: Federal authorities
17 about Montour.
18 THE WITNESS: I had one telephone
19 conversation with an Assistant U.S. Attorney in
20 Seattle, and that she was the woman that was
21 handling the indictment against Mr. Montour for
22 perjury.

05:52:37 1 BY MR. LUDDY:
 2 Q. When was that?
 3 A. Last fall. I don't remember if it was
 4 September or October.
 5 Q. Did you tell her in that conversation that
 6 you thought Mr. Montour had been untruthful in an
 7 affidavit in your case?
 8 MS. CATE: Objection. The content of the
 9 discussion would, indeed, be privileged.
 10 MR. LUDDY: That is clearly not privileged.
 11 MR. VIOLI: It's not attorney-client.
 12 MR. LUDDY: Who is the client?
 13 PRESIDENT NARIMAN: Very sorry, I'm only
 14 asking you what's the point of pursuing this now?
 15 Your point was that it's contrary to sworn testimony
 16 means, and he has explained what he meant by it.
 17 MR. LUDDY: Mr. Chairman, I will move on.
 18 PRESIDENT NARIMAN: That's much better.
 19 MR. FELDMAN: Mr. President, we have
 20 another witness waiting outside. Can we release
 21 him?
 22 MR. LUDDY: I'm not going to get to him

05:58:23 1 I think that was the first that I knew that
 2 it was possible that cigarettes were coming into
 3 California unlisted off-directory, not-fire-safe
 4 cigarettes were coming into California from the FTZ
 5 in Las Vegas. I did not have prior knowledge of
 6 cigarettes being sold, Seneca cigarettes or other
 7 brands made by Grand River that were being sold on
 8 Reservations in California prior to that time.
 9 BY MR. LUDDY:
 10 Q. Over the last couple of days we talked a
 11 little bit, and I believe--were you here during
 12 openings?
 13 A. I was.
 14 Q. Mr. Violi, I think, was talking about an
 15 action that the State of New York had commenced
 16 against Philip Morris and others under the MSA,
 17 seeking basically a declaration that the MSA didn't
 18 apply on-reserve and that the states didn't have to
 19 take actions in that regard.
 20 Are you familiar with that case?
 21 A. I'm generally familiar with it. I can't
 22 say that I have read the complaint, but I am

05:54:14 1 today.
 2 MR. FELDMAN: Okay.
 3 (Pause.)
 4 PRESIDENT NARIMAN: All right.
 5 BY MR. LUDDY:
 6 Q. Just to wrap up, my overriding question:
 7 Why now? Why suddenly in 2008 when NWS had been
 8 shipping or selling to on-reserve customers all
 9 these years, why now in 2008 did the three or four
 10 states decide independently or together to try to
 11 shut down that off-reserve business--on-reserve
 12 business? I'm sorry.
 13 MS. CATE: Objection. The witness can only
 14 speak to what California has done.
 15 THE WITNESS: I think I address that in
 16 Paragraph 1--Paragraph 2, I guess it is, of my
 17 declaration. I was not aware prior to early 2007
 18 that on-reserve cigarettes were being sold in
 19 California.
 20 Well, let me be more direct, more accurate
 21 than that. I did not know until--no, let's see.
 22 I'm trying to get the chronology down.

05:59:29 1 generally familiar that New York did file such an
 2 action. I'm not sure that I would agree with your
 3 characterization.
 4 Q. My characterization might have been wrong.
 5 A. But they did file a declaratory relief
 6 action against Philip Morris and other tobacco
 7 makers.
 8 Q. Did California file a similar action at any
 9 time?
 10 A. No. In California, it has been the law for
 11 many years that all California licensed
 12 distributors, all those licensed to distribute
 13 cigarettes in California are required to distribute
 14 tax-stamped cigarettes, tax-paid cigarettes to all
 15 entities other than other licensed distributors.
 16 So, if they distribute to a retailer, a wholesaler,
 17 a jobber or anybody else for consumption in the
 18 State of California, the cigarettes have to be
 19 stamped. And after the Directory Statute, the
 20 complementary law was passed in California, only
 21 cigarettes that are on the directory are legal for
 22 stamping by licensed California distributors.

06:00:37 1 Q. But--and this brings us back to the issue
2 we talked about at the very beginning--in fact, I
3 can't remember your answer whether you were unclear
4 or whether you had an answer as to whether Big Sandy
5 Rancheria needs to be a licensed California
6 distributor. Do you know the answer to that?

7 A. You mean between now and the beginning of
8 my testimony?

9 Q. I actually don't remember your answer. I'm
10 not making that up. I'm embarrassed to tell you
11 that.

12 A. The Board of Equalization is an independent
13 state agency. We do work with them, but we do not
14 advise them on those matters. They make their own
15 decisions.

16 As far as I know, they have--they have not
17 required Big Sandy to get a license, but I do not
18 know of any communications between them and Big
19 Sandy. There was implication that there was such a
20 communication that was going to be the case, but I'm
21 not aware of any such communication.

22 Q. All right. And just as a technical matter,

06:02:41 1 that California had no right to interfere with the
2 commerce between NWS and Big Sandy Rancheria, did
3 you call or contact the FTZ to tell them about that
4 development in the matter?

5 A. No.

6 Q. You know, having accepted and--

7 A. Let me clarify my answer. I don't

8 necessarily agree with your characterization of the
9 decision which is--that it was a declaration that we
10 had no authority. This was the reasoning of the
11 court how she got to the point of ruling that we had
12 no personal jurisdiction, and again that--to the
13 extent that she made comments about subject-matter
14 jurisdiction about authority to regulate activities
15 on Indian land, I think she went beyond the scope of
16 the motions that were before her, and one could
17 argue as a lawyer that that's dicta.

18 Q. That's fine.

19 I mean, that's why--not that I agree with
20 you, but I don't want to rehash a decision.

21 A. I wouldn't expect you to agree with me.

22 Q. Thank you.

06:01:36 1 the decision by the court in September did, in fact,
2 vacate the judgments; correct? As a technical
3 procedural matter, those judgments are vacated;
4 correct?

5 A. You're talking about the judgments--you're
6 talking about the decision in December.

7 Q. I am. Thank you for the correction.

8 A. Regarding Grand River, the judgments
9 against Grand River.

10 Q. Correct.

11 A. I don't know what that means. Technically
12 speaking, the order is not final. The order
13 vacating the judgments is not final because it's
14 subject to appeal. I don't believe that we would
15 have the ability to enforce those judgments while
16 they are vacated. But if that order is reversed by
17 the Court of Appeal, which it could well be or it
18 is--yeah, again, if it's reversed by the Court of
19 Appeal by the California Supreme Court, then that
20 would change the same situation legally.

21 Q. You know, after you got that September
22 ruling with all those determinations by the court

06:03:50 1 But having injected yourself into the
2 stream of commerce with FTZ and made allegations in
3 that August of '08 letter about the impropriety of
4 NWS's actions and the fact that the cigarettes they
5 were selling were contraband and the fact that they
6 shouldn't be selling them to Big Sandy Rancheria in
7 California, having done all that, did it ever occur
8 to you that maybe the right thing to do would have
9 been to contact the FTZ and say, "By the way, that
10 lawsuit I mentioned, it got tossed"?

11 PRESIDENT NARIMAN: It got what?

12 MR. LUDDY: It got thrown out.

13 BY MR. LUDDY:

14 Q. Did that ever occur to you?

15 A. It did not because we appealed that
16 decision. We thought it was wrong. It was not
17 final.

18 Q. Well, how did if the decision is ultimately
19 upheld by the appeal? Are you going to contact the
20 FTZ and tell them you were wrong?

21 A. If at that time they are still handling
22 cigarettes that are coming and due us, I suppose we

06:04:47 1 could, yes.
 2 Q. Don't you think that would be the fair
 3 thing to do--
 4 ARBITRATOR ANAYA: Mr. Luddy, I'm having a
 5 hard time understanding how this relates to the
 6 NAFTA claim.
 7 MR. LUDDY: I'm done, but we will tie it
 8 together.
 9 I have no further questions.
 10 PRESIDENT NARIMAN: Anything, Ms. Cate?
 11 MS. CATE: Yes, I do have redirect, if I
 12 could beg your indulgence for a little bit longer,
 13 if you prefer to resume tomorrow.
 14 PRESIDENT NARIMAN: No, go ahead.
 15 MS. CATE: Thank you.
 16 I prefer to do it from here rather than
 17 standing up, if you don't mind.
 18 PRESIDENT NARIMAN: Yes, please.
 19 Don't ask your own witness too many
 20 questions. Friend leap advice I give you.
 21 MS. CATE: I need about a couple of
 22 minutes, if you don't mind.

06:07:33 1 even predominantly
 2 'on-Reservation'--"on-Reservation" is in
 3 quotations--"activities. The Seneca cigarettes
 4 shipped at NWS's direction from the FTZ to BSR,
 5 Huber and Native Made traveled hundreds of miles
 6 across off-Reservation Territory in California
 7 before reaching their destination, and virtually all
 8 of NWS's sales of Seneca cigarettes to these
 9 entities in California ultimately were resold to
 10 nonmembers of the governing tribe resulting in
 11 substantial off-Reservation effects."
 12 Q. Thank you.
 13 With respect to the first half of that
 14 paragraph, it discusses the shipment of Seneca
 15 cigarettes hundreds of miles across off-Reservation
 16 Territory in California.
 17 A. Correct.
 18 Q. Could you explain how that relates to the
 19 statute that you're enforcing.
 20 A. Well, the statute--the complementary
 21 legislation are "Directory Statute," as I prefer to
 22 call it, does prohibit the transportation of

06:06:02 1 PRESIDENT NARIMAN: Yes, take your time.
 2 (Pause.)
 3 REDIRECT EXAMINATION
 4 BY MS. CATE:
 5 Q. Mr. Eckhart, I believe Paragraph 22 was
 6 mentioned in cross-examination.
 7 A. Paragraph 22 of my declaration?
 8 Q. Exactly, which we will use Claimants' Core
 9 Bundle Tab Number 56. It's Page 8, Paragraph 22.
 10 A. Paragraph 22 is not in this binder of--it
 11 skips from Page 7 to Page 9 of my declaration, so I
 12 don't have a complete copy right here.
 13 MR. LUDDY: The next page. It's possible
 14 at one point I saw it was reversed.
 15 THE WITNESS: Okay, seven and eight are
 16 reversed.
 17 I have Paragraph 22, thank you.
 18 BY MS. CATE:
 19 Q. Okay. Great.
 20 Could you read that paragraph, please.
 21 A. "I do not believe that NWS's activities in
 22 California can be characterized as exclusively or

06:08:44 1 cigarettes that are not listed on the directory, and
 2 so there is an issue that because the cigarettes are
 3 being transported across the highways, and there is
 4 U.S. Supreme Court authority for the states to seize
 5 contraband cigarettes when they are on the states'
 6 highways that is off-Reservation, and that that
 7 there is not--Big Sandy is a Reservation in the
 8 Sierra Nevada mountains east of Fresno occupying
 9 somewhere in the neighborhood of 4,500 acres; and,
 10 in order to get to Big Sandy from Las Vegas, a truck
 11 would have to pass through several hundred miles of
 12 highways that are not on Reservation land.
 13 And, in addition, the shipments that were
 14 going to Huber Enterprise would--that would be
 15 approximately a six or 700-mile trip from Las Vegas
 16 to Huber which is up right near Eureka in the north,
 17 in Humboldt County in the northwest portion of
 18 California, and Native Made was a recipient of
 19 cigarettes also from the Foreign Trade Zone, and
 20 Native Made is a smoke shop in Palm Springs, it's on
 21 the Agua Caliente Reservation, but it would also
 22 require transport across non-Indian country to get

06:10:10 1 the cigarettes from the FTZ to the--to that
2 location, as well.
3 Q. Okay. And then with respect to the second
4 part of the paragraph, which starts with "Virtually
5 all of NWS's sales, Seneca cigarettes to these
6 entities in California ultimately were resold to
7 nonmembers of the governing tribe resulting in
8 substantial off-Reservation effects," could you
9 explain what you mean by "substantial
10 off-Reservation effects."
11 A. Well, the off-Reservation effects include
12 that the cigarettes--it is our understanding based
13 upon this--the information we had at this time as
14 well as subsequent information gained about Big
15 Sandy Rancheria's operations that the cigarettes are
16 transported to about 40 or so locations across the
17 state, and that we have visited those locations.
18 And non-Indians working for us have purchased
19 cigarettes at--Seneca cigarettes at many locations.
20 They're not asked for their tribal identification
21 cards. They're simply--if they come in the store
22 and have the money to buy the cigarettes, the

06:12:30 1 quantities.
2 ARBITRATOR ANAYA: Where are they shipping?
3 THE WITNESS: They're shipping to smoke
4 shops.
5 ARBITRATOR ANAYA: On-Reservation?
6 THE WITNESS: On-Reservation business.
7 But those businesses are open to the
8 general public and are advertising on the Internet
9 at cheaper prices such that they attract customers
10 from off-Reservation. Customers come on to the
11 Reservation, buy cigarettes that are untaxed.
12 ARBITRATOR ANAYA: Do you have any data on
13 that, what percentage of the sales go to
14 non-Indians?
15 THE WITNESS: Just given the volume.
16 We have so far--in our court proceedings,
17 the courts have stayed discovery. We have a current
18 case pending against a smoke shop in Palm Springs
19 called Black Hawk Tobacco. It has received over
20 four-year period almost 7,000 master cases of
21 cigarettes. The master case has 60 cartons in it
22 specifically. Sometime a half-master case has 30

06:11:23 1 cigarettes are sold to them.
2 Big Sandy itself sells, and Huber and
3 Native Made have all sold cigarettes to our
4 investigators without asking for their status as
5 members of any tribe, let alone the Tribe on which
6 the businesses are located.
7 ARBITRATOR ANAYA: Excuse me. So, are the
8 substantial off-Reservation effects the fact that
9 they sold them to your investigators?
10 THE WITNESS: And that because of the
11 quantity. We are talking hundreds of millions of
12 cigarettes, and Big Sandy Rancheria is a tribe of
13 approximately 400 members, and only 71 of whom live
14 on the Reservation. So, it would be impossible,
15 literally impossible, for those 71 members, assuming
16 they're all adults, would be smoking that many
17 cigarettes, and so we know that--
18 ARBITRATOR ANAYA: That's an inference,
19 though. Do you have any data, other than--
20 THE WITNESS: It's an inference. It's also
21 based upon a list of information that we have of
22 where Big Sandy is shipping these cigarettes and the

06:13:31 1 cartons. So, we are talking truck loads and truck
2 loads of cigarettes being delivered, and the Agua
3 Caliente Reservation, although it's fairly large in
4 terms of its land area, according to the Tribe, has
5 only 219 members living on the Reservation.
6 ARBITRATOR ANAYA: I understand the
7 argument and the inferences that can be made; they
8 seem reasonable. I'm just wondering the extent to
9 which you have some data or there is something
10 about--evidence to this effect in the record.
11 THE WITNESS: The court in that case--the
12 court in the Black Hawk case decided beginning of
13 January that it had subject-matter jurisdiction over
14 our litigation, and he has continued a stay of
15 discovery which has been in place since the first
16 motion to quash--the complaint for lack of
17 subject-matter jurisdiction was made last September.
18 And at this point we only have information from
19 third parties and we could get through
20 noncourt-compelled discovery because of the stay on
21 discovery.
22 ARBITRATOR ANAYA: It is your testimony,

06:14:36 1 though, that there are substantial off-Reservation
2 effects, right?
3 THE WITNESS: Yes.
4 ARBITRATOR ANAYA: Okay. I'm trying to
5 get--
6 THE WITNESS: The cigarettes that are not
7 on our directory, which means that non-Indians are
8 smoking those cigarettes and developing whatever
9 tobacco-related diseases they might develop over the
10 course of time, these cigarettes are also not
11 certified as firesafe in the State of California,
12 and that has off-Reservation effects to the extent
13 that cigarettes that are going off the Reservation
14 are--have the propensity to start a fire whereas if
15 they were certified and had been tested according to
16 standards set by the state and many other states for
17 their ability to go out and to self-extinguish after
18 a few moments of not being puffed on, that there
19 would be less danger of forest fires, brushfires,
20 house fires and so on. So, that's another
21 off-Reservation effect.
22 ARBITRATOR ANAYA: Is there evidence to

06:16:37 1 MR. FELDMAN: Thank you, Professor.
2 Sitting here at this time, I know that we
3 have the numbers on the various reservations and the
4 volumes of Seneca cigarettes passing through those
5 reservations, and we relied heavily on those figures
6 in both of our briefs. We would need to review the
7 record to see whether also the fire-safety issues
8 that Mr. Eckhart has identified, whether those are
9 included in the record, as well.
10 ARBITRATOR ANAYA: Okay. Thank you.
11 MS. CATE: I would just like to note as
12 well in addition that the public health effects
13 obviously would not be something that you could
14 easily see at this stage.
15 ARBITRATOR ANAYA: Understood.
16 MS. CATE: Thank you.
17 BY MS. CATE:
18 Q. With regard to your declaration again at
19 Paragraph 16--
20 A. Okay.
21 Q. --you note here the numbers of shipments.
22 A. Yes.

06:15:36 1 this effect in the record? Specific evidence?
2 MS. CATE: With respect to the volume and
3 to the numbers of persons living on the actual
4 Reservations, yes.
5 PRESIDENT NARIMAN: That's an inference.
6 ARBITRATOR ANAYA: We only have information
7 from which to draw inferences. We don't have any
8 evidence about the actual substantial
9 off-Reservation effects beyond that kind--
10 THE WITNESS: I don't believe it's in the
11 record of this proceeding.
12 ARBITRATOR ANAYA: Okay.
13 THE WITNESS: This declaration was filed a
14 year and two months ago, and there is--we had
15 additional information about individual sales, but
16 anecdotal information about sales.
17 ARBITRATOR ANAYA: I pose the question to
18 you but also to the Respondent which is asserting
19 that the sales have substantial off-Reservation
20 effects. I'm just trying to see what is in the
21 record to that effect, at least to support that
22 factual assertion.

06:17:45 1 Q. And again these were how many exactly were
2 going--these were all going to either NWS or Huber;
3 is that correct?
4 A. No. These were going to either--primarily
5 going to Big Sandy, to BSR--the majority of them
6 went to BSR. A smaller number were going directly
7 to Huber Enterprise. And a few of the shipments, I
8 think it was approximately 25 or 30, went to Native
9 Made in Palm Springs. I don't have the exact
10 number. I would have to review Mr. Gruber's
11 declaration to get the exact numbers.
12 Q. Actually, if you wouldn't mind turning to
13 Exhibit A of your declaration, which is Mr.
14 Buehler's declaration, just to take an example of
15 the kinds of documents that you have submitted, if
16 we could look at Exhibit A-1 of Mr. Buehler's
17 declaration, and there are four documents there.
18 You mentioned that you had done a
19 deposition of the official at the FTZ, and she had
20 explained the process of how these cigarettes came
21 into the FTZ and then subsequently went out.
22 And in light of that deposition, would you

06:19:25 1 be so kind as to explain each of these documents in
2 turn.
3 A. The first document has at the top, Exhibit
4 A-1, these don't have page numbers, so at the top
5 it's dated--I believe that's 2/7. Let me see if
6 it's February 7th or--apparently February 7th, 2008,
7 and it says "Nevada FTZ No. 89." Number 89 is the
8 number of that Foreign Trade Zone, I believe.
9 And this document, as I understand it, as
10 explained by Joanne Tornberg at her deposition, is a
11 document that is prepared by the Foreign Trade Zone
12 based upon information that the Foreign Trade Zone
13 receives from Native Wholesale on this, which is the
14 second document in this exhibit.
15 The second document essentially is--not
16 essentially, but--her explanation was, and it would
17 appear from the face of the document as well is that
18 it was faxed to the Foreign Trade Zone by NWS,
19 indicating a group of--or a shipment of cigarettes
20 or a number of cigarettes which were to be sent from
21 the Foreign Trade Zone, released from the Foreign
22 Trade Zone, and shipped to Big Sandy Rancheria.

06:22:15 1 which the FTZ receives from the customs broker for
2 Native Wholesale, for NWS, indicating that the
3 customs duties and whatever other paperwork is
4 necessary for U.S. customs to release the product
5 for sale in the United States has been completed,
6 but the customs duties have been paid. And I
7 believe also that the Federal excise tax has to be
8 paid at that point before they could be released.
9 Q. With respect to this last document, it's
10 interesting--could you just note here, the ultimate
11 consignee and importer of record, who is that?
12 A. This particular document which we are
13 looking at, if it's part of Exhibit A-1 to
14 Mr. Buehler's declaration, says the ultimate
15 consignee is Native Wholesale Supply Company, and
16 the importer of record is also Native Wholesale
17 Supply Company.
18 Q. And then moving back to the third document,
19 which is the straight bill of lading, as it's
20 entitled, who was this billed to?
21 A. There is a "bill to" line on the left side
22 of the document below the information about where it

06:20:57 1 So, the first document essentially is the
2 Foreign Trade Zone's spreadsheet, if you will, of
3 where--of the order that's been placed by Native
4 Wholesale on the prior page or the direction that
5 was given by Native Wholesale to pull those
6 cigarettes off of the shelves and put them on
7 pallets and get them ready to be loaded on to a
8 truck.
9 And the third document in this exhibit is a
10 Conway Freight straight bill of lading which the FTZ
11 prepares in relationship to this shipment, once they
12 hear from somebody at NWS that it is Conway Freight
13 that will be picking up this shipment, and these are
14 the arrangements. This is the day they will be
15 there and have it ready for them by X date. So,
16 they prepare this document--the Foreign Trade Zone
17 prepares this document, and it's signed by the
18 driver of the--I think the driver of the truck signs
19 it at the bottom, acknowledging that he has
20 received--he or she has received it.
21 The third document or the fourth document,
22 excuse me, as it was explained to me, is a form

06:23:35 1 says "shipper (from)," and there is a separate set
2 of boxes that say "bill to," and it says "bill to
3 Native Wholesale Supply." So, that led me to
4 understand that Native Wholesale Supply was the
5 entity paying the bill for the shipping.
6 Q. And on the second document--again this is
7 the invoice/bill of lading--
8 A. Yes.
9 Q. --who is noted as the seller?
10 A. The seller is noted as Native Wholesale
11 Supply in Gowanda, New York.
12 Q. And again going back to the first document
13 which is FTZ's document, what cigarettes, what brand
14 of cigarettes, are noted there as being held?
15 A. Two different brands, Seneca 60s and Opal
16 30s, and another style of Senecas, 120s--I believe
17 that refers to the length of the cigarette role.
18 Q. Thank you.
19 ARBITRATOR ANAYA: I just have one
20 question. Does California tax cigarettes sales to
21 non-Indians?
22 THE WITNESS: I have to answer it in two

06:24:47 1 parts. As I explained to Mr. Luddy when he asked me
2 the question, the law in California is that a
3 California licensed distributor can only sell tax
4 pre-paid cigarettes to retailers in California. So,
5 if a licensed distributor--bear with me, please. A
6 licensed distributor sells to Black Hawk Tobacco
7 on-Reservation in Palm Springs, that distributor has
8 to sell tax-stamp cigarettes to Black Hawk. The
9 only way Black Hawk can get unstamped cigarettes is
10 to purchase from something like Big Sandy.

11 The State of California does not--there was
12 a Supreme Court decision in 1985 I believe was
13 called "Board of Equalization versus Chemeuvi
14 Tribe," in which the Supreme Court said that the
15 state has the right and authority to require the
16 Tribe to collect the state tax on sales to
17 non-Indians.

18 That decision, as far as I'm concerned, is
19 the law of the land. The Board of Equalization does
20 not currently have a scheme or process set up to
21 collect or to enforce that with the Tribes, who
22 don't have tax compacts with the Tribes, but legally

06:27:19 1 THE WITNESS: I could escape the snowstorm?

2 BY MS. CATE:

3 Q. Could you just briefly explain, what are
4 the activities that are regulated under a
5 complementary legislation of California?

6 A. I don't have the statute in front of me,
7 but generally speaking, no person is supposed to
8 stamp a cigarette for distribution in California
9 that is not on the directory, and no person is
10 supposed to sell, possess, import, transport
11 cigarettes that they know will be distributed in
12 violation of the statute, meaning they're not on the
13 directory.

14 Q. Have GRE's cigarettes ever been listed on
15 California's directory of compliant cigarettes?

16 A. No. No cigarettes that I know of made by
17 Grand River have ever been listed on the directory.

18 Q. What must GRE do to become listed on
19 California's directory?

20 A. GRE would have essentially have to become
21 compliant with our Escrow Statute for past sales
22 that would include sales that were included as under

06:26:11 1 it's my position, and I believe the law, that sale
2 to a nontribal member who does not reside on that
3 land is taxable.

4 ARBITRATOR ANAYA: My question, though, is
5 whether you do, and you're saying you don't.

6 THE WITNESS: We don't have a mechanism,
7 but the mechanism is that the combination of the
8 Directory Statute and the Tax Law that you have to
9 have to buy--the licensed distributor has to sell
10 tax-stamped cigarettes, and that's the way it should
11 work.

12 And many of the Tribes, I will state just
13 as a matter of fact, many of the Tribes--the
14 majority of the Tribes purchased tax-stamp
15 cigarettes from licensed distributors, and only a
16 few purchase from Big Sandy and others who may be
17 selling unstamped cigarettes.

18 MS. CATE: I do have a couple more
19 questions.

20 THE WITNESS: My flight is not until
21 tomorrow morning.

22 PRESIDENT NARIMAN: They don't want you.

06:28:39 1 the liability, allegations in our complaints against
2 them as well as subsequent sales on which taxes,
3 California taxes, were collected.

4 To maybe clarify my answer to Professor
5 Anaya a moment ago, if taxes are not collected on a
6 cigarette, it's not considered a unit sold, and
7 therefore there is escrow obligation. But if taxes
8 are collected--and I would submit that in some
9 instances--in many instances taxes should be
10 collected on cigarettes that are sold to non-Indians
11 on the Reservation, there would be an escrow
12 obligation that would be attendant upon that.

13 Q. Are there any other--

14 A. There is certain paperwork requirements
15 they would have to submit--we would have to resolve
16 the outstanding penalty issues, depending upon--the
17 judgments are on appeal, so those are still in play
18 as far as any kind of a settlement. We would have
19 to resolve that in some way to our satisfaction and
20 to Grand River's satisfaction. And there were some
21 paperwork requirements they would have to provide us
22 with certain information that's required under our

06:29:44 1 regulations for anybody who wants to be listed on
2 the directory such things as we have to know that
3 they have filed their rotation plan with the Federal
4 Government for the Surgeon General's warnings. They
5 have to disclose their ingredients from the
6 Department of Health and Human Services and so
7 forth.

8 So, those things--again, paperwork has to
9 be completed. Once that paperwork is completed and
10 they are in compliance with our escrow law, they
11 could be listed. Would be listed.

12 MS. CATE: I have one further line of
13 questioning with regard to the recently admitted
14 Black Hawk decision.

15 Do you have copies of that? If not, I
16 could provide them to you.

17 BY MS. CATE:

18 Q. Mr. Eckhart, this is a very recent decision
19 of the Superior Court of California.

20 A. Yes. I mentioned it a moment ago. It's a
21 decision issued at the beginning of January in our
22 case against Black Hawk Tobacco.

06:32:22 1 it.

2 This can't be done in re-examination.
3 Nobody objected so it's all right, but normally
4 speaking you should--whatever question--that's why I
5 told you please ask him additionally whatever you
6 want to ask him from the sworn statement. That's
7 the correct matter; thereafter, you leave the
8 witness to cross-examining counsel. But here the
9 objection is with regard to a sort of fact situation
10 in respect of a fact witness. I mean, if it's a
11 case, then you refer to it in your argument. I have
12 no objection to that argument. How does he know
13 anything about this case?

14 MS. CATE: I would just note that the
15 witness has noted this case in the
16 cross-examination; therefore, it is within the scope
17 of the redirect for me to discuss it.

18 In addition, this case actually involves,
19 to my understanding, Seneca cigarettes; and, as a
20 result, it is fully within this case.

21 PRESIDENT NARIMAN: What's the date?

22 MS. CATE: It is well after our Rejoinder

06:31:11 1 Q. And can you provide a background on the
2 facts of the case.

3 A. Well, we are also aware that--

4 MR. VIOLI: I would like to mention one
5 thing. When Claimants agreed to the submission of
6 the developments of law to the Tribunal, it was not
7 in the context of presenting fact witnesses with
8 those opinions for purposes of colloquy or
9 discussion with the Tribunal.

10 The decisions that relate to the Claimants
11 in this action are perfectly proper to speak to this
12 witness about, but to bring in a separate lawsuit, a
13 decision in a separate lawsuit not involving these
14 Claimants and starting to present to a fact witness
15 is nothing we have agreed to, and it's improper.

16 MS. CATE: My next question will clarify it
17 and why it's related to this case.

18 PRESIDENT NARIMAN: I didn't want to
19 interrupt you at the beginning, but the proper thing
20 for all this questioning should have been in your
21 examination and further examination-in-chief. So,
22 if they had anything to say, then they cross-examine

06:33:32 1 dated 12/23/2009.

2 PRESIDENT NARIMAN: Oh, okay. Yes,
3 December 2009, so he's entitled to--

4 THE WITNESS: It was January 8, 2010. The
5 hearing, the oral hearing, was on the 23rd of
6 December, and we--

7 PRESIDENT NARIMAN: We could read this, but
8 if there is something special to say, say it, and
9 they will ask you some questions.

10 THE WITNESS: I'm sorry, what was the--the
11 factual circumstances.

12 PRESIDENT NARIMAN: Yes, factual.

13 THE WITNESS: Very simply, we have
14 documents from a shipping company within the State
15 of California that indicated that Black Hawk Tobacco
16 was the largest customer of Big Sandy Rancheria, and
17 we contacted Black Hawk, we sent them a letter
18 similar to the letter we sent to Mr. Montour before
19 we sued Native Wholesale, asking him to stop selling
20 cigarettes that were on the directory. And when we
21 got no reply to that letter after several months,
22 and after we had contacted the--and actually--I

06:34:39 1 should back up.
 2 Before we sent the letter to the owner of
 3 this business, we contacted the Tribe to see if they
 4 had any sovereign concerns about our enforcing our
 5 law on their land, and they said they did not. We
 6 then contacted the owner of this business. He did
 7 not respond. We then sued him for selling
 8 cigarettes that were not listed on our Tobacco
 9 Directory that were not fire-safe and that were
 10 not--did not bear evidence of state tax had been
 11 paid.
 12 PRESIDENT NARIMAN: Okay.
 13 BY MS. CATE:
 14 Q. And what is the holding of the court?
 15 PRESIDENT NARIMAN: That we could read.
 16 MR. LUDDY: Objection.
 17 PRESIDENT NARIMAN: Is there anything you
 18 want to ask?
 19 MR. LUDDY: One question.
 20 ARBITRATOR ANAYA: This is a tribally owned
 21 company?
 22 THE WITNESS: No. It's owned by an

06:36:28 1 the record that assists, helps with the enforcement
 2 of the Escrow Statutes and the purposes of the
 3 Escrow Statutes; right?
 4 A. Yes.
 5 Q. Okay. Now, a minute ago--withdrawn.
 6 Has the State of California, BOE, Board of
 7 Equalization, sent any tax bill to the Big Sandy
 8 Rancheria for cigarettes sold on that land?
 9 A. I don't believe so.
 10 Q. You don't believe so.
 11 So, they're not units sold under the Escrow
 12 Statute; correct? Just the Escrow Statute.
 13 A. They're not units sold because tax has not
 14 been collected, that's correct.
 15 Q. Correct. So, they're not sold under the
 16 Escrow Statute.
 17 And Grand River hasn't been sued for any of
 18 the Seneca cigarettes sold on the Big Sandy
 19 Rancheria Reservation or sold by Big Sandy; is that
 20 correct? By your office. Yes or no. Have they
 21 been sued--
 22 A. Because tax has not been collected on them,

06:35:38 1 individual, and he was incorporated under the law of
 2 the State of California as well as under the law of
 3 the Sac and Fox Nation. He is--as far as I know,
 4 and he's with the Sac and Fox Tribe. He's not a
 5 member of the Tribe, of the Agua Caliente Tribe on
 6 whose reservation he's doing business.
 7 ARBITRATOR ANAYA: Okay. So, he's a member
 8 of another tribe doing business in California.
 9 THE WITNESS: Yes.
 10 ARBITRATOR ANAYA: And the California
 11 Reservation.
 12 THE WITNESS: That's correct, yes.
 13 PRESIDENT NARIMAN: Okay.
 14 Sure, you are entitled to ask.
 15 RE-CROSS-EXAMINATION
 16 BY MR. VIOLI:
 17 Q. Mr. Eckhart, the issue known as
 18 complementary legislation, what is it complementary
 19 to?
 20 A. I think that phrase is used because it
 21 complements the state's Escrow Statute enforcement.
 22 Q. And it assists--we have seen documents in

06:37:27 1 that's correct.
 2 Q. So, if these cigarettes are not subject to
 3 the Escrow Statute, Grand River is not being sued
 4 for them, and they're not units sold, then why is
 5 the State of California telling the Foreign Trade
 6 Zone do not ship these cigarettes to an Indian
 7 Reservation in California and that these cigarettes
 8 are illegal as contraband under California law when
 9 they are not being sold, satisfying that definition?
 10 A. Because the Directory Statute or the
 11 "complementary legislation," as you called it,
 12 is--stands on its own. It doesn't require--in my
 13 view, it doesn't require that it only be enforced if
 14 it complements the Escrow Statute enforcement. It
 15 is a stand-alone provision of law that--
 16 Q. It's a stand-alone provision, but when it
 17 was presented to the legislatures, it was because we
 18 needed to enforce the statutes; correct? There is
 19 something wrong with the Escrow Statutes, and we
 20 need to enforce them. We need better powers to
 21 enforce them; correct?
 22 A. Correct.

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06:38:26 1 Q. Okay. Now, you mentioned a Bracker test;
2 right? The Federal Bracker test?
3 A. I did.
4 Q. That arises out of taxation on cigarettes
5 on Indian land or Indian or sovereign land; right?
6 A. Not necessarily taxation. The question is
7 regulation, not necessarily taxation.
8 Q. But they--the cases you talked about are
9 taxation on cigarettes on Indian land; correct?
10 A. The Mescalero case did not involve
11 taxation.
12 ARBITRATOR ANAYA: Mr. Violi, just so I'm
13 clear this late in the day, are you trying to elicit
14 more information from him, or is it just legal
15 information?
16 MR. VIOLI: More information because I want
17 to find out what the answer the incidence of this
18 regulation, unlike tax, does not fall on the
19 non-Native consumer that comes to the Indian
20 Reservation.
21 ARBITRATOR ANAYA: But that's a legal
22 argument.

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06:40:10 1 Q. Do you know whether or not the Seneca
2 cigarettes--withdrawn.
3 Isn't it true that the fire-safe cigarettes
4 that are sold to the Big Sandy Rancheria and go to
5 California are all made with the fire-safe paper
6 that various states have approved as far as
7 safe-certified?
8 A. I'm not aware of that.
9 Q. Did you ever test them?
10 A. That's the--the issue is that in order to
11 be compliant with California law, the manufacturer
12 has to certify to the state that they have had the
13 cigarettes tested and provide the test results. And
14 that hasn't been done. Grand River has never done
15 that.
16 Q. But you're not saying--that's different
17 than saying that Seneca cigarettes are not
18 fire-safe; correct? There is just not fire
19 cigarette certified according to state law which you
20 believe applies to the Big Sandy Rancheria; correct?
21 A. Yes.
22 Q. You have no information on whether or not

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06:39:24 1 MR. VIOLI: Well, the incidence is a
2 factual issue. If the Tribunal determines if the
3 incidence--these statutes and those measures applied
4 not to the consumer, not to the immediate seller but
5 to the upstream Native supplier--
6 ARBITRATOR ANAYA: You need to get that
7 from him?
8 MR. VIOLI: I do, unless there's a
9 different view.
10 PRESIDENT NARIMAN: How long?
11 MR. VIOLI: About another minute.
12 BY MR. VIOLI:
13 Q. But the incidence of the Escrow
14 Statute--the complementary legislation is falling
15 upon NWS; correct?
16 A. It falls on anybody who sells cigarettes in
17 California that are not on the directory.
18 Q. To an Indian Reservation; correct?
19 A. Yeah. That's my--that's my position.
20 That's the position of our office, yes.
21 Q. You mentioned fire-safe cigarettes before.
22 A. Yes.

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06:41:01 1 they are not or they are fire-safe cigarettes;
2 correct?
3 A. I don't. That's correct.
4 Q. Okay. Thank you.
5 MR. VIOLI: No further questions.
6 PRESIDENT NARIMAN: Good.
7 MS. CATE: Thank you for your indulgence.
8 PRESIDENT NARIMAN: We might meet at 9:00.
9 (Whereupon, at 6:41 p.m., the hearing was
10 adjourned until 9:00 a.m. the following day.)
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CERTIFICATE OF REPORTER

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

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

DAVID A. KASDAN