INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
Washington, D.C.

In accordance with the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules

GRAND RIVER ENTERPRISES SIX NATIONS, LTD., ET AL.
(CLAIMANTS)

V.

UNITED STATES OF AMERICA
(RESPONDENT)

AWARD

Before the Arbitral Tribunal constituted under Chapter 11
of the North American Free Trade Agreement, and comprised of:

Mr. Fali S. Nariman, President
Prof. James Anaya, Arbitrator
Mr. John R. Crook, Arbitrator

Secretary of the Tribunal
Ms. Janet Whittaker

Date of dispatch to the parties: January 12, 2011

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REPRESENTATION OF THE PARTIES

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The Tribunal notes that the Respondent has always been represented by the Office of International Claims and Investment Disputes of the United States Department of State. However, the composition of this Office has evolved throughout the proceeding. The Tribunal wishes to mention that Ms. Jennifer Thornton, Attorney-Adviser, was involved in this case through the hearing on the merits.

I. INTRODUCTION AND SUMMARY

1. This is the Final Award in a claim brought on March 12, 2004 under Chapter 11 of the North American Free Trade Agreement (hereinafter "NAFTA"). As described in the Tribunal's July 20, 2006 Decision on Objections to Jurisdiction (hereinafter "Decision on Jurisdiction") and more fully below, the Claimants contend that actions taken by various states of the United States of America to implement the 1998 Master Settlement Agreement (hereinafter "MSA") violate their rights under Chapter 11 of NAFTA. The MSA was concluded on November 23, 1998 to settle litigation by a number of U.S. states against certain major U.S. cigarette manufacturers. While the specific actions at issue have been taken by states of the United States, the United States has acknowledged throughout that it is internationally responsible under NAFTA for their actions.

2. The Claimants are Grand River Enterprises Six Nations, Ltd. of Ohsweken, Ontario, Canada, a corporation incorporated under the laws of Canada in April 1996 (hereinafter, "Grand River"), Messrs. Jerry Montour and Kenneth Hill, also of Ohsweken, and Mr. Arthur Montour, Jr., of Seneca Nation Territory, Perrysburg, New York (hereinafter, "the individual Claimants"). The individual Claimants were all born in Canada and are members of indigenous peoples or First Nations belonging to the Six Nations of the Iroquois Confederacy, also known as the Haudenosaunee. Messrs. Jerry Montour and Kenneth Hill are controlling stockholders of Grand River, with Mr. Montour holding 30% of the common shares and Mr. Hill holding 10%. Both Jerry Montour and Kenneth Hill reside on the Grand River Reserve in Ohsweken, Ontario, Canada. Arthur Montour resides on Seneca Nation Territory in northern New York State, where he carries on a tobacco distribution business through his wholly owned company, Native Wholesale Supply Company ("NWS").

3. The proceedings have been protracted, reflecting the bifurcation of the jurisdictional and merits phases, the Respondent's challenge to a member of the Tribunal, the Claimants' requests for several extensions of time, and other factors. They have been vigorously contested, with extensive briefing and factual and legal arguments. The Parties' principal contentions are necessarily summarized in this Final Award in less detail than they were presented in the extensive written and oral pleadings. However, the Tribunal has considered and taken into account all of their respective claims and contentions.

4. A fuller presentation of the factual and legal arguments and the Tribunal's findings on them is set out later. The following is a brief summary of the Tribunal's conclusions.

5. The Tribunal finds that it does not have jurisdiction over the claims of Kenneth Hill, Jerry Montour and Grand River, because they did not have an investment in the United States as defined by NAFTA. The evidence did not establish that these Claimants had constituted an enterprise in the United States or engaged in other significant activities there satisfying the definition of investment in Article 1139 of NAFTA. Instead, the record shows that, as relevant here, their activities centered on the manufacture of cigarettes at Grand River's manufacturing plant in Canada for

export to the United States. The Tribunal concludes that such activities and investments by investors in the territory of one NAFTA party do not satisfy the jurisdictional requirements for a claim against another NAFTA party.

6. The Tribunal does have jurisdiction over Arthur Montour's claim. The evidence shows that he created and carried on a substantial business in the United States, importing cigarettes manufactured by Grand River and distributing them to wholesalers and retail outlets on Indian reservations in the United States. His operations reflect an investment for purposes of NAFTA.

7. However, the Tribunal concludes that Arthur Montour's claims fail on their merits. His claim for the claimed expropriation of his business in violation of NAFTA Article 1110 fails; he has not been deprived of ownership or control of an apparently prosperous and growing business importing and distributing Grand River's cigarettes. He did not establish that he had been denied of national or most-favored-nation treatment contrary to NAFTA's Articles 1102 and 1103. (The Claimants' claims under those Articles centered on off-reservation sales of Grand River's cigarettes; Mr. Montour's activities involved on-reservation sales.) Finally, Mr. Montour alleged but failed to establish that his treatment did not conform to the customary minimum standard of treatment required by NAFTA's Article 1105.

II. FACTUAL BACKGROUND

A. The MSA and Its Implementation

8. As described in the Tribunal's Decision on Jurisdiction,[1] the claim originates in litigation brought by more than 40 U.S. state attorneys general against the major U.S. tobacco producers (hereinafter, "the Majors") in the 1990s, claiming compensation for the states' costs of treating tobacco-related illnesses. An initial proposed comprehensive settlement requiring U.S. federal legislation failed of enactment in June 1998. Subsequent negotiations then sought a settlement not requiring Congressional approval. In November 1998, several state attorneys general and four of the Majors[2] concluded an elaborate settlement of the states' lawsuits, namely, the MSA. Additional states subsequently adhered to the MSA. Ultimately 46 states, the District of Columbia and five U.S. territories became parties. (Liggett Group, the fifth Major, settled separately with the states in 1996.)

9. The MSA is a massive and complex document. In it, each participating company ("Participating Manufacturer" or "PM") agreed to extensive restrictions on advertising and other marketing practices, and to fund smoking prevention and cessation programs. The MSA also requires each PM to make in perpetuity cash payments to a central account in respect of its sales, as measured by the number of its

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[1] *Grand River Enterprises Six Nations, Ltd. v. United States*, Decision on Objections to Jurisdiction (July 20, 2006) ("Decision on Jurisdiction"), ¶¶ 7-17.

[2] Phillip Morris Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corp. and Lorillard Tobacco Company.

cigarettes taxed by the participating states. Each participating state receives a share of the substantial amounts paid by PMs, proportional to the total amount of cigarette sales subject to the MSA in that state. The amounts charged per cigarette increase each year in accordance with an agreed formula.

10. The MSA increased the costs of PMs' cigarettes to consumers. The Tribunal received evidence indicating that wholesale per carton prices increased by $4.50 per carton during the MSA's first year, with additional large increases in subsequent years. Because of these higher costs, PMs stood to lose sales and market share to competitors not subject to the MSA's financial obligations and other restrictions. Accordingly, the MSA incorporated elements aimed at encouraging other, mostly smaller, manufacturers to adhere to the MSA, or otherwise at limiting their ability to gain market share at the expense of higher-cost PMs.

11. Companies that joined the MSA after November 23, 1998 are called "Subsequent Participating Manufacturers" or "SPMs." As an inducement to join the MSA, SPMs that joined during the sixty days (later extended to ninety days) following November 23, 1998 received an exemption from the MSA's payment obligations for up to 125% of their 1997 or 100% of their 1998 market share. Sales above this exemption are subject to the mandatory payments, but all sales below it remain permanently exempt. Companies utilizing this provision are referred to as "exempt SPMs" or "grandfathered SPMs". The fifth Major, Liggett Group, took advantage of this provision and became an exempt SPM. The evidence indicated that about 40 other U.S. and foreign cigarette manufacturers also did so. Claimant Grand River did not, and it has remained a "Non-Participating Manufacturer," or "NPM." Significant elements of the claims here involve differences between the Claimants' treatment under the MSA and its associated measures, and the treatment received by exempt SPMs.

12. When the MSA was concluded in 1998, the manufacture of cigarettes for the U.S. market was highly concentrated. The evidence indicated that the Majors accounted for more than 97% per cent of 1997 sales, with Liggett Group and all other producers accounting for the remainder. Of this, Liggett and other SPMs accounted for 2.6% of total market share. NPMs accounted for just 0.37%.

13. The MSA's primary device aimed at limiting NPMs' ability to gain market share from PMs was a requirement that each participating state adopt escrow legislation replicating a draft law annexed to the MSA. This legislation requires each NPM annually to place in escrow in a state a sum approximating the amount that it would have paid in respect of its taxed sales in that state, had it joined the MSA. These funds must be escrowed by April 15 of the year following the year in which the cigarettes are sold. Sales volume is determined based on the number of cigarettes receiving state tax stamps for sale in the state.

14. An NPM retains title to escrowed funds and any accrued interest, but the funds remain in escrow for 25 years, and can be used to pay any judgment against the NPM stemming from litigation by the state involving adverse health consequences of the

NPM's product. All of the 46 states party to the MSA adopted escrow laws in the prescribed form. The amount to be escrowed per cigarette was slightly larger than the amount paid by MSA manufacturers to the central account, reflecting additional payments made by the Majors pursuant to settlements they concluded with four states prior to the MSA.

15. As initially adopted, the escrow laws included "allocable share" provisions that could significantly lower the amount to be escrowed in a given state. These provided that an NPM need not escrow in any state more than that state would have received in respect of that NPM's total sales in all MSA states, if the NPM were a PM. This greatly reduced the amount to be escrowed by NPMs that concentrated their sales in a few states. This is because each state's share of MSA funds reflects its proportionate share of total national cigarette sales covered by the MSA regime. Thus, for example, a state with 1% of all national sales of covered cigarettes receives 1% of all funds paid in by the PMs. If a NPM sold all of its cigarettes in that state, it would have to escrow in that state an amount approximating the amount that it would have paid to the national MSA fund were it a PM. However, thanks to the allocable share provisions, the NPM would then receive an immediate release of 99% of the escrowed funds, because the state would receive only 1% of the NPM's payments were it a PM.

16. This feature of the MSA allowed a NPM concentrating its sales in a few states to recoup most of the funds it placed in escrow. The Parties disputed whether this was inadvertent (as contended by the Respondent) or intentional (as contended by the Claimants). Several of the Respondent's witnesses testified at the hearing that it was inadvertent, and that the MSA was designed on the incorrect assumption that any future NPMs would pursue a national marketing strategy. (At the time of the MSA, the U.S. cigarette production was almost entirely in the hands of firms of national scope.) Claimants maintained, however, that the allocable release provisions were intentionally included in the MSA in order to "level the playing field" between NPMs and exempt SPMs.

17. In 1998, when the MSA was concluded, Grand River's Seneca® brand had not yet been created, and thus it had no U.S. market share. However, sometime in 2002 or early 2003, Claimants adopted a marketing strategy intended to take advantage of the allocable share provisions. They determined to limit the off-reservation[3] marketing of Seneca® cigarettes to a limited group of states, and to bring Grand River into compliance with those states on a "without prejudice basis." The states initially involved were North and South Carolina, Oklahoma, Arkansas, and Georgia. This strategy succeeded for several years.

18. As noted above, when the MSA was concluded in November 1998, small

[3] As used throughout this Award, the term "reservation" refers to those geographically delimited areas that, under the federal law of the United States, are recognized as pertaining to and being under the jurisdiction of federally-recognized Indian tribes or nations.

manufacturers outside the MSA regime had less than 0.4% of the total U.S. cigarette market. However, as the MSA was implemented, PMs raised their prices and were subject to the MSA's restrictions on advertising and other marketing practices. At the hearing, Claimants contended that the Original Participating Manufacturers ("OPMs") raised their prices far more than was required to meet the costs of MSA compliance in a deliberate effort to lose market share, because under the complex mechanism of the MSA, the ensuing loss of market share stood to reduce the OPMs' payments under the MSA in amounts greater than revenue losses resulting from declining market share. This argument largely rested upon inferences the Claimants drew from the OPMs' pricing behavior.

19. There followed a substantial reduction in PMs' sales and market share, and an increase in NPMs' sales and market share. There was undisputed evidence indicating that the total market share of NPMs like Grand River grew to 8.1% of the U.S. market in 2003. This threatened the states' revenues under the MSA, and also resulted in increased sales of lower-price cigarettes not subject to the MSA's restrictions on advertising, youth marketing and the like. The Parties disputed whether such factors related to health played any significant role in the states' subsequent actions. The Claimants contended that the states acted solely or primarily to protect their MSA revenues; the Respondent contended that considerations of public health were important motivating factors.

20. States participating in the MSA responded to the growth of NPMs' sales by intensifying efforts to enforce their escrow laws. In addition, late in 2001 and early in 2002, they began to enact "complementary legislation" (referred to by the Claimants as "contraband laws") to strengthen enforcement of the escrow laws. These statutes required state attorneys general to maintain lists of NPMs not in compliance with the escrow laws, and prohibited state stamping agents from placing tax stamps on cigarettes from non-complying manufacturers. Cigarettes not stamped for sale became subject to forfeiture as contraband.

21. Beginning in 2003, states also began to amend the escrow laws to repeal the allocable share provisions. The states came to regard these provisions, which authorize substantial rebates of escrowed funds to NPMs which concentrated their sales in a few states, as a "loophole," and the evidence indicated that 38 states had adopted amendments to "plug the loophole" by September 2004. As noted above, the Claimants denied that the allocable share provisions were a loophole, contending instead that they were deliberately included in the MSA to "level the playing field" between NPMs and exempt SPMs.

B. The Claimants

22. There is no dispute that Grand River and the three individual claimants are nationals of Canada. The record shows that the individual claimants, Messrs. Jerry Montour and Arthur Montour (who are not related) and Mr. Kenneth Hill, each have long experience in the tobacco business and have engaged in a variety of tobacco-related ventures in Canada and the United States. Mr. Jerry Montour has been since 1998 the

chief executive officer of Grand River and is (along with Mr. Hill) a controlling stockholder in the company. Mr. Hill is president of the company.

23. Grand River is a federally incorporated Canadian company created in 1996. Grand River manufactures tobacco products at its plant in Ohsweken, Ontario for sale in Canada and export to the United States, and is engaged in business ventures in Germany and in other countries as well. It is the largest employer on the Six Nations of the Grand River Territory in Canada.

24. Mr. Arthur Montour, who resides on the Seneca Nations Territory in upstate New York, is the sole owner of Native Wholesale Supply, a corporation created under the law of the Sac and Fox Nation. Throughout the relevant period, Native Wholesale Supply and a predecessor company, Native Wholesale Direct, purchased and imported tobacco products manufactured by Grand River from Canada, and then sold those products to wholesalers and retailers operating on Indian reservations at various locations in the United States.

25. The Claimants indicate that at some point, after studying the MSA, the escrow statutes and the contraband laws, they formulated a marketing strategy aimed at developing their off-reservation sales in a small number of states, primarily in the southern United States. In this connection, in June 2002, Grand River concluded a Cigarette Production Agreement with Tobaccoville USA, Inc., a U.S.-owned U.S. corporation, which is not a claimant here. Under that agreement, Grand River would manufacture Seneca® brand cigarettes to Tobaccoville's specifications, and Tobaccoville would have the exclusive right to distribute those cigarettes off-reservation in the United States. The evidence is not clear regarding the time at which these marketing decisions were made. Jerry Montour's first declaration indicates that it was at the beginning of 2003, but, as noted above, the agreement with Tobaccoville was concluded in June 2002.

26. The evidence indicates that this marketing strategy of concentrating off-reservation marketing in a small number of states, taking advantage of the allocable share features of the Escrow Statutes, initially was very successful, and that off-reservation sales of Grand River's cigarettes grew significantly. However, after the repeal of the allocable share amendments, off-reservation sales declined.

III. PROCEDURAL HISTORY

27. The procedural history of the case leading to the July 20, 2006 Decision on Objections to Jurisdiction is set out in that Decision,[4] and need not be repeated here. Matters since the Decision are described below.

A. Challenge to Professor Anaya

28. On March 30, 2007, Respondent wrote to Professor Anaya, indicating that it had recently learned of his service as counsel to the petitioners in the case of *Dann v.*

[4] Decision on Jurisdiction, ¶¶ 22-32.

United States before the Inter-American Commission on Human Rights and that he had recently appeared in an informal meeting before the Commission. The Respondent asked whether this was correct and requested "further information regarding any representation by you since 2002 of any party in any matter adverse to the United States." Because of administrative difficulties, Professor Anaya was not aware of this letter and did not immediately reply. On April 11, 2007, the Respondent lodged a challenge to Professor Anaya under Article 10(1) of the UNCITRAL Arbitration Rules, which govern this proceeding. The letter noted the fifteen-day requirement for bringing a challenge under Article 11(1) of the UNCITRAL Arbitration Rules.

29. On April 12, 2007, Professor Anaya wrote to explain the lack of immediate response to the March 30 letter, and requested additional time to comment. Subsequently, in a letter of April 16, 2007, he confirmed his recent representation as co-counsel in a meeting convened by the Inter-American Commission on Human Rights to discuss the U.S. Government's response to that Commission's recommendations relating to his client and other members of the Western Shoshone. He also described other activities—all of them involving human rights matters not pertaining to matters of international trade—which he thought the Respondent might in some way consider "adverse to the United States." However, Professor Anaya stated that in his view, the Respondent's request for information regarding any representations adverse to the United States went "beyond what is material to my independence or impartiality in the present arbitration."

30. There followed a series of letters and filings by the Parties setting out their views regarding the substance of the challenge, as well as further correspondence from Professor Anaya explaining his objections to the challenge. Professor Anaya argued, *inter alia*, that the case before the Inter-American Commission on Human Rights involved an indigenous land claim entirely unrelated to the issues at stake in the Grand River matter and that his involvement in the case had for some time been known to agents of the United States. The Respondent contended that the challenge should be allowed; the Claimants called for it to be rejected.

31. On October 23, 2007, the Deputy Secretary-General of ICSID notified Professor Anaya of ICSID's conclusion that the challenge was timely and that, "[w]ithout in any way questioning your integrity and competence as an arbitrator," representing or assisting parties in the proceedings before the Inter-American Commission on Human Rights "would be incompatible with simultaneous service as an arbitrator in the NAFTA proceedings." The Deputy Secretary-General accordingly asked Professor Anaya whether he intended to continue to represent or assist parties in the non-NAFTA proceedings. On October 25, Professor Anaya responded that he had already determined to cease his involvement in the proceedings before the Inter-American Commission on Human Rights upon his nomination to serve as the Special Rapporteur on indigenous peoples of the United Nations Human Rights Council. (His appointment to that position followed in May 2008.) On November 28, 2007, the Secretary-General of ICSID took note of Professor Anaya's action and notified him and the Parties that she had decided not to sustain the challenge. The Secretary-

General indicated in this regard that Professor Anaya's supervision of students in a clinical course relevant to their work with the Western Shoshone, other indigenous peoples and the UN Committee for the Elimination of Racial Discrimination was not such as to come within the ambit of Article 10(1) of the UNCITRAL Rules.

B. Exchange of Documents

32. As recorded in the Minutes of the Tribunal's First Session on March 31, 2005, "[t]he parties agreed that Article 3 of the International Bar Association's Rules on the Taking of Evidence ("IBA" Rules") shall govern the exchange of documents (excepting Article 3.12, regarding confidentiality) ... ."[5] Under Article 3, requests for documents must be directed to specific documents or to "a narrow and specific requested category of Documents." In each case, the requester must provide "a statement as to how the Documents requested are relevant to the case and material to its outcome."

33. On September 21, 2006, following its Decision on Jurisdiction, the Tribunal authorized the Parties to file requests for documents in accordance with Article 3 of the IBA Rules. The Tribunal directed that "[t]he parties must define the nature of the information sought, clearly and with particularity, and describe why it is relevant and how it is material."

34. On January 22, 2007, the Claimants filed their "First Request for the Production of Documents." The request was framed in the expansive language often found in discovery demands in U.S. domestic litigation. The Claimants sought twenty-seven broad classes of documents held by each of the states and territories of the United States. The first request sought "[a]ll documents concerning the negotiation, drafting, implementation, or enforcement of the MSA's provisions that relate to SPMs or NPMs." The other 26 requests were similarly phrased; the final request was for "[a]ll documents prepared by Respondent since January 1, 1997 that mention any of the Claimants, their products, or sales of their products." The Claimants sought "the original and all drafts of documents in paper (hardcopy form) or electronically stored information – including writings, drawings, graphs, charts, photographs, sound recordings, images and other data or data compilations stored in any medium." Claimants also made four requests for persons to be produced for examination on deposition regarding negotiation of the MSA and other matters.

35. Also on January 22, 2007, the Respondent filed a request for production of documents by the Claimants. The Respondent sought several identified documents, as well as classes of documents related to aspects of the Claimants' business operations, such as the volume of certain sales or transfers of Grand River's tobacco products. On February 6, 2007, the Claimants filed objections to certain of these requests, but agreed to provide certain documents, which were later provided. On February 28, 2007, the Respondent accepted the Claimants' offers of documents, subject to limited qualifications. The Parties apparently resolved any remaining

[5] Minutes of the First Session of the Tribunal (Mar. 31, 2005), ¶ 20.

issues related to the Claimants' production of documents directly and without recourse to the Tribunal.

36. On February 6, 2007, the Respondent filed objections to the Claimants' document request. *Inter alia*, these contended that the request ignored the IBA Rules' requirements, was "unspecific and overreaching," and "should be rejected in its entirety." The Respondent characterized the request as seeking "irrelevant, expansive and unspecified categories of documents that would be objectionable even in U.S. litigation, and which is entirely inappropriate in international arbitration."

37. On February 14, 2007, counsel for the Claimants informed the Tribunal that the Parties had agreed in principle that there should two further rounds of written submissions on document production, and requested the Tribunal's approval. On February 21, the Tribunal authorized these additional submissions. In its letter, the Tribunal stated that it "expects the parties to take careful account of, and be guided by, all relevant provisions of the IBA Rules," emphasizing Rules 3(a) and 3(b).

38. On February 28, 2007, the Claimants filed a Second Submission on the Production of Evidence, contending that their initial document requests satisfied the IBA Rules and that certain of Respondent's objections argued issues going to the merits. The Claimants also suggested that many of their requests could be satisfied by documents in the possession of the National Association of Attorneys General. On March 30, 2007, the Respondent responded to the Second Submission, reiterating that the Claimants' requests did not comply with Rule 3 of the IBA Rules and were overly broad and otherwise objectionable.

39. After the Tribunal had completed its deliberations related to document disclosure, but before it issued an order, the challenge to Professor Anaya was filed. On May 4, 2007, the Tribunal asked the Parties whether in the circumstances either would object to issuance of a procedural order on discovery while the challenge was pending. There was no objection.

40. On May 14, 2007, the Tribunal transmitted to the Parties a sixteen paragraph Procedural Order on document production. The Tribunal declined the Claimants' requests for twenty-six broad categories of documents and their requests for interrogatories, as not in conformity with the IBA Rules. In response to the twenty-seventh request (seeking copies of all exhibits on which the Respondent intended to rely), the Tribunal ordered the Claimants to identify specific documents previously referred to in the Respondent's pleadings that they sought, and the Respondent to provide them.

41. The May 14, 2007 Procedural Order further directed each Party to deliver to the other (and to the Tribunal) within thirty days all documents in its "possession, custody or control" which the Party considered "relevant and material to the outcome of the case" and which it considered "should not be excluded from production for any of the reasons specified in Article 9.2 of the IBA Rules." Paragraph 12 directed the Parties

to agree on measures to protect propriety or confidential information. The Parties agreed on a confidentiality agreement on June 19, 2007.

42. Pursuant to the Procedural Order, and as noted above, on June 20, 2007, each Party provided large quantities of documents to the other Party.

43. On October 4, 2007, the Claimants filed a ten-page submission criticizing the Respondent's document production. The Claimants alleged that the Respondent's production was disorganized and incomplete; did not include large classes of documents it had requested; and included hundreds of pages of duplicate documents. The Claimants also protested that the Respondent had failed to provide "documents which Claimants have requested in and the MSA states have produced in other cases throughout the country." (The Claimants did not relate this observation to IBA Rule 3(c)'s requirement that a document request include "a statement that the documents requested are not in the possession, custody or control of the requesting party.") The Claimants further complained that the Respondent declined to provide certain confidential business information, notwithstanding the June 19, 2007 confidentiality agreement. They requested the Tribunal to issue a further order directing the Respondent to produce several broad classes of documents "including public documents or documents in the public domain."

44. On October 17, 2007, the Respondent requested that the Tribunal take no further action on additional document production pending resolution of the challenge to Professor Anaya. The Tribunal agreed. Following resolution of the challenge, on December 14, 2007, the Respondent responded to the Claimants' October 4, 2007 submission, describing the steps it had taken to comply with the Tribunal's Procedural Order within the required period, and disputing the Claimants' request for a further order. The Respondent did not agree that the June 19, 2007 confidential agreement entitled the Claimants to receive certain confidential business information that it viewed as "highly sensitive, company-specific business information of Grand River's competitors." The Respondent offered to provide a privilege log regarding the material involved. On January 2, 2008, the Claimants reiterated their view that the June 2007 confidentiality agreement precluded a privilege claim by Respondent, and affirmed their October 4, 2007 requests for an order directing additional document disclosure.

45. On January 8, 2008, the Tribunal rejected the Claimants' requests for additional discovery. The Tribunal also requested the Parties' views regarding further scheduling in the case, and directed the Respondent to submit the privilege log by January 18, 2008. The letter set out a schedule for prompt resolution of the disputed privilege issue. On January 18, 2008, the Respondent wrote that it had been advised that the documents at issue in the privilege claim recently had been produced to Grand River in U.S. domestic litigation. The Respondent accordingly provided additional copies of the documents to the Claimants, with copies to the Tribunal.

46. On January 25, 2008, the Claimants provided suggestions regarding future scheduling and again disputed the adequacy of the Respondent's document production. The

Claimants protested that "while thousands, if not tens of thousands, of other documents have already been produced by Respondent, through its state governments in domestic court proceedings, none of those same documents have been produced in this arbitration." The Claimants averred that the Respondent was acting in bad faith by not producing in this NAFTA arbitration all of the documents previously disclosed by U.S. states in U.S. court proceedings related to the MSA, and asked the Tribunal to order the Respondent to produce in these NAFTA proceedings "all documents that have been or will be produced to Claimants (or any one of them) in the domestic proceedings."

47. On January 28, 2008, the Tribunal wrote to the Parties establishing the schedule for the further proceedings. It stated that "[t]he Tribunal now closes the question of production of documents. The parties are instructed, as specified below, to file such documents and correspondence as they deem appropriate. In this regard, each party is reminded that any un-explained non-production of relevant documents would be a matter of raising of inferences."

48. On January 29, 2008, the Claimants filed a new "urgent" document request for "the data and calculations used by the Respondent's states to calculate the payment burdens imposed on exempt and non-exempt manufacturers under the Master Settlement Agreement and its escrow legislation." The Claimants represented that without this information "it will be extremely difficult for Claimants and their experts to present Claimants' claims."

49. On February 4, 2009, the Tribunal responded by reiterating that "[a]s stated in the Tribunal's letter of January 28, 2008, the question of production of documents is closed."

50. On March 28, 2008, the Respondent informed the Tribunal that additional documents were being provided to the Claimants, several of which were already in the Claimants' possession following discovery proceedings in U.S. courts. These included updated versions of reports by PricewaterhouseCoopers and a report prepared by the Brattle Group. These documents apparently were prepared in connection with separate arbitral proceedings between the states and the Participating Manufacturers under the MSA. On April 6, 2008, the Claimants protested the timing of this disclosure, which they asserted was unfair and done for purely tactical reasons close to the deadline for filing their Memorial. Claimants stated that one of them (presumably Grand River) had possessed some of these documents for over a year, but was unable to use them in this arbitration because of confidentiality obligations imposed in other proceedings. The Claimants concluded by requesting an unredacted copy of the Brattle Group report.

51. On April 9, 2008, the Respondent wrote to dispute the Claimants' claim that it had acted improperly, noting that it had produced the PricewaterhouseCoopers reports on the day the National Association of Attorneys General released them to the United States. The Respondent also objected to the request for an unredacted copy of the Brattle Group report, which it said had not been released in unredacted form "in

multiple wide-ranging document productions conducted under expansive U.S. discovery rules, including Grand River's ongoing New York litigation."

52. On April 18, 2008, the Tribunal wrote to the Parties referring to its letters of January 28 and February 4, 2008 and stating for the third time that "the question of production of documents is **closed**" (emphasis in original).

C. Schedule of Pleadings and Hearing

53. On January 28, 2008, the Tribunal set a schedule for further proceedings in the case that would have culminated in a hearing on February 2-13, 2009. (As that schedule was not maintained subsequently, it is not reproduced.) Thereafter, the schedule was revised several times, primarily in response to the Claimants' requests for additional time. In the event, the Claimants' Memorial was filed on July 10, 2008; the Respondent's Counter-Memorial on December 22, 2008; the Claimants' Reply on March 3, 2009; and the Respondent's Rejoinder on May 13, 2009. A hearing in the case scheduled for June 2009 had to be rescheduled due to the indisposition of the Chairman of the Tribunal.

54. The hearing could not be rescheduled during 2009 due to multiple scheduling conflicts, so the Tribunal sought to reschedule it in February 2010. The Tribunal learned of a difficulty in this regard in an August 7, 2009 letter from the Claimants' counsel, advising, *inter alia*, that two of the individual claimants had been indicted by the U.S. Department of Justice on criminal charges "associated with the distribution of Native American tobacco products and statements made in connection therewith." On August 14, another of the Claimants' counsel informed the Tribunal that Mr. Arthur Montour and Mr. Kenneth Hill had been indicted, and that Mr. Montour's trial might be adjourned until after the projected February hearing. In that case, "absent an agreement by Respondent not to seek the testimony of Mr. Montour," the Claimants would be forced to seek an adjournment. (The Respondent previously gave notice of its intent to cross-examine Mr. Montour.)

55. On August 25, 2009, the Tribunal wrote the Parties setting the hearing for February 1-12, 2010, concluding that "[t]he Tribunal thanks the Claimants for advising of their circumstances but wishes to emphasize that the dates fixed above are firm."

56. On December 4, 2009, the Claimants requested that the Tribunal issue an order to protect Mr. Montour's rights in respect of his cross-examination at the hearing. Claimants asked either that the hearing be postponed, or that the Tribunal determine that no adverse inferences would be drawn if Mr. Montour did not appear for cross-examination. On December 7, 2009, the Respondent objected to any rescheduling of the hearing; averred that it did not foresee any overlap between the issues raised by Mr. Montour's indictment and its planned cross-examination; and noted that in the event of any overlap, the Claimants could object at the hearing.

57. On December 14, 2009, the Tribunal reaffirmed the dates of the February hearing, stating that it expected Mr. Montour to be present for cross-examination. The

Tribunal stated further that "[i]f any questions directed to him at that time raise matters that in counsel's opinion may be prejudicial to his position in the pending criminal case, counsel may object, indicating the reason for the objection. The Tribunal will then make an appropriate ruling, always bearing in mind the need to avoid any prejudice to his position in the criminal case." As it happened, Mr. Montour was cross-examined by Respondent at the February 2010 hearing. There was no objection raised that any of the questions might prejudice his position in the criminal case.

58. The hearing got underway as scheduled on Monday, February 1, 2010 at the premises of the World Bank in Washington DC. Counsel and other persons present at the hearing are listed elsewhere in this Award. The hearing proceeded without interruption through Thursday, February 4. On February 5, the World Bank was closed and the hearing postponed on account of a heavy snowfall in the Washington DC region; between two and three feet of snow fell that day. The World Bank remained closed over the weekend and into the subsequent week. On February 9 and 10, a second heavy snowstorm struck the area. In the face of adversity, the Tribunal's Secretary (then Ms. Katia Yannaca-Small) was able to make alternative hearing arrangements with the consent of all concerned at a hotel in Washington DC. The hearing resumed on Friday, February 12 and concluded on Sunday, February 14.

D. Article 1128 and Non-Disputing Party Submissions

59. Pursuant to NAFTA Article 1128, Canada submitted a statement of its views regarding the interpretation of NAFTA's Article 1105 on January 19, 2009. Canada's submission stated, *inter alia*, that (1) pursuant to the Free Trade Commission's July 31, 2001 Notes of Interpretation, a violation of the Jay Treaty as alleged by the Claimants does not establish a violation of NAFTA Article 1105(1); and (2) ILO Convention 169 and the U.N. Declaration on the Rights of Indigenous Peoples do not constitute customary international law, and so do not fall within the ambit of Article 1105(1).

60. The Tribunal did not receive any requests to be heard from non-disputing parties prior to the deadline it established for such requests. The Tribunal subsequently received a letter dated January 19, 2009 from Mr. Phil Fontaine, National Chief of the Assembly of First Nations. Mr. Fontaine's letter endorsed the UN Declaration on the Rights of Indigenous Peoples "and the customary international law principles if reflects," and he called for indigenous rights to be "taken into account whenever a NAFTA arbitration involves First Nations investors or investments." Mr. Fontaine applauded the success of the Claimants' venture, commended their service to the community, and expressed disappointment at the Claimants' treatment by U.S. state officials. The Claimants included the National Chief's letter as a supporting exhibit to their March 2009 Reply. In that context, it was read and considered by the Tribunal.

IV. THE APPLICABLE LAW

A. The Question of Precedent

61. The Parties' briefs and arguments cited awards in many other NAFTA and non-NAFTA investment cases. These often helped to illuminate legal issues presented by the present claims. Being rooted in their specific facts, NAFTA arbitral awards are not binding precedents (Article 1136(1)) of NAFTA). But on jurisdictional aspects, NAFTA awards are more relevant and appropriate than decisions in non-NAFTA investment cases. The Tribunal has given careful consideration to the reasoning set out in the cited authorities – both NAFTA and non-NAFTA investment cases; however, it has reached its decision based on its own assessment of the facts and the applicable law.

B. Construing and Applying NAFTA

62. Under NAFTA Article 102(2), NAFTA must be interpreted and applied "in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law." Under Article 1131(1), the Tribunal "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." Under Article 1131(2), "[a]n interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."

63. The Parties debated whether key terms in NAFTA's Chapter 11, such as "investment" or "enterprise," should be construed in a broad way favoring the existence of a protected investment. They also disagreed regarding the scope of the NAFTA obligation to "take into account" other rules of international law. The Claimants urged a broad understanding of the scope of "investment" and of the obligation to take into account other legal rules, urging that this obligation brings into the process of interpretation human rights norms and customary rules relevant to indigenous peoples. The Respondent disputed the Claimants' broad readings of these NAFTA provisions.

64. The Parties agreed that NAFTA is an international agreement to be construed in accordance with the rules of interpretation reflected in the Vienna Convention on the Law of Treaties (VCLT).[6] This is in harmony with the approach of many other

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[6] The VCLT's rules of interpretation are set out in Article 31 and 32. These provide, in relevant part:

> *Article 31*
> *General rule of interpretation*
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> ...

NAFTA Tribunals.[7] However, they did not agree regarding application of the VCLT's rules.

65. The Claimants first urged that NAFTA's definitions and the Respondent's obligations must be construed in accordance with NAFTA's object and purpose as indicated in the Preamble and Article 102(1). Citing these provisions and the awards of some past NAFTA tribunals, the Claimants maintained that Chapter 11's provisions "are to be construed in a broad and remedial manner consistent with the object and purpose of NAFTA. As such, when interpreting the plain language of a provision, in context, if a tribunal is presented with two equally plausible meanings it should choose the one most in accord with the objectives of promoting investment and competitive opportunity."

66. The Claimants urged further that in construing Chapter 11, the Tribunal must take into account other treaties between the United States and Canada affecting the Haudenosaunee, customary law rules affecting indigenous peoples, and "fundamental human rights norms, including but not limited to *jus cogens* principles." They particularly stressed Article III of the 1794 Jay Treaty, as affirmed in the 1814 Treaty of Ghent. In the Claimants' view, Article III assured their right to carry on their cigarette business free from interference by the United States, and in particular, by the states of the United States.

67. The Claimants also invoked several propositions they viewed as reflecting customary international law. These included "an evolving norm of customary international law, [embodying] the duty of States to respect and protect the rights and interests of First Nations across borders, in good faith," a customary rule requiring States "to honor obligations undertaken with respect to First Nations," an obligation "to respect the rights of indigenous peoples to occupy and enjoy their traditional territories," and a principle of "constant promotion and protection for First Nations members" in respect of traditional commercial activities carried on in their territories across borders. The Claimants also invoked the jurisprudence of the Inter-American Court of Human Rights in contending that their interests should be assessed in harmony with the communal property rights of indigenous peoples.

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3. There shall be taken into account, together with the context:
(*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(*c*) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

[7] *See Canadian Cattlemen for Fair Trade v. United States,* Award on Jurisdiction (Jan. 28, 2008) *("Canadian Cattlemen")*, ¶ 45 ("There is no dispute that the Vienna Convention on the Law of Treaties is applicable to the NAFTA.").

68. The Respondent replied that "relevant rules" under the VCLT cannot override agreed treaty text and the Parties' agreements regarding its interpretation. It stressed in this regard the Free Trade Commission's July 31, 2001 Notes of Interpretation, which provide that breach of another agreement does not result in a violation of Article 1105. The Respondent also contended that the Claimants' arguments regarding the Jay Treaty disregarded both the treaty's text and consistent subsequent practice of both the United States and Canada interpreting it. Further, in the Respondent's view, the Claimants' arguments invoking customary international law cited principles or documents that lacked customary status, or mischaracterized the operative principles.

C. The Tribunal's Conclusions Regarding Applicable Law

69. In the Tribunal's view, terms used in NAFTA such as "investment" should not be construed "broadly" or "narrowly," or in any way other than in accordance with their plain meaning and the normal rules of treaty interpretation as indicated by the Vienna Convention on the Law of Treaties. The Tribunal notes in this regard that NAFTA involves a balance of rights and obligations, and does not point unequivocally in a single direction. While NAFTA's preamble speaks of promoting investment, it also affirms the need to preserve the NAFTA Parties' "flexibility to safeguard the public welfare."

70. The Tribunal also believes that several of the non-NAFTA cases invoked by the Claimants supporting a broad conception of the scope of "investment" have little value in construing NAFTA. For example, several of those cited involved straightforward forms of investment, or facts that do not support the proposition that "investment" is necessarily to be construed expansively.

71. The Tribunal understands the obligation to "take into account" other rules of international law to require it to respect the Vienna Convention's rules governing treaty interpretation. However, the Tribunal does not understand this obligation to provide a license to import into NAFTA legal elements from other treaties, or to allow alteration of an interpretation established through the normal interpretive processes of the Vienna Convention. This is a Tribunal of limited jurisdiction; it has no mandate to decide claims based on treaties other than NAFTA. As the *Methanex* Tribunal warned, "interpreting Article 1131(1) to create a jurisdiction extending beyond Section A of Chapter 11 would indeed be to transform it ... 'into an unqualified and comprehensive jurisdictional regime, in which there would be no limit ratione materiae to the jurisdiction of a tribunal established under" Chapter 11

NAFTA.'"[8] The Tribunal is particularly mindful in this regard of the Free Trade Commission's directive that a violation of an obligation under another treaty does not give rise to a breach of Article 1105.

72. The Claimants' contentions regarding the Jay Treaty and contemporary conventional and customary principles concerning indigenous peoples are further discussed below, in connection with the Claimants' specific NAFTA claims.

V. JURISDICTION

A. The Respondent's Prior Objections to Jurisdiction

73. In the proceedings leading to the Tribunal's 2006 Decision on Jurisdiction, the Respondent raised five objections to the Tribunal's jurisdiction. It contended that:

- the claims are time barred under NAFTA Articles 1116(2) and 1117(2);

- the claims are not within the scope and coverage of NAFTA Chapter 11;

- Mr. Arthur Montour had not submitted sufficient proof of Canadian nationality;

- claims are included with respect to tax measures barred by NAFTA Articles 1105(1) and 1110; and

- claims are included that were not specified in the Claimants' Notice of Intent, and that were not properly submitted under NAFTA Articles 1119 and 1120.

74. The Tribunal considered the first objection—whether the claims were submitted in a timely fashion satisfying NAFTA Articles 1116(2) and 1117(2)—as a preliminary matter. Following extensive written pleadings and a three-day hearing in March 2006, the Tribunal made the following decision in July 2006.

> The Claimants' claims of breach of the North American Free Trade Agreement with respect to:
>
> — the Master Settlement Agreement,
>
> — the Escrow Statutes (as they existed prior to March 12, 2001), and

[8] *Methanex Corp. v. United States*, Final Award on Jurisdiction and Merits (Aug. 3, 2005), *("Methanex Final Award")*, Part II, Chapter B, ¶ 5, quoting *Access to Information under Article 9 of the OSPAR Convention (Ireland v. United Kingdom)*, ¶ 85, 42 ILM 1118, 1136. *See Biloune and Marine Drive Complex v. Ghana*, UNCITRAL, Award (Oct. 27, 1989), 95 ILR 184, 203. (International law establishes the minimum standard of treatment and fundamental human rights. However, "it does not follow that ... this Tribunal is authorized to deal with allegations of violations of fundamental human rights.")

— any related enforcement measures adopted or implemented by U.S. states prior to March 12, 2001, with respect to cigarettes manufactured or distributed by any of the Claimants, and sold at retail off-reservation,

are hereby dismissed with prejudice as barred by Articles 1116(2) and 1117(2) of the North American Free Trade Agreement. (Any such claims with respect to retail sales on reservation will be considered at the stage of the merits.)

104. The Claimants' oral motion to add claims with respect to the allocable share amendments is granted. Accordingly, the Claimants' claims of breach of NAFTA directly arising out of the adoption and implementation of the allocable share amendments are reserved for consideration on the merits.

105. The Respondent's remaining jurisdictional objections and each Party's claims for costs are reserved, and will be dealt with in subsequent proceedings on the merits.[9]

75. The July 2006 Decision on Jurisdiction thus resolved the first of the Respondent's jurisdictional objections. The third was resolved by clarifications provided by Mr. Arthur Montour; the Parties agree that he is a national of Canada for purposes of NAFTA. The fifth was resolved by the Tribunal's decision to allow the Claimants to amend their claim to include claims regarding the allocable share amendments. The second and fourth objections—that the claims fall outside the scope of NAFTA's Chapter 11, and that certain of them concern tax measures and are barred by NAFTA Articles 1105(1) and 1110—are addressed below.

B. The Jurisdictional Gateway of Article 1101

76. As other NAFTA tribunals have noted,[10] NAFTA's Article 1101 defines the field of application of NAFTA's Chapter 11, and operates as "gateway" to NAFTA arbitration. In relevant part, Article 1101 provides:

1. This Chapter applies to measures adopted or maintained by a Party relating to:

(a) investors of another Party; and

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

77. Thus, a NAFTA tribunal only has jurisdiction regarding (1) "measures" (2) "adopted or maintained by a Party." Further, these measures must (3) "relate to" either (4) "investors of another Party" or (5) "investments of investors of another Party in the territory of the Party."

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[9] Decision on Jurisdiction, ¶¶ 103-105.

[10] *See Mondev International Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002) ("*Mondev*"), ¶ 43; *Methanex Corp. v. United States,* First Partial Award (Aug. 7, 2002), ¶ 106; *Canadian Cattlemen*, ¶¶ 118 & 206 (quoting *id.*).

78. There is no dispute as to the first two elements. The Parties agree that the actions by various states of the United States disputed by the Claimants—the repeal of the allocable share amendments, and various enforcement measures by state authorities under the complementary legislation—constitute "measures," and that they were "adopted or maintained by a Party." While the measures were adopted by states of the United States and not by the national government, the Respondent United States of America accepts that it bears responsibility for them under NAFTA.

79. Both Parties agree that Grand River Enterprises Six Nations, Ltd. and the three individual Claimants are nationals of Canada. They also agree that Claimant Arthur Montour has an investment in the United States. The record demonstrates that he owns a substantial tobacco distribution business in the United States as well as the Seneca® trademark, and that he has made substantial marketing efforts and expenditures to promote the brand in the United States.

80. However, the Respondent contends that the three remaining Claimants do not have an investment in the United States falling under NAFTA Chapter 11. It also denies that the contested measures "relate to" Arthur Montour. As to the first point, there is no dispute that Grand River is a successful Canadian manufacturer of large quantities of cigarettes that are exported to the United States for ultimate sale to U.S. consumers. The issue is whether Grand River and its stockholders Jerry Montour and Kenneth Hill have an investment in the United States centered on the development and marketing of Grand River's cigarettes for sale in U.S. markets (as the Claimants contend), or whether they are instead a successful Canadian manufacturer and exporter of cigarettes without any such investment (as the Respondent contends).

C. Do Jerry Montour, Ken Hill, and Grand River Enterprises Have a Qualifying Investment?

81. International investment tribunals have often considered whether particular business or economic relationships or situations constituted "investments" for purposes of the ICSID Convention or particular regional and bilateral investment treaties. Many of these cases involved treaties containing broad and sometimes open-textured definitions of investment.

82. NAFTA's Article 1139 is neither broad nor open-textured. It prescribes an exclusive list of elements or activities that constitute an investment for purposes of NAFTA. As the Claimants' expert Professor Mendelson pointed out, this definition is exclusive and not illustrative. "Investment" is defined by Article 1139 to mean in relevant part:

> (a) an enterprise;
>
> ...
>
> (d) a loan to an enterprise
>
> (i) where the enterprise is an affiliate of the investor, or

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

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

...

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

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

(i) contracts involving the presence of an investor's property in the territory of the Party ... or

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

but investment does not mean,

(i) claims to money that arise solely from

(i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or

(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or

(j) any other claims to money,

that do not involve the kinds of interests set out in subparagraphs (a) through (h);

83. NAFTA Article 1139 defines enterprise to mean "an 'enterprise' as defined in Article 201 (Definitions of General Application), and a branch of an enterprise." Article 201, in turn, defines "enterprise" to mean:

> any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association ... .

84. Whether a given activity constitutes an investment for purposes of Article 1139 has not figured prominently in past NAFTA cases. In cases involving each of the three NAFTA Parties, the economic relationships or transactions at issue typically have involved some presence by the foreign investor in the territory of the respondent country in the form of a local company, a locally incorporated subsidiary or affiliate,

or other form that fits without great difficulty within some portion of Article 1139's definition. Hence the question of whether there was an investment typically has not arisen, or has been readily dealt with.[11]

1. The Cigarette Plant at Ohsweken

85. This case poses an unusual situation. As relevant here, Grand River's business is centered on the manufacture of cigarettes at Grand River's cigarette plant at Ohsweken in Canada and their sale and export to two distributors in the United States. The three Grand River Claimants' most obvious and substantial investment—the manufacturing plant—is in Canada. One of the distributors—Arthur Montour, the fourth Claimant in this case—clearly is an investor with an investment in the United States. The other distributor—Tobaccoville—is an independent U.S. corporation that purchases Grand River's cigarettes and distributes them off reservation under the terms of a contract with Grand River. It is a U.S. owned and controlled entity. It is not, and could not be, claimed as part of the Claimants' investment.

86. The Claimants' position regarding the investment in the cigarette plant at Ohsweken, Ontario evolved over the course of the proceedings. The Claimants' pleading described their investment as including "millions of dollars ... to purchase truly state of the art equipment" for the manufacturing plant. The Claimants initially included $38 million (later reduced to $24 million) in lost investment in equipment in Ohsweken in calculating their damages claim. However, at the hearing, the Claimants' valuation expert expressed reservations about the accuracy of even the reduced figure, and the Claimants withdrew their $24 million claim for damages in respect of their plant in Canada in their closing arguments at the hearing.

87. Prior NAFTA tribunals have held, following extensive briefing and argument, that they do not have jurisdiction over claims that are based upon injury to investments located in one NAFTA Party on account of actions taken by authorities in another. Chapter Eleven would be applicable only to investors of one NAFTA Party who seek to make, are making, or have made, an investment in another NAFTA Party: absent those conditions, both the substantive protection of Section A and the remedies provided in Section B of Chapter Eleven are unavailable to an investor. Thus, the tribunal in *Canadian Cattlemen* found it lacked jurisdiction over a claimed NAFTA breach "where all of the Claimants' investments at issue are located in the Canadian portion of the North American Free Trade Area and the Claimants do not seek to make, are not making and have not made any investment in the territory of the United

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[11] *See Pope & Talbot Inc. v. Canada*, Interim Award (June 26, 2000) ("*Pope & Talbot Interim Award*"); *Metalclad Corp. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000) ("*Metalclad*"); *S.D. Myers v. Canada*, First Partial Award (Nov. 13, 2000) ("*S.D. Myers*"); *Mondev*; *Marvin Feldman v. Mexico*, Case No. ARB(AF)/99/1, Award (Dec. 16, 2002) ("*Feldman*"); *International Thunderbird Gaming Corporation v. Mexico,* UNCITRAL, Final Award (Jan. 26, 2006) ("*Thunderbird Gaming*"); *United Parcel Service of America v. Canada,* Award (May 24, 2007) ("*UPS*"); *Glamis Gold, Ltd. v. United States*, (June 8, 2009) ("*Glamis Gold*").

States of America."[12]

88. *Bayview Irrigation District v. United Mexican States* is similar. There, U.S. water right holders in the state of Texas alleged that water use authorized in Mexico impaired their U.S. investments. The claim was dismissed on the ground that NAFTA did not provide rights or protections "to investors whose investments are wholly confined to their own national states."[13] It was held in that case that a salient characteristic of an investment covered by the protection of NAFTA Chapter Eleven would be that the investment is primarily regulated by the law of a state other than the state of the investor's nationality, and that this law is created and applied by that state which is not the state of the investor's nationality.[14]

89. The Tribunal finds the reasoning of these decisions persuasive here. The Claimants' investment in Grand River's cigarette plant in Canada does not satisfy the jurisdictional requirements of a claim under NAFTA Article 1101.

2. Was There an Enterprise Operating in the United States?

90. In their written materials and at the hearing, the Claimants also urged that the three individual Claimants and Grand River together constituted an "enterprise," the first form of investment specified by Article 1139, that operated in the United States.

91. There was limited evidence regarding this and other jurisdictional arguments. The individual Claimants' declarations contain similar descriptions of cooperative efforts to promote the sale of Grand River's cigarettes in the United States in what the Claimants' Memorial described as the "undocumented manner customary among indigenous peoples." The Claimants also introduced a small group of documents that in their view showed the existence of an enterprise. These included a March 15, 1999 "Cigarette Manufacturing Agreement" by which the predecessor company to Native Wholesale Direct authorized Grand River to manufacture Senecas®; Grand River's distribution agreement with Tobaccoville, the U.S.-owned corporation that handled distribution for off-reservation sales; and documents showing Arthur's Montour's ownership of the Seneca® trademark.

92. These documents and the asserted indigenous customary practices do not support the existence of an enterprise as defined by NAFTA Articles 1139 and 201. These Articles refer to some form of business association with its own juridical personality constituted or organized under applicable law, rather than mere mutually beneficial business, contractual, or culturally-rooted relations.

93. On their face, the first two contracts just mentioned indicate arm's length negotiations between unrelated entities in the tobacco business. Paragraph 8 of the 1999 Cigarette

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[12] *Canadian Cattlemen*, ¶ 233.

[13] *Bayview Irrigation District v. Mexico*, ICSID Case No. ARB(AF)/05/1 (June 19, 2007), ¶ 103.

[14] *Id.*, ¶¶ 98-99.

Manufacturing Agreement licenses Grand River to use the Seneca® trademark "for the sole purpose of manufacturing and delivery of the brands." The licensing and sales agreement between Grand River and Tobaccoville, its U.S. off-reservation distributor, provides that Grand River will manufacture cigarettes to Tobaccoville's specifications and ship them from Canada at Tobaccoville's order. This shows a manufacturing and sales relationship between Grand River and an unrelated U.S. company, but it is not shown how this evidences an enterprise. The documents related to the Seneca® trademark show ownership by Native Wholesale Supply, and corroborate that Arthur Montour had an investment in the United States (which Respondent admits). They do not indicate any relevant interest in that trademark on the part of the other three Claimants. The assertions of undocumented understandings "customary among indigenous peoples" (sic) are too vague and lacking in evidentiary support to make out an enterprise from the record.

94. Other evidence is at variance with the proposition that Grand River and its stockholders jointly constituted and maintained an enterprise in the United States. In an affidavit in U.S. court proceedings, Claimant Steve Williams, the President of Claimant Grand River, emphasized the absence of connections between Grand River and the United States.

> 4. ... Grand River itself does not sell any cigarettes in the United States, nor does it sell any cigarettes to consumers located in the United States.
>
> 5. Grand River does not maintain any place of business in any state. It has no personnel, office, real estate, or sales agents in any state. GRE itself does not advertise or solicit in any state. It does not have any telephone listing in any state.[15]

95. In other U.S. court proceedings, Mr. Williams emphasized Grand River's position as a Canadian manufacturer and exporter.

> Grand River is a Canadian company with its principal place of business on the Grand River Reservation in Canada. Grand River produces and packages Seneca® cigarettes for Native Wholesale Supply ("NWS") and Tobaccoville, USA, Inc. ("Tobaccoville") pursuant to a limited use license and manufacturing agreement. The Seneca® cigarettes produced by Grand River for NWS and Tobaccoville are, and have been sold at all times on the F.O.B. basis, with title and risk of loss transferring to these third parties at Grand River's facility in Ohsweken, Canada. These cigarettes have been at all times produced, packaged, and shipped under the strict instruction and requirements of NWS and

[15] Affidavit of Steve Williams in Support of Grand River's Motion for Summary Judgment, *Grand River Enterprises v. King* (D.C. S.D.N.Y), (Aug. 12, 2009).

Tobaccoville.[16]

96. Mr. William's testimony was reinforced by an affidavit filed in administrative proceedings in the state of South Carolina by Larry Phillips, President of Tobaccoville, the sole U.S. distributor of Grand River's cigarettes off reservation. Mr. Phillips testified there, *inter alia,* that all Seneca® cigarettes are manufactured at Grand River's plant in Canada and that:

> GRE [Grand River Enterprises] manufactures Tobaccoville's off-reservation Seneca brand cigarettes according to blend specifications and ingredients provided by Tobaccoville, and to meet specific orders placed by Tobaccoville. Tobaccoville has at all times provided the blend specifications for the off-reservation Seneca cigarettes to GRE.[17]

97. Mr. Phillips testified further that:

> All of GRE's sales to Tobaccoville take place in Canada, and Tobaccoville takes delivery of the cigarettes in Canada. After GRE has sold the cigarettes to Tobaccoville in Canada, Tobaccoville imports them into the United States, where they are resold. GRE does not sell any cigarettes in the United States, and has no input into where sales are made, to whom, in what volumes, or the pricing. GRE sells only in Canada.[18]

98. The Claimants' Memorial raises a further question as to whether the Claimants were collectively engaged in an enterprise in the United States. It indicates that the Claimants structured their business to minimize tax liability in both the United States and Canada, and that this was only possible if they did not create a formal partnership or joint venture. In response, the Respondent submitted the expert opinion of Professor Joseph Isenbergh, concluding that under U.S. tax law, Grand River, Jerry Montour and Kenneth Hill could avoid U.S. taxation only if they were not engaged in a joint venture, partnership or limited partnership. The Claimants' Reply dismissed this as "beside the point," but did not address the substantive point that claiming immunity from U.S. taxes on U.S.- source income would be inconsistent with involvement in a juridically distinct enterprise doing business in the United States.

99. The Claimants' Memorial did not address Article 201's requirement that an enterprise be "constituted or organized under applicable law." This issue was first addressed in the Reply Memorial, which contended that the Seneca Nation of Indians Business Code ("the Code") was the relevant applicable law, and that the Claimants constituted

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[16] Affidavit of Steve Williams in Support of Defendant's Motion to Dismiss or for a Stay, *Kansas v. Grand River Enterprises* (D.C. Kan 2008) (Case. No. 08C207), ¶15, quoted in Respondent's Counter-Memorial, p. 33.

[17] Affidavit of Larry Phillips, in *Tobaccoville USA, Inc. v. McMaster*, S. Car. Admin. Law Ct., No. 2007-ALJ-30-0198-CC, Oct. 11, 2007, U.S. Counter-Memorial Exhibits, Vol. 9, Tab 155, ¶ 3.

[18] *Id.*, ¶ 14.

and operated their venture under it.

100. The Council of the Seneca Nation of Indians adopted the Code in 1988. Pursuant to Article 1-102, the Code's rules "shall govern the conduct of business operations within the exterior boundaries of the Seneca Nations Reservations," and "shall include traditional custom and practice." Article 1-102 also provides the procedure for determining tribal law or custom: "[w]here doubt exists as to such custom, the advice of tribal elders familiar with tribal custom will be requested. Proof of the existence of a tribal law or custom shall be by presentation of evidence showing the custom to exist by a preponderance of the evidence."

101. The Claimant's Reply cited Article 1-102, which refers to "traditional customs and practice" and Article 1-105, which provides that "Seneca laws and customs not in conflict with the laws of the United States are to govern civil matters on Seneca nation territory" as the law applicable to business operations. In the Claimants' view, they constituted and engaged in an *enterprise* under Seneca law within the meaning of these provisions. In support of this view, the Claimants' Reply included the expert opinion of Professor Maurice Mendelson QC, who concluded that the Claimants' relationships constituted an *enterprise* under the Seneca Business Code. In addition to Articles 1-102 and 1-105, Professor Mendelson cited other provisions of the Code relating to the Peacemakers Court's jurisdiction and to the business license system.

102. The Tribunal recognizes Professor Mendelson's expertise in public international law. However, as his opinion acknowledges, he is not expert in either U.S. domestic law or the Seneca Business Code. That Code contains no provisions dealing with constituting *enterprises*. Articles 1-102 and 1-105 are a general incorporation of Seneca Laws and customs, and do not establish by their terms that the Claimants constituted an *enterprise* for purposes of NAFTA. In response to a question from the Tribunal, the Claimants' counsel stated that the Claimants tried to obtain the views of a Seneca expert to provide an opinion on relevant Seneca law and custom for the Tribunal's benefit, but that they were ultimately not able to do so, for reasons that remain unclear.

103. All that appears in the record in this regard are the Claimants' general assertions about the existence of Seneca law and custom, without any specific evidence or even any proffered articulation of relevant elements of Seneca law and custom by which business enterprises or associations may be established. The Tribunal is respectful of the cultural patterns that inform business relations among First Nations peoples, to which the Claimants repeatedly referred in their written submissions and during the hearing. It is likewise respectful of Seneca law and custom, and does not question that the written or unwritten customary laws of indigenous peoples could be the basis for establishing an enterprise for the purposes of NAFTA. But there is nothing to show that the culturally-based or other business understandings that the Claimants describe are sufficient under Seneca law and thereby under NAFTA. Mere assertions of the existence of Seneca law and custom, just as mere assertions of other forms of law, are not enough.

104. Indeed, the record suggests that the Claimants previously did not view the Seneca Code as relevant to their claimed collective enterprise. Except for certain very small businesses, Article 2-105 of the Code requires every individual doing business "of any sort" on the Seneca Reservation to obtain a Seneca Business License. "Individual" is broadly defined in Article 2-104 to include "a natural person, a corporation, an entity, association." The record included an annual business license issued to Arthur Montour on January 9, 2009, but no license was on record for the claimed enterprise in any year.

105. At the hearing, the Claimants contended that their enterprise was not required to hold a license because it did not conduct business on Seneca Nation territory. Section 2-107(b) of the Code does exempt from licensing any "association ... who does not engage in or conduct a trade, business of professional activity ... on the reservation." However, this argument of exemption conflicts with the record. A major participant in the claimed enterprise—Arthur Montour—carried on extensive importing, warehousing and other operations on reservation lands within the Seneca territory through his company Native Wholesale Supply. This argument also poses another difficulty. If the claimed enterprise did not do business on the Seneca Nation's reservation lands within New York, and if Grand River did not otherwise do business in the United States as indicated by Mr. Hill, the implication would seem to be that the claimed enterprise conducted its business in Canada, posing the jurisdictional questions addressed in *Canadian Cattlemen* and *Bayview Irrigation District*.

106. The Tribunal concludes that the Claimants have not shown that they had an *investment* in the form of an *enterprise* constituted under applicable law meeting the requirements of NAFTA Articles 1139 and 201.

3. Other Possible Forms of Investment in the United States

107. Much of the discussion of jurisdiction at the hearing involved whether there was an *enterprise*, but the Claimants also cited other elements said to show an investment satisfying Article 1139. They noted Jerry and Arthur Montour's witness statements, describing how Grand River extended financing to Arthur Montour's U.S. distribution companies in connection with inventory purchased from Grand River. Mr. Jerry Montour's first witness statement described how Grand River provided Native Tobacco Direct ("NTD") and later Native Wholesale Supply with "access to an inventory loan with no fixed maturity date." He described this loan as interest free and as ranging between $1 million and $4.5 million. His statement also described how GRE extended larger inventory loans to Tobaccoville, which was not part of the claimed investment.

108. There were no loan agreements or other documents of record showing the existence or terms of this loan, and the Claimants did not treat the arrangement as a loan for purposes of their formal accounts. Grand River's financial statements for the years that they were available do show significant accounts receivable, but no loans to NTD or NWS. Similarly NWS' audited balance sheet for 2001 shows 12/31/01 accounts payable (presumably to Grand River) of $2,280,656, but does not show this as a loan

liability. (NWS' 2001 accounts do show two loan liabilities—a note to the former owner, and a $50,000 bank letter of credit, which apparently secured a bond for the U.S. Bureau of Alcohol, Tobacco and Firearms).

109. NAFTA Article 1139 excludes from its definition of investment "the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d)." The transactions described by Jerry Montour fit within this exclusion; they were credit extended in connection with the sale of cigarettes by Grand River to Arthur Montour's companies. They are thus not an investment, unless they fall under subparagraph 1139(d), providing that certain loans to an enterprise can constitute an investment if "the enterprise is an affiliate of the investor," or "where the original maturity of the loan is at least three years." Thus, the loan must (a) be to an affiliated enterprise, or (b) have an original maturity greater than three years.

110. NAFTA does not define "affiliate," but as used in legal and financial contexts, the term typically indicates a degree of ownership or control of one enterprise by another, or subsidiaries owned by a single parent. *Black's Law Dictionary* describes an "affiliate company" as one "effectively controlled by another company."[19] No such ownership or control is present here. The evidence shows that Native Wholesale Supply is an independent corporation wholly owned by Arthur Montour. It is not owned nor controlled by Grand River or the other individual Claimants. Article 1139(d)'s second alternative is not met either. The inventory loans were said to have "no fixed maturity date," and so do not have an assured maturity of over three years. In any case, there is no corroborating documentation of their existence or terms. In the evidence that is on record—the Claimants' balance sheets—they were not treated as loans for accounting purposes. Absent evidence of, *inter alia*, the circumstances under which the loans could be called, the record does not show that this requirement has been met.

111. NAFTA Article 1139 makes clear that inventory loans are not investments, except under limited conditions not met here. Accordingly, the Tribunal finds that this aspect of the Claimants' business dealings does not constitute an *investment*.

112. The Claimants also averred that millions of dollars have been deposited into escrow accounts in some U.S. states, and that these amounts, as well as amounts paid to some states as penalties, constituted an investment. Jerry Montour stated that "[t]o date, approximately $29 million has been deposited with the states" in connection with sales of Grand River's cigarettes. The first report of the Claimants' valuation expert, Mr. Wayne Wilson, calculated the amounts "held on behalf of the Claimants' entities or their ventures" as $28,540,880, based on records obtained from Tobaccoville and counsel.

113. The Claimants did not relate these expenditures to NAFTA Article 1139's definition of investment. The record indicates that significant amounts were raised and placed

[19] BLACK'S LAW DICTIONARY, p. 58 (6th Ed. 1990).

in escrow by Tobaccoville, Grand River's independent U.S. off-reservation distributor, and not by the Claimants. In this regard, the Claimants' valuation expert reported that he excluded escrow payments from the Claimants' costs of production in calculating claimed damages, because "counsel considers the escrow obligations under the MSA to be the responsibility and under the control of the importers and holder of record of product in the United States. Therefore, as GRE maintained no responsibility for escrow payments, they have not been included as a cost herein."[20] The Claimants' Reply states that Tobaccoville paid about $11 million in escrow obligations for 2007 and 2008 in this manner. The Reply thus acknowledges that these payments by Tobaccoville do not constitute an investment by the Claimant.

114. The Respondent noted the limited evidence in support of this argument, and denied that any such outlays by the Claimants constituted an investment for purpose of Article 1139, because the Claimants retained title to any escrowed funds and related interest, and because Article 1139's definition of investment did not embrace costs of complying with state regulatory requirements incident to product sales. The first argument, while factually correct, is not decisive. Insofar as the Claimants placed their own funds in escrow, they did lose the use and benefit of those funds for the term of the escrow.

115. The second argument is more compelling. The obligations to comply with escrow and other regulatory requirements existed solely because of sales of cigarettes. They thus were incident to "commercial contracts for the sale of goods or services," which generally fall outside of Article 1139's definition of investment. In this context, particularly given Mr. Hill's representations to U.S. courts that Grand River did not do business in the United States, it is not apparent how payments incident to the sale of Grand River's cigarettes fall within NAFTA's categories of investment, to the extent that the Claimants made such payments.

116. The record does not show the amount of escrow payments that the Claimants (as opposed to Tobaccoville) may have made, and any such payments were the legal consequence of sales of cigarettes manufactured in Canada by Grand River. Such payments have not been shown to constitute an investment within the meaning of Article 1139.

117. The Claimants next contended that they had a significant investment stemming from their collaborative efforts to create and promote the intellectual property associated with the Seneca® brand. They urged that the individual Claimants devoted significant time and expertise in developing the tobacco blends, packaging and other elements involved in the brand, and made substantial efforts to promote and market it.

118. Arthur Montour's wholly-owned company NWS owned the Seneca® trademark. The documents provided to the Tribunal (the 1999 Cigarette Manufacturing Agreement and the 2002 Cigarette Production Agreement) indicate that Grand River's core interest in that trademark was a limited license to manufacture Seneca® cigarettes to

[20] Rebuttal Report of Wayne R. Wilson (Mar. 3, 2009) ("Wilson Rebuttal Report"), ¶ 48.

the order of NWS and Tobaccoville. Mr. Montour's testimony at the hearing and much other evidence shows that he made great personal efforts to promote on-reservation sales of Seneca® cigarettes, [redacted] The evidence also shows that NWS expended large sums to promote the brand, paying for advertising, distribution of promotional goods, drawings, and the like. It is uncontested that Arthur Montour has an investment, but his efforts and the promotional expenses his company incurred to promote the Seneca® brand do not establish that the other Claimants also had an interest constituting an investment in the brand for NAFTA purposes.

119. With regard to off-reservation sales, the evidence indicates that Tobaccoville, a U.S. company that is not a claimant, was a central actor in developing the Seneca® brand. Article 1 of the 2002 Cigarette Production Agreement between Tobaccoville and Grand River required that Seneca® cigarettes for distribution by Tobaccoville were to be manufactured using tobacco blends and packaging specified by Tobaccoville, not by Grand River. Article 4 provided that they were to be manufactured according to Tobaccoville's quality standards. Article 11 gives Tobaccoville the exclusive right to import and sell Senecas® off-reservation in the United States, subject to minimum sales requirements. Thus, the agreement assigns the central marketing role to Tobaccoville, with Grand River limited to supplying product blended and manufactured to Tobaccoville's specifications. The statements of Larry Phillips, Tobaccoville's President, underscore Tobaccoville's central role in developing the brand off-reservation. They describe his company's early success in promoting Seneca® sales, and its later efforts to maintain distribution by borrowing large sums in its own name, and with its own principals' guarantee, to make some escrow payments.

120. Taken as a whole, the evidence does not show that the Claimants, other than Arthur Montour, have an interest in the Seneca® brand of a nature constituting an investment for purposes of NAFTA Article 1139.

121. Finally, the Claimants pointed to other more modest expenditures cumulatively said to indicate the existence of an investment for purposes of NAFTA. These included:

— Grand River's loan of a leased 2000 Volvo truck and trailer to Arthur Montour's company, apparently for use during late 2000 and the first half of 2001. The Claimants' evidence included receipts and drivers' logs showing that this truck was used for four trips to the western United States between October 2000 and February 2001. [redacted] The evidence also included ledger documents showing payments of about $29,900 for lease, extended warranty, and insurance fees for the truck through June 30, 2001. It is not clear whether these documents came from NWS or Grand River; they were not authenticated or explained. They all identified Grand River as the vendor, which would seem to suggest that the documents may have been NWS' records, and that Grand River received the payments. Internal evidence suggests that the payments were calculated in U.S., and not Canadian, dollars, and may have been

made in the United States. The documents could thus be understood to show Arthur Montour's company, Native Tobacco Direct, paid the truck's lease and other expenses (and not Grand River). Given the ambiguity of this evidence, and the modest expenditures involved in relation to the size of the claim, the loan of a leased truck for a few months is not compelling evidence of an investment by Grand River, Jerry Montour or Kenneth Hill.

— Roughly $300,000 in expenditures by Grand River, said to be in connection with trademark litigation related to the Seneca® trademark. These expenses were briefly mentioned for the first time in the Claimants' Reply. The sole supporting evidence is a two-page spreadsheet captioned "GRE-USA Trademark related Invoices from 2002-2008/ For Todd Weiler," which does not total the amounts said to be involved. The sketchy information on this spreadsheet was not authenticated or explained, nor was the process by which it was created. Some entries involve expenses to register new trademarks unrelated to this arbitration, apparently in Canada. Some litigation expenditures involve litigation by Tobaccoville, which is not part of the Claimants' investment. Other expenses do appear to concern litigation related to the Seneca® trademark, but the circumstances, and the relationship of the expenses to the claimed investment or to the requirements of Article 1139, are not explained. As with the truck, the sparse and ambiguous evidence and the relatively limited sums involved, are insufficient to establish the existence of an investment by Grand River and Messrs Jerry Montour and Kenneth Hill.

122. The Claimants urged that in assessing whether they had an investment satisfying the requirements of NAFTA's Article 1139, the Tribunal should consider the totality of their activities and not weigh each element in isolation. The Tribunal agrees. However, given the relatively restricted definition of "investment" under Article 1139, the Claimants must nonetheless establish an investment that falls within one or more of the categories established by that Article. Viewing the evidence of their activities in the aggregate in light of their claim for hundreds of millions of dollars, the Claimants have failed to show that Jerry Montour, Kenneth Hill and Grand River have an investment in the United States that qualifies as such within any of those categories. They have shown no investment in the United States by way of enterprise, loan, property or other interest conforming to the definition of Article 1139. Their claims, which relate to off-reservation sales of Grand River's cigarettes, are therefore dismissed for lack of jurisdiction.[21]

D. Claims Potentially Implicating Tax Measures: Michigan's Equity Assessment

123. A separate jurisdictional issue arises from the Claimants' contention that they are denied national treatment by operation of the Michigan Equity Assessment Act, a statute that would impose a levy (in addition to required escrow payments) on Grand

[21] At the hearing, counsel for the Claimants indicated that the focus of their case was on the treatment accorded to exempt SPMs in comparison with the treatment of off-reservation sales of Grand River's products. Transcript, Mr. Violi: 79.

River's cigarettes should they be sold off-reservation in Michigan. The Claimants described this provision as particularly disadvantageous to Grand River, as its manufacturing facility is not far from the Detroit-Windsor frontier, and the Detroit market offers great potential for off-reservation sales of its low-priced cigarettes. As noted above,[22] the United States contended in its initial jurisdictional objections that this claim implicated tax measures; that the Claimants had not complied with the procedural requirements of NAFTA's Article 2103 relating to claims involving tax measures; and that Article 2103(4)(g) precluded such claims with respect to new taxation measures that have adequate tax policy justifications.

124. The Tribunal held above that it does not have jurisdiction with respect to claims by Jerry Montour, Kenneth Hill and Grand River involving off-reservation sales. The gravamen of the claim regarding Michigan's equity assessment is that it improperly discriminates with respect to off-reservation sale of Grand River's cigarettes in Michigan. As the Tribunal does not have jurisdiction with respect to claims involving such sales, it need not decide the Respondent's objection involving asserted non-compliance with NAFTA Article 2103.

VI. NAFTA ARTICLE 1110 – EXPROPRIATION AND LEGITIMATE EXPECTATIONS

125. The Claimants' case implicated two separate sets of measures by states of the United States. First, they addressed the alleged adverse impact of the Allocable Share Amendments on off-reservation sales of cigarettes manufactured by Grand River. The Tribunal has determined that it only has jurisdiction over claims linked to Arthur Montour's investment activities, which relate exclusively to on-reservation or other Indian country sales. Hence, the claims as they relate to the Allocable Share Amendments and off-reservation sales fail for lack of jurisdiction and will not be considered further.

126. Second, the claims addressed the impact of the Respondent's enforcement measures under the complementary legislation against Arthur Montour and his distribution companies. These claims are within the Tribunal's jurisdiction and are assessed below. In this section, the Tribunal addresses the claim of expropriation of Arthur Montour's investment under NAFTA Article 1110, and the contention that the disputed measures are inconsistent with his reasonable and legitimate expectations, a contention also made to support his claim under NAFTA Article 1105.

A. The Question of the Claimant's Reasonable Expectations

127. In his claims under both NAFTA Articles 1105 and 1110, Arthur Montour contended that the disputed measures, including the complementary legislation, were inconsistent with his reasonable investment-backed expectations. The Respondent agreed that the issue of an investor's reasonable expectations can be relevant to a claim of regulatory expropriation under NAFTA Article 1110, but maintained that

[22] *Supra*, ¶ 73.

such expectations were not legally relevant to claims of denial of fair and equitable treatment under the customary law minimum standard of treatment under NAFTA Article 1105. Given this disagreement, the Tribunal addresses issues related to Arthur Montour's reasonable expectations here, in the context of the Article 1110 claim, where both Parties recognize their potential relevance. The following discussion applies with equal weight to all of Arthur Montour's arguments that his legitimate expectations were frustrated contrary to NAFTA's Chapter 11.

1. Reasonable Expectations: First Nations Status

128. Arthur Montour stressed his status as a member of one of the First Nations in North America and the nature of his business activities, which he described as involving trade among sovereign indigenous peoples. On this basis, he maintained that he had a legitimate expectation not to be subjected to MSA-related regulatory actions by the states of the United States in respect of his tobacco-related activities. Citing the opinions of the Claimants' experts, Professors Clinton and Fletcher, Mr. Montour urged that he was "entitled to expect that none of [his] business activities would even be subjected to the Escrow Statutes, the Allocable Share Amendments, the Contraband laws or any Equity Assessment legislation."

129. Mr. Montour emphasized that he is a member of the Haudenosaunee, the Iroquois Confederation, which was never defeated militarily and was assured the right to pursue parallel and independent political and economic life by the Seventeenth-Century Two Row Wampum Treaty and subsequent treaties, including the 1794 Treaty of Canandaigua with the United States. He placed particular emphasis on his understanding of Article 3 of the 1794 Jay Treaty and the Treaty of Ghent, which ended the War of 1812 between the United States and the United Kingdom and reaffirmed the relevant Jay Treaty provisions.[23] Article 3 of the Jay Treaty provides:

> It is agreed that it shall at all Times be free to His Majesty's Subjects, and to the Citizens of the United States, and also to the Indians dwelling on either side of the said Boundary Line freely to pass and repass by Land, or Inland Navigation, into the respective Territories and Countries of the Two Parties on the Continent of America (the Country within the Limits of the Hudson's Bay Company only excepted) and to navigate all the Lakes, Rivers, and waters thereof, and freely to carry on trade and commerce with each other. ...
>
> No Duty of Entry shall ever be levied by either Party on Peltries brought by Land, or Inland Navigation into the said Territories respectively, nor shall the Indians passing or repassing with their own proper Goods and Effects of whatever nature, pay for the same any Impost or Duty whatever. But Goods in Bales, or other large Packages unusual among Indians shall not be considered as Goods belonging bona fide to Indians.

[23] The Treaty of Ghent reaffirmed Jay Treaty obligations under discussion here, but did not confer new or additional rights potentially relevant here.

130. Mr. Montour also urged that under U.S. domestic law, individual states of the United States do not have jurisdiction to regulate commerce among Native Americans, especially when it involves transactions outside of the states' geographic boundaries or within "Indian country," including reservation lands. In this regard, his tobacco distribution businesses (Native Wholesale Supply and its predecessor, Native Tobacco Direct) purchased large quantities of cigarettes F.O.B. from Grand River at its plant in Canada and imported them into the United States. Many were sold at wholesale to Native American purchasers on the reservation lands within the Seneca Nations Territory in northern New York, who then offered them for sale, either at retail outlets on the Seneca reservation or to customers across the United States, often via the Internet. Such wholesale sales to customers on the Seneca reservation accounted for much of NWS' business, constituting about 68% of NWS' total sales in 2007.

131. The state of New York has not applied its MSA-related legislation to Mr. Montour's companies on the Seneca reservation. It has not collected escrow in connection with their sales, nor has it taken relevant enforcement action under New York's Complementary legislation. Accordingly, Native Wholesale Supply's sales to customers on the Seneca Reservation are not at issue here. However, NWS also sold substantial quantities of Grand River's cigarettes to Native American wholesalers and retailers operating on reservation lands in other states of the United States, as well as to such dealers in the state of Oklahoma operating within areas that qualify as "Indian country" with similar immunities from state law. Authorities in several of these other states have sought to apply their complementary legislation with respect to the Claimants' on-reservation and other Indian country sales.

132. As viewed by the Claimants' experts, Professors Clinton and Fletcher, under the provision of the Commerce Clause of the U.S. Constitution related to "Indians" and the related body of domestic law generally referred to as "federal Indian law," the power to regulate commerce among Native Americans is reserved solely to the U.S. federal government, such that, with limited exceptions, states cannot regulate their activities, especially within their recognized lands, absent a delegation from the U.S. Congress. In the view of these experts, the states could not under the U.S. Constitution and federal Indian law lawfully apply the Escrow Acts, the Allocable Share Amendments, or take enforcement measures under the complementary legislation, with respect to the Claimants' activities. The Claimants' experts provide elaborate and highly technical arguments to this effect, citing an array of judicial precedents and stressing the factual nexus between the Claimants' business activities, their status as First Nations investors, and the location of the transactions.

133. The Respondent disputed the Claimants' characterizations of the Jay Treaty and applicable U.S. domestic law, and denied that Arthur Montour could reasonably expect that his activities would be wholly immune from state regulation.

134. With respect to the Jay Treaty, the United States asserted that the Claimants had no reasonable expectation that the Treaty would shield their business from governmental regulation. In the Respondent's view, the treaty assures rights for individual Native

Americans to cross the U.S.-Canadian border, as well as limited rights for their peltries and personal goods. It does not insulate an international and interstate tobacco business involving billions of cigarettes from regulation. The Respondent cited in this regard multiple decisions by both U.S and Canadian courts holding that the Jay Treaty does not authorize indigenous persons' duty-free passage of commercial goods.

135. As to U.S. domestic law, the Respondent relied on expert reports by Professor Carol Goldberg and contended that the Claimants—and, as relevant here, Mr. Arthur Montour—had no reasonable expectation of immunity from state regulation arising from U.S. federal Indian law. It urged that "Indian country" is a term of art in U.S. law, encompassing reservations and certain other areas, and that U.S. states can regulate activities involving Native Americans outside of Indian country as well as activities occurring partially inside and partially outside.

136. In the Respondent's view, Arthur Montour's actions took place partially off reservation, and had significant off-reservation effects. Native Wholesale Supply shipped large quantities of cigarettes across large areas of the United States outside of Indian country. Further, the large volumes of cigarettes shipped to on-reservation customers were intended for re-sale to non-Indian customers for consumption off-reservation, and so had substantial off-reservation impacts. By way of example, the Respondent cited evidence showing sales of millions of cigarettes to customers on reservations in California with small Native American populations, such as the sale of 70 million cigarettes to a shop on a small reservation, equaling 116 packs per day per Native American resident.

137. The Tribunal believes that both Parties advanced positions regarding the state of U.S. federal Indian law that were unjustifiably categorical. Both posited legal "bright lines" in situations where they do not exist. In the Tribunal's understanding, U.S. federal Indian law is a complex and not altogether consistent mixture of constitutional provisions, federal statutes, and judicial decisions by the U.S. Supreme Court and other courts. Determining the contents of that law, and its likely impact on particular types of state regulation, often calls for necessarily uncertain predictions of how future courts will apply past decisions involving different settings and different types of state regulation.

138. What is clear from the Parties' submissions and their experts' reports is that U.S. domestic law is currently far from conclusive about the question raised here of the extent of permissible state regulation. The Tribunal notes that the Claimants' experts, Professors Clinton and Fletcher, and the Respondent's expert, Professor Goldberg, are all eminent scholars renowned for their expertise in federal Indian law, yet Professor Goldberg arrives at a conclusion opposite to that of the other two.

139. Both parties apparently would have the Tribunal resolve this highly contested question of U.S. domestic law, which the Tribunal declines to do. In determining, within the framework of this NAFTA proceeding, whether Arthur Montour could have reasonably harbored an expectation that his tobacco distribution activities would

not face state regulation, it is not for this Tribunal to decide whether or not he is correct on the underlying domestic legal proposition of immunity from the state regulation. Even if the Tribunal ultimately were to agree with him on the question of U.S. domestic law, that would not settle the matter of what regulatory response he could reasonably expect when he and his company embarked on their business ventures involving sales in the United States.

140. The Tribunal understands the concept of reasonable or legitimate expectations in the NAFTA context to correspond with those expectations upon which an investor is entitled to rely as a result of representations or conduct by a state party. As the tribunal in *Thunderbird Gaming* explained, the "concept of 'legitimate expectations' relates ... to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages."[24] The question of reasonable expectations, therefore, is not equivalent to whether or not an investor is ultimately right on a contested legal proposition that would favor the investor.

141. The "conduct" of the United States pointed to by the Claimants as giving rise to reasonable expectations of immunity from MSA measures is U.S. federal Indian law and the Jay Treaty. Ordinarily, reasonable or legitimate expectations of the kind protected by NAFTA are those that arise through targeted representations or assurances made explicitly or implicitly by a state party. Even accepting that cited U.S. federal Indian law and the Jay Treaty might serve as sources of reasonable or legitimate expectations for the purposes of a NAFTA claim, the Tribunal finds that they do not in this case.

142. As to U.S. domestic law, given its unsettled nature in relevant respects, it is implausible to find that Mr. Montour could have reasonably expected, and reasonably relied on such an expectation as a prudent investor, that states would refrain from applying the MSA measures to him as they have done. As demonstrated by Professor Goldberg's expert report, U.S. states had at least a colorable argument under domestic law for valid application of the MSA measures to his activities. By this observation the Tribunal is not expressing agreement with the argument in favor of state regulation. The point is that the relative strength of this argument and the range of relevant domestic judicial precedents were such that Mr. Montour was not in a position to reasonably harbor an expectation, upon which he would be entitled to rely under NAFTA, that he would be free from application of the MSA measures. The Tribunal believes, however, that Mr. Montour did have a reasonable expectation that he could pursue his challenge to the application of the MSA measures to his activities on the basis of U.S. domestic law in U.S. domestic courts, and the Tribunal understands that he in fact has done so.

143. Similarly, the Tribunal declines to resolve the opposing interpretations of the Jay treaty in relation to Arthur Montour's commercial activities. The Tribunal affirms the

[24] *Thunderbird Gaming*, ¶ 147.

importance of the principle of *pacta sunt servanda* and acknowledges the significant and constructive roles treaties may have in securing the rights of indigenous peoples. The Tribunal also acknowledges the importance of the Jay Treaty for protecting cross-border movement and trade among indigenous peoples in North America. However, Mr. Montour asserts an absolute immunity from state regulation for commercial activities involving cross-border trade at a significant scale, and in doing so relies on an interpretation of the Jay Treaty that is not plainly supported by the text or easily and readily derived from application of accepted rules of treaty interpretation. What is readily apparent, instead, are the ambiguities in the meaning of the text in respect of the far-reaching claimed immunity, especially in light of the understandings and practice of the contemporary treaty parties, Canada and the United States, which are contrary to the Claimants' interpretation and which must be taken into account. Professor Clinton offers a novel, detailed argument and historical narrative in support of the Claimants' interpretation. However persuasive his argument may be, it does not establish that interpretation as having the degree of certainty that might reasonably ground in the Claimant—for the purposes of his NAFTA claim—a reasonable expectation that he could avoid state application of the MSA measures.

144. The Tribunal also notes that trade in tobacco products has historically been the subject of close and extensive regulation by U.S. states, a circumstance that should have been known to the Claimant from his extensive past experience in the tobacco business. An investor entering an area traditionally subject to extensive regulation must do so with awareness of the regulatory situation.

145. Given the circumstances—including the unresolved questions involving the Jay Treaty and U.S. domestic law, and the practice of heavy state regulation of sales of tobacco products—the Tribunal holds that Arthur Montour could not reasonably have developed and relied on an expectation, the non-fulfillment of which would infringe NAFTA, that he could carry on a large-scale tobacco distribution business, involving the transportation of large quantities of cigarettes across state lines and into many states of the United States, without encountering state regulation. (As noted above, Native Wholesale Supply's sales on the Seneca Reservation in New York State are not at issue.)

B. Arthur Montour's Expropriation Claim

146. The Tribunal has jurisdiction over Arthur Montour's claim, including his claim that improper enforcement actions by various states other than New York affecting Native Wholesale Supply's sales have resulted in the expropriation of a substantial portion of the value of his investment. The Tribunal accordingly considers here whether the circumstances claimed involved an expropriation in violation of NAFTA Article 1110.

147. The starting point must be the language of Article 1110(1), providing that "[n]o Party may directly or indirectly nationalize or expropriate *an investment* of an investor of another Party in its territory," unless certain conditions are met (emphasis added).

The text speaks of "an investment," not "an investment or some portion thereof." The most natural reading of the language is that any act of expropriation will affect the totality of an investment. This is in harmony with the conception of expropriation applied in numerous cases—that expropriation involves the deprivation or impairment of all, or a very significant proportion of, an investor's interests.

148. Other NAFTA Tribunals have regularly construed Article 1110 to require a complete or very substantial deprivation of owners' rights in the totality of the investment, and have rejected expropriation claims where (as here) a claimant remained in possession of an ongoing business. The *Pope & Talbot Interim Award* rejected a claim that the disputed measures interfered with the claimants' business sufficiently to constitute an expropriation, where the claimant continued to make profitable exports of logs.[25] As the *S.D. Myers* tribunal explained, "[a]n expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights."[26]

149. The tribunal in *Feldman v. Mexico* rejected a claim of expropriation where the claimant remained in possession and able to conduct other lines of business.

> [H]ere, as in *Pope & Talbot*, the regulatory action (enforcement of longstanding provisions of Mexican law) has not deprived the Claimant of control of the investment, CEMSA, interfered directly in the internal operations of CEMSA or displaced the Claimant as the controlling shareholder. The Claimant is free to pursue other continuing lines of export trading, such as exporting alcoholic beverages, photographic supplies, or other products ... although he is effectively precluded from exporting cigarettes. Thus, this Tribunal believes there has been no "taking" under this standard articulated in *Pope & Talbot*, in the present case.[27]

150. *Glamis Gold* is to similar effect.

> [A] panel's analysis should begin with determining whether the economic impact of the complained of measures is sufficient to potentially constitute a taking at all: "[I]t must first be determined if the Claimant was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto ... had ceased to exist." The Tribunal agrees with these statements and thus begins its analysis of whether a violation of Article 1110 of the NAFTA has occurred by determining whether the federal and California measures "substantially impair[ed] the investor's economic rights, i.e. ownership, use, enjoyment or management of the business, by rendering them useless. Mere restrictions on the property rights do not constitute takings.[28]

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[25] *Pope & Talbot Interim Award*, ¶¶ 100-102,

[26] *S.D. Myers*, ¶ 283. The tribunal continued in *dicta* that "it may be that in some contexts and circumstances" that lesser deprivations would amount to an expropriation, but did not explain this view or indicate authority for it.

[27] *Feldman*, ¶ 152.

[28] *Glamis Gold*, ¶ 357 (citations omitted).

151. Non-NAFTA tribunals also have held that an expropriation requires very great loss or impairment of all of a claimant's investment. The Iran-U.S. Claims Tribunal looked to actions "depriving the owner of virtually all of its property or property rights."[29] ICISD tribunals have rejected expropriation claims involving significant diminution of the value of a claimant's property where the claimant nevertheless retained ownership and control. Thus, the Tribunal in *CMS v. Argentina* rejected a claim of expropriation where the claimant retained full ownership and control of the investment, even though its value was reduced by more than 90%.[30] *LG&E v. Argentina* is similar: "Interference with the investment's ability to carry on its business is not satisfied where the investment continues to operate, even if profits are diminished."[31]

152. However, Arthur Montour's Article 1110 claim involves the alleged expropriation of only part of a growing and seemingly profitable ongoing investment over which he retains ownership and control. U.S. Customs tabulations show that in 2007, Native Wholesale Supply imported almost [redacted] cigarettes from Grand River. In 2008, it imported almost [redacted] In the first three months of 2009 alone, it imported almos[redacted] According to a press report, Native American retailers' sales of Seneca® cigarettes in upstate New York grew by 200% between 2007 and 2008, substantially exceeding sales of Marlboros in the region. The report of the Respondent's valuation experts, Navigant Consulting, shows that Grand River's sales to Native Wholesale Supply also increased during the earlier period 2005-2007. According to the March 2009 Rebuttal Report of the Claimants' valuation expert, "over the past 4 years in California NWS sales have increased by an average of [redacted] per year."

153. The Tribunal received limited evidence as to Native Wholesale Supply's financial condition, but its financial statements from 2001 through September 30, 2006 show substantial growth in the firm's value. The statement for the first nine months of 2006 (the final statement on record) shows continued growth, with the sole stockholder's equity more than doubling during that period. (Arthur Montour is NWS' sole stockholder.) The large growth in the volume of Grand River's cigarettes imported by NMS after 2006 suggests that the venture remained profitable.

154. The language of Article 1110 and the reasoning of numerous tribunals show that an expropriation must involve the deprivation of all, or a very great measure, of a claimant's property interests. The Claimant pointed to no cases supporting the notion that state action allegedly impairing only a limited portion of the value of an otherwise ongoing and profitable investment like Native Wholesale Supply can give rise to a "partial" expropriation under either NAFTA Article 1110 or general

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[29] Charles N. Brower & Jason N. Brueschke, THE IRAN-U.S. CLAIMS TRIBUNAL (1998), p. 409.

[30] *CMS Gas Transmission Co., Inc. v. Argentina*, ICSID Case No. ARB/01/8, Final Award (May 12, 2005), ¶¶ 262-264.

[31] *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006), ¶ 191.

international law. In response to a question from the Tribunal, Mr. Wilson, the Claimants' valuation expert, testified that he had not previously encountered an expropriation claim of this kind.

> I have never seen anything where it was just one or a subset of assets, and it's really difficult to build that as a business and do what we would traditionally do which is basically the value before and the value after.[32]

155. The Tribunal has been offered no reason to interpret the language of NAFTA's Article 1110(1) to mean other than it says. An act of expropriation must involve "the investment of an investor," not part of an investment. This is particularly so in these circumstances, involving an investment that remains under the investor's ownership and control and apparently prospered and grew throughout the period for which the Tribunal received evidence. Arthur Montour's expropriation claim fails for failure to establish an expropriation within the scope of Article 1110.

VII. CLAIMS OF VIOLATIONS OF ARTICLES 1102 AND 1103 – NATIONAL AND MOST-FAVORED NATIONAL TREATMENT

A. The Governing Texts

156. The Claimants alleged that the Respondent has violated its obligations to assure national and most-favored-nation treatment under Articles 1102 and 1103 of NAFTA. These provide in relevant part:

> Article 1102: National Treatment
>
> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.
>
> Article 1103: Most-Favored-Nation Treatment
>
> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other

[32] Transcript, Mr. Wilson: 639-640.

Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

157. NAFTA Article 1104 requires that investors and investments receive the better of either national or most-favored-nation treatment.

> Each Party shall accord to investors of another Party and to investments of investors of another Party the better of the treatment required by Articles 1102 and 1103.

B. Articles 1102 and 1103 in Relation to Arthur Montour

158. As presented in their papers and at the hearing, the Claimants' claims of denial of national or most-favored nation treatment addressed only off-reservation sales in the United States of cigarettes manufactured by Grand River in Canada. These claims emphasized the difference in treatment between exempt Subsequent Participating Manufacturers (which do not make MSA payments with respect to their pre-MSA market share), and Grand River as a Non-Participating Manufacturer, with no corresponding exemption to its escrow payment obligations under the Allocable Share amendments for off-reservation sales.[33]

159. The Tribunal has determined that it does not have jurisdiction over the claims of Grand River, Jerry Montour, and Ken Hill involving Tobaccoville's off-reservation U.S. sales of cigarettes manufactured by Grand River; besides, Tobaccoville is not a claimant in this case. Accordingly, the claims of denial of national or most-favored nation treatment related to those off-reservation sales are outside of the Tribunal's jurisdiction.

160. Arthur Montour's written declarations and testimony at the hearing did not clearly articulate a separate claim of denial of national or most-favored-nation treatment related to his investment involving on-reservation sales. Nevertheless, to assure completeness, the Tribunal will examine whether the arguments and evidence in the case could sustain such a claim.

161. The Claimants urged that Articles 1102 and 1103 should be construed "in a broad and remedial fashion" to accomplish the objectives of NAFTA's Article 102(1). In their view, these provisions do not require a showing that differences in treatment were imposed on account of nationality, or that contested measures had a disproportionate impact on foreign investors. Instead, in the Claimants' view, the question is whether

[33] *See, e.g.*, Claimants' Memorial ¶ 267 ("The Allocable Share Amendments Have Accorded Better Treatment to Exempt SPMs.")

they received treatment less favorable than that given to any properly selected comparator. If so, and if the difference in treatment cannot be justified, there is a breach of NAFTA's national or MFN treatment obligations. The Claimants maintained in this regard that there was no proper justification for the Allocable Share Amendments, so that their adoption by various state legislatures resulted in a denial of national treatment.

162. The Respondent disputed the Claimants' arguments, including, *inter alia*, the claimed lack of justification for adopting the Allocable Share Amendments. However, as the Tribunal lacks jurisdiction over the claims involving the Allocable Share Amendments and off-reservation sales, it need not and does not make any decision in this regard.

163. To assess whether there was a violation of either Article 1102 or 1103, the Claimants urged the Tribunal to utilize the three-step analytical model articulated by the *Pope & Talbot*. That is, the Tribunal should:

— Identify comparable domestic investors and/or investments,

— Determine whether the domestic investors/investments receive more favorable treatment, and then

— Determine whether the difference in treatment is justified in the circumstances.[34]

164. As to the first step, the Claimants' extensive arguments in their papers and at the hearing emphasized the appropriate comparators for purposes of off-reservation sales of cigarettes manufactured by Grand River. The Respondent disputed those arguments. As the tribunal has no jurisdiction regarding the claims involving off-reservation sales, it need not and does not make any decision regarding the proper comparator for purposes of those sales.

165. The Claimants did not identify a comparator for Arthur Montour's investment. In the Tribunal's view, the comparable investments for purposes of NAFTA Articles 1102 and 1103 would be other firms engaged in the wholesale distribution of cigarettes in the United States and potentially subject to enforcement actions under the states' complementary legislation.

166. In this regard, NAFTA tribunals have given significant weight to the legal regimes applicable to particular entities in assessing whether they are in "like circumstances"

[34] *Pope & Talbot, Inc. v. Canada,* Award on Merits (Part 2) (April 10, 2001) *("Pope & Talbot Final Award"),* ¶¶ 78 *et seq*. The Respondent saw the appropriate analytical framework to be the three-step analysis used by the tribunal in *UPS:* (1) did Claimants receive "treatment" in respect of their investment, (2) were they in "like circumstances" with local investments and investors, and (3) was the treatment "less favorable." For purposes of this case, the Tribunal sees no significant difference between the two approaches.

under Articles 1102 or 1103. While each case involved its own facts, tribunals have assigned important weight to "like legal requirements" in determining whether there were "like circumstances." The *ADF* tribunal thus emphasized that both the claimant and its U.S. competitors were subject to the same U.S. "Buy America" provisions.[35] *Pope & Talbot* found that the relevant comparators were lumber exporters subject to the same restrictive legal regime as the claimant, so there was no denial of national treatment if exporters in other unregulated provinces were not so limited.[36] *Feldman v. Mexico* found the relevant comparators for purposes of MFN analysis to be a limited group of cigarette exporters subject to the same legal requirements as the claimant.[37] The *Methanex* tribunal (citing *Pope & Talbot*) emphasized the importance of assuring that purported comparators face similar regulatory requirements.[38] Looking at the question from the other direction, *UPS v. Canada* found a key difference between the parties there to be that Canada Post was subject to legal requirements under national law and international postal agreements that did not affect UPS.[39]

167. The reasoning of these cases shows the identity of the legal regime(s) applicable to a claimant and its purported comparators to be a compelling factor in assessing whether like is indeed being compared to like for purposes of Articles 1102 and 1103.

168. As to the second step of their suggested analysis, the Claimants urged that Articles 1102 and 1103 entitled them, as individual investors, to the best treatment accorded to any U.S. comparator. In their view, it would not matter if, hypothetically, a U.S. measure might result in all other Canadian investors receiving advantageous treatment, or even treatment better than the U.S. comparators. In their view, only the situation of the Grand River claimants is legally relevant.

169. However, the record does not establish that Arthur Montour's distribution business was subjected to enforcement measures that were not applied to other similarly situated businesses, or that other similarly situated investments received better treatment. Indeed, the Tribunal understands a core element of Mr. Montour's NAFTA claims to be that he and his distribution companies should not have been subject to the disputed measures applicable to other similarly situated investors and investments, because of his situation as a First Nations trader.

170. In the third step of their proposed analysis of Article 1102 and 1103, the Claimants contended that if relevant differences in treatment were established, the respondent government has the "strategic burden" of showing that the difference was justified, that is, to show that the comparators were not truly "in like circumstances." As the record does not show that Claimant Arthur Montour received relevant differences in

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[35] *ADF Group, Inc. v. United States,* ICSID Case No. ARB(AF)/00/1, Award (Jan. 9, 2003) (*"ADF"*), ¶ 156.
[36] *Pope & Talbot Final Award,* ¶ 88.
[37] *Feldman,* ¶¶ 171-172.
[38] *Methanex,* Part IV-Chapter B, ¶¶ 18-19.
[39] *UPS,* ¶¶ 117-118.

treatment (and indeed, as the thrust of his claim appears to be that he should not have received treatment to which other wholesale distributors were subject), the Tribunal need not consider this line of argument.

171. The Respondent contended that in order to make out a claim of violation of Articles 1102 or 1103, a claimant must make some showing that the alleged difference in treatment was on account of or related to a foreign investor's nationality, citing similar statements to this effect made by all three NAFTA parties in previous NAFTA proceedings. As noted above, the Claimants disagreed, believing that Article 1102 and 1103 do not require such a showing. However, given that there has been no showing that the disputed enforcement measures have subjected Arthur Montour to treatment less favorable than that accorded the appropriate domestic comparator, regardless of his nationality, the Tribunal need not consider this issue or make any decisions in this regard.

172. Insofar as Arthur Montour makes a claim for denial of national or most-favored-nation treatment, the claim is denied for failure to show a violation of NAFTA Articles 1102 or 1103.

VIII. CLAIMS UNDER ARTICLE 1105 – THE CUSTOMARY STANDARD OF FAIR AND EQUITABLE REATMENT

A. Introduction: The Governing Texts

173. The Claimants—and, as relevant here, Arthur Montour—contended that their treatment by various states of the United States violated the Respondent's obligation to accord fair and equitable treatment as required by NAFTA's Article 1105. That provision, captioned "Minimum Standard of Treatment" states in relevant part:

> 1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

174. The text makes clear that the controlling element in applying Article 1105 is international law. "Fair and equitable treatment" and "full protection and security" do not exist as independent, free-standing concepts drawing content from sources such as equity or the policy preferences of individual arbitrators. Their content is determined by international law.

175. The NAFTA Free Trade Commission has provided further guidance regarding this aspect of Article 1105. NAFTA Article 1131(2) requires this Tribunal to apply interpretations of NAFTA provisions adopted by that Commission. On July 31, 2001, the Commission issued "Notes of Interpretation of Certain Chapter 11 Provisions" providing, *inter alia*, that:

> B. Minimum Standard of Treatment in Accordance with International Law

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

176. Thus, the content of the obligation imposed by Article 1105 must be determined by reference to customary international law, not to standards contained in other treaties or other NAFTA provisions, or in other sources, unless those sources reflect relevant customary international law. A violation of another treaty does not establish a violation of Article 1105. Further, the concepts of "fair and equitable treatment" and "full protection and security" refer to existing elements of customary international law regarding the treatment of aliens and do not add to that standard.

177. A final aspect of the text requires mention. The required treatment must be accorded to "investments of investors of another Party." Article 1105 provides no scope for individual investors' claims that they have received treatment contrary to international law, except as that treatment affects a covered investment. Some of the Claimants' Article 1105 claims are presented in terms that emphasize their treatment as individual investors, not the treatment of their investments.

B. The Claimants' Contentions: The Law Applicable Under Article 1105

178. *The Legal Standard of Fair and Equitable Treatment.* The Claimants' written pleadings alleged several separate forms of mistreatment said to violate Article 1105, although these claims sometimes were presented in repetitive or overlapping terms. In large measure, these claims did not differentiate among the situations of the three individual Claimants on the one hand and Grand River on the other. Accordingly, to assure completeness, the Tribunal will consider all of them as though intended specifically to relate to Arthur Montour, the sole Claimant over whom alone it has jurisdiction.

179. The Claimants urged that the customary international law standard under Article 1105 is evolving, and that a breach of the Article does not require egregious or bad faith conduct by a state. They referred to the oft-cited summary from *Waste Management II* as reflecting the contemporary meaning of Article 1105:

> Taken together, the *S.D. Myers, Mondev, ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading

to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.[40]

180. In the Claimants' view, the content of the United States' obligations under Article 1105 is further shaped by U.S. obligations under the Jay Treaty, by principles of customary international law involving indigenous peoples, and by international human rights treaties and customary principles of human rights law. At the hearing, the Claimants' counsel urged that such international legal obligations were "relevant" in determining the obligations owed to these Claimants under Article 1105. In response to the Tribunal's question, counsel urged in this regard that the minimum standard of treatment was not a standard applicable to aliens generally, but that it varied to take account the varying status and legal rights of particular claimants.[41]

181. The Tribunal has previously addressed aspects of this line of argument.[42] While other legal rules may shape the context in which Article 1105 is applied, they do not alter the content of the customary international law minimum standard of treatment. This follows from the very conception of the international minimum standard, which the Tribunal must apply pursuant to the Free Trade Commission's direction. The FTC directed that "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment" that must be given to covered investments. This must be read in harmony with the Commission's further instruction that "[a] determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)."

182. The Claimants' Memorial cited five clusters of overlapping obligations that the Claimants viewed as part of the customary standard applicable under NAFTA Article 1105. For the Claimants:

— (1) the essence of Article 1105 is the obligation to act in good faith and not to "affect the basic expectations that were taken into account by foreign investor [sic] to make the investment." The Claimants contended that investors are entitled to rely on host countries' promises, including implicit promises, and that "where an investor detrimentally relies upon a promise made specifically to him as an individual or a member of a group, the breach will be manifest."

— (2) an investor making decisions involving an investment "is entitled ... to enjoy stability and predictability in the regulatory environment in which such decisions were made." States must maintain a transparent and predictable business and regulatory climate; the longer a regulatory regime remains in place, the more reasonable the investor's expectations in reliance upon it will be. While "no investor

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[40] *Waste Management, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004), ¶ 98.

[41] Transcript, Mr. Weiler: 105-106.

[42] *See* Part VI(A), *supra.*

may reasonably expect that the circumstances prevailing at the time its original investment was made would remain totally unchanged," an investor is entitled to expect that neither changes nor the process by which they are made "will be arbitrary, discriminatory or non-transparent."

— (3) both customary international law norms protecting the economic rights of indigenous peoples and more general human rights rules apply pursuant to NAFTA Articles 102(2) and 1131(1), adding significant content to the fair and equitable treatment obligation. The Claimants invoked numerous sources to argue the existence such of customary norms, including Article 21 of the Inter-American Convention on Human Rights, Article 17 of the Universal Declaration of Human Rights, Article 17 of the United Nations Declaration on the Rights of Indigenous Peoples, Article 19 of the same declaration, Article 6(1)(a) of ILO Convention 169, the decision of the Inter-American Court of Human Rights in *Hilaire, Constantine and Benjamin v. Trinidad and Tobago*, cases such as *AMCO v. Asia*, and Bin Cheng's treatise on the central role of good faith. In light of these authorities, the Claimants contended that Article 1105 obliged the Respondent to take "pro-active steps to consult with indigenous investors prior to imposing a measure that will impact upon them or their community."

— (4) the minimum standard of fair and equitable treatment requires "[e]ven-Handedness and Fair Dealing in the Prevention of Discrimination Against First Nations Investors." Under human rights law and customary international rules applicable to the Claimants as indigenous investors, they cannot be subjected to discrimination, either *de jure* or *de facto*. This obligation is not met if state actions result in *de facto* differences in treatment. Actions with a discriminatory impact on protected groups like First Nations investors therefore are by their nature contrary to Article 1105.

— (5) the Claimants' have been denied due process and basic procedural fairness in connection with multiple state legislatures' adoption of the Allocable Share Amendments. (As presented in their Memorial, the Claimants' emphasized the claim that they were denied due process in connection with the conclusion of the MSA in 1998, but their arguments at the hearing emphasized instead the repeal of the Allocable Share Amendments.)

C. Specific Claims Under NAFTA Article 1105

183. The Tribunal, with the exception of one of its members, considers it important, before turning to the specific claims under Article 1105 of NAFTA, to point out that it finds force in certain aspects of Mr. Montour's and the other Claimants' arguments asserting a lack of fair and equitable treatment. The thrust of many of the Claimants' myriad arguments in this case is that they were treated inequitably by various states participating in and enforcing the MSA and related legislation, through tactics that favored the major tobacco companies and that targeted the Claimants for punitive treatment because of their efforts to avoid the MSA, without in fact advancing legitimate health interests. The Tribunal notes the federal criminal law enforcement

proceedings that have been initiated against Mr. Montour partly as a consequence of alleged infractions of the complementary legislation because of his tobacco distribution activities. With the exception of one member, the Tribunal believes that the evidence before it leaves open to question whether the MSA scheme has in fact produced substantial health benefits for the participating states.

184. Further, except for one member, the Tribunal believes it plausible that some OPMs did raise their prices in order to lose market share, as the Claimants contended in the portion of their claim dealing with off-reservation sales, in the expectation of eventual financial benefit through the NPM Adjustment provisions. In two members' view, the various U.S. states may well have adopted the Allocable Share Amendments primarily to preserve their MSA revenues from reductions under the NPM Adjustment provisions (which they see as a significant flaw in the MSA).[43]

185. The Tribunal, again with the exception of one member, also believes that state legal officers acted less than optimally in working together to discuss and develop the proposed Allocable Share Amendments and complementary legislation without bringing the NPMs and other interested parties, and in particular the Claimants, into the process. The Tribunal notes in this regard evidence on the record showing that some state legal officials and officials of the National Association of Attorneys General consulted and met with representatives of the PMs, but not with the NPMs, in designing the legislative proposals and legislative strategies. In the view of two Tribunal members, it would have been better for the representatives of the state attorneys general to have included Grand River and other NPMs in these meetings and discussions related to possible amendments of the MSA adverse to the NPMs' interests, just as the OPMs and SPMs were included in them. As stated more fully in paragraph 212, *infra*, the Tribunal considers that First Nations or tribal governments, particularly those in the United States whose regulatory authority is or may be implicated by application of the MSA, should have been included in these discussions.

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[43] MSA Article IX(d)(1), the "NPM Adjustment" provision, allows OPMs to receive a reduction in payments to a particular state equal to three times the amount of their market share loss exceeding 2%, if they can persuade an independent arbitrator that (1) the MSA was a "significant factor" in the OPMs' collective loss of more than 2% of market share, and, if so, (2) an arbitrator finds that the state failed to enact or diligently enforce an Escrow statute. Neither Party presented a full picture of the proceedings under the NPM Adjustment provision, and there was innuendo and lack of clarity at the hearing as to whether relevant matters might be subject to confidentiality restrictions pursuant to U.S. court orders in discovery proceedings, orders in arbitrations under the MSA, or otherwise. However, the January 2009 opinion of U.S. District Court Judge Alvin K. Hellerstein in *Freedom Holdings v. Cuomo*, which was on record, indicates that:

> [t]o date, no NPM adjustment has been granted, although The Brattle Group, the firm tasked with making the 'significant factor' determination, concluded in 2003, 2004, and 2005 that the MSA had been a "significant factor" in the OPMs' loss of market share ... ." 592 F. Supp.2d 684 (SDNY, 2009) (citation omitted).

186. All members of the Tribunal agree that the U.S. states, in developing and implementing the MSA, do not appear to have been at all sensitive to the particular rights and interests of the Claimants or the indigenous nations of which they are citizens, including those interests in maintaining and developing cross-border trade relations in accordance with longstanding traditions in promoting economic development opportunities for indigenous communities. The Tribunal cannot avoid noting the strong international policy and standards articulated in numerous written instruments and interpretive decisions that favor state action to promote such rights and interests of indigenous peoples.

187. Nevertheless, the Tribunal has already held unanimously that it has no jurisdiction to adjudicate the claims of Grand River, Kenneth Hill and Jerry Montour, for the reasons discussed above. And as to Mr. Montour's claim under Article 1105 of NAFTA, the Tribunal finds—also unanimously—that, whatever unfair treatment was rendered him or his business enterprise, it did not rise to the level of an infraction of the fair and equitable treatment standard of 1105, which is limited to the customary international law standard of treatment of aliens. Applying that standard, the Tribunal now turns to the specific claims under 1105.

188. Drawing on the five sets of legal propositions described above, the Claimants' Memorial asserted four separate, although potentially overlapping, claims under Article 1105. (For convenience, these are referred to as the First, Second, Third and Fourth Article 1105 Claims.) In addition, at the hearing, the Claimants developed additional contentions not presented in their Memorial or Reply. However, in response to the Tribunal's question, the Claimants' counsel confirmed that "every claim that we have in the Memorial is still our claim."[44] The Tribunal accordingly has taken the Article 1105 claims as presented in Claimants' Memorial as the basis of its analysis of Arthur Montour's claims under Article 1105.

189. *The First Article 1105 Claim.* Emphasizing *Metalclad v. Mexico*, the Claimants maintained that the Respondent failed to ensure a transparent and predictable framework for their investments associated with the off-reservation marketing of Grand River's cigarettes.[45] Thus, this claim involves the claims by Jerry Montour, Kenneth Hill and Grand River related to off-reservation marketing.

190. *The Second Article 1105 Claim.* The Claimants next contended that the Respondent violated obligations of good faith treatment and of non-discrimination against "special or disadvantaged groups" under Article 1105, in that U.S. state officials failed "to proactively consult Claimants, as First Nations investors with commercial

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[44] Transcript, Mr. Weiler: 457-58.

[45] *See, e.g.*, Claimants' Memorial ¶ 203 ("The MSA regime ... represented a unilateral offer from states to tobacco producers/distributors: either join the MSA regime of comply with the escrow payment regime"); ¶ 210 ("Claimants reasonably entertained a legitimate expectation that the expansion of their brand to a limited number of new state markets was encouraged under the MSA regulatory framework.")

activities likely to be significantly affected by their measures."[46] This breach is said to have occurred before the Escrow Laws were initially enacted and as states adopted the Contraband Laws (claims now partly barred by the 2006 jurisdictional decision), and when the Escrow Laws were amended to repeal the allocable share provisions. The Claimants contended that the customary international law standard of equitable treatment incorporates the duty of consultation, and accordingly barred the states from removing the allocable share release mechanisms "without first attempting to ameliorate the resulting impact upon Claimants as First Nations investors."[47]

191. *The Third Article 1105 Claim.* In their third claim, the Claimants contended that they had reasonable expectations that the Respondent "could not, and would not, attempt to assert its regulatory jurisdiction over the commercial activities of Haudenosaunee individuals and enterprises."[48] The Claimants maintained that they were entitled to expect that none of their transactions anywhere on Six Nations territory (and apparently outside of it as well) would be subject to the MSA regime. State governments had no authority under U.S. law to impose an escrow requirement in relation to sales of their product, including sales made nationwide and off-reservation. U.S. judicial decisions adopting different constructions of their claimed rights could not alter those rights. (Again, insofar as the Claimants contended here that enactment of the Escrow Laws and other legislative actions prior to March 2001 violated their rights under NAFTA, those claims are barred by the Tribunal's 2006 jurisdictional decision.)

192. *The Fourth Article 1105 Claim.* The Claimants alleged that the Respondent failed "to ensure that all tobacco enterprises, and especially First Nations tobacco enterprises, received the equal opportunity to choose whether to face tort allegations against it with the context of a civil trial, and to actually be held liable for an actionable wrong, before being forced to make millions of dollars in payments, ostensibly in order to permit state officials to collect at some future moment in time, should they ever attempt to pursue any sort of action in tort against Claimants in respect of their U.S. business venture." [49]

193. The Claimants' papers characterized this final claim as involving denial of justice. Their papers emphasized that the denial of justice claim was not based on any failings or limitations of U.S. courts. "It is not Claimants' position before this Tribunal, that they have been denied due process in respect of the manner in which the dozens of cases pursued against them, or in the one case they are pursuing against the MSA states violates international principles of due process."[50]

194. Instead, in their written submissions and at the hearing, the Claimants maintained that the denial of justice lay in the fact that the states treated them unfairly and without

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[46] *Id.* ¶ 213.
[47] *Id.* ¶ 218.
[48] Id. ¶ 221.
[49] *Id.* ¶ 200.
[50] The Claimants' Reply ¶ 181.

due process in enacting and enforcing the Escrow Statutes, even though they had not been sued like the OPMs and there was no evidence or judicial finding that their cigarettes had health consequences.[51]

195. Insofar as the claim involves the initial enactment of the Escrow Acts, it is barred by the Commission's 2006 jurisdictional decision. However, in their March 2009 Reply and at the hearing, the Claimants refined their argument, maintaining that the denial of justice lay in the repeal of the Allocable Share provisions by the legislatures of various states, which exposed them to significantly increased MSA payment obligations.[52]

D. The Respondent's Position

196. The Respondent disputed the Claimants' characterizations of the contents of the customary minimum standard of protection under Article 1105, initially noting that the Article's language covers only property interests of aliens ("investments of investors"), not claims involving claimed violations of individual or group rights. The Respondent also urged that state practice shows states retain a significant sphere within which to regulate in the public interest. Accordingly, tribunals should resist any temptation to second-guess regulatory decisions.

197. In the Respondent's view, the customary law minimum standard includes obligations to prevent denial of justice as the concept is understood in customary international law, and to assure minimum levels of internal security and law and order. It also bars expropriation except under prescribed conditions, thus operating in parallel with NAFTA's Article 1110. However, because it is a minimum standard, it does not allow variations in protection for different classes of aliens; Article 1105 requires a minimum level of property protection that must be extended to all alien investors' investments. And, as the FTC interpretation establishes, violation of a separate agreement does not entail violation of the minimum standard. "Relevant rules of international law" cannot override treaty language.

198. The Respondent disputed the premises of the First Article 1105 Claim. However, this claim involves off-reservation sales and lies outside the Tribunal's jurisdiction, so the Respondent's position need not be further described.

199. As to the Second Article 1105 Claim, alleging *de facto* discrimination and a failure to consult to avert that discrimination, the Respondent noted that the language of Article 1105 does not expressly prohibit discrimination. The Respondent contended that the Claimants did not show that there was a customary law prohibition against *de facto* discrimination against foreign investors, and that international law clearly contains no such blanket prohibition. In any case, the disputed measures do not differentiate between foreign or domestic, or indigenous and non-indigenous, investors.

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[51] Transcript, Mr. Weiler: 892; Transcript, Mr. Violi: 894-898.
[52] Transcript, Mr. Weiler: 908.

200. In the Respondent's view, the sources cited by the Claimants did not establish that the claimed duty of "pro-active" consultation with indigenous communities is a rule of international customary law. The Respondents asserted that the United Nations Declaration on the Rights of Indigenous Peoples, which calls for consultations with indigenous peoples, does not represent customary international law, while pointing out that the United States voted against the Declaration when the General Assembly adopted it in 2007. However, if there is such a customary rule, it involves consultation with indigenous communities, not individual indigenous Canadian businessmen, and is not part of the minimum international standard of protection. Finally, the Respondent saw the Claimants' discrimination arguments as essentially asking that the Claimants be accorded special treatment not given to other similarly situated NPMs who are not indigenous tobacco producers. This contradicts the idea of a minimum standard of treatment due to all aliens.

201. The Respondent's contentions regarding the main elements of the Third Article 1105 Claim (involving rights under the Jay Treaty and other treaties, and under U.S. domestic law provisions relating to indigenous peoples) are summarized above, in connection with the Claimants' expropriation claim. In brief, the Respondent disputed the Claimants' characterization of the Jay Treaty, urging that it does not immunize large-scale tobacco business from governmental regulation. Further, the legal instruments cited by the Claimants are not widely accepted or are hortatory or political in character. They do not prove the existence of customary rules, let alone customary rules constituting part of the minimum standard for the treatment of aliens.

202. As to the Fourth Article 1105 Claim (denial of justice), the Respondent pointed out that the claim did not allege any shortcomings of the U.S. judicial system, emphasizing that Grand River has brought and maintained many actions in U.S. courts, often with success. The Claimants' instead attacked the legislative process leading to enactment of the Escrow Laws and much later to the Allocable Share Amendments.

203. Respondent urged that the escrow requirements under the Escrow Laws do not deprive the Claimants of property without judicial process, since they retain title to the escrowed funds. In any case, the Respondent maintained that a claim for denial of justice requires that the judicial system be given the opportunity to correct any errors, and hence that the Claimants must exhaust their remedies, but the Claimants have not done so. They are challenging the disputed measures in *Grand River v. Pryor*, U.S. federal litigation that remains ongoing following a court of appeals decision reversing a lower court's dismissal and allowing the case to proceed.

E. The Tribunal's Findings

204. *The First Article 1105 Claim.* As presented, the first claim related to off-reservation sales, and rested on the contention that the customary minimum standard requires protection of the Claimants' reasonable expectations regarding stability of the legal framework for off-reservation marketing of Grand River's cigarettes. The Tribunal does not have jurisdiction regarding Kenneth Hill's, Jerry Montour's and Grand River

's claims relating to off-reservation sales. Accordingly, the First Article 1105 Claim lies outside the Tribunal's jurisdiction, and is dismissed.

205. *The Second Article 1105 Claim.* This claim maintained that Article 1105 includes an obligation of non-discrimination against special or disadvantaged groups, giving rise to related obligations on U.S. states to "proactively consult Claimants, as First Nations investors with commercial activities likely to be significantly affected by their measures." In addition, states were bound not to enact the Allocable Share Amendments "without first attempting to ameliorate the resulting impact upon Claimants as First Nations investors." This claim is relevant to Arthur Montour, and to that extent lies within the Tribunal's jurisdiction.

206. As worded in the Claimants' Memorial, the claim emphasized their treatment as investors, not the treatment of their investments. This suggests a potential issue with regard to Article 1105's limitation to "investments", but not "investors." This issue was briefly raised, but was not pursued by the Parties. In light of the Tribunal's other findings, it need not make any decisions in this regard.

207. The Respondent agreed that the customary minimum standard of protection included some protections against discrimination (for example, prohibiting discriminatory acts of expropriation). However, it denied that the Claimants had shown that the customary minimum standard of protection included either a customary rule barring discrimination against aliens' investments writ large, or a more limited rule requiring consultation and forbearance in dealings involving economic interests of indigenous peoples.

208. *The Tribunal's Conclusions.* The language of Article 1105 does not state or suggest a blanket prohibition on discrimination against alien investors' investments, and one cannot assert such a rule under customary international law. States discriminate against foreign investments, often and in many ways, without being called to account for violating the customary minimum standard of protection.[53] As the *Methanex* Tribunal explained:

> [T]he plain and natural meaning of the text of Article 1105 does not support the contention that the "minimum standard of treatment" precludes governmental differentiations as between nationals and aliens. Article 1105(1) does not mention discrimination; and Article 1105(2), which does mention it, makes clear that discrimination is not included in the previous paragraph. By prohibiting discrimination between nationals and aliens with respect to measures relating to losses suffered by investments owing to armed conflict or civil strife, the second paragraph imports that the preceding paragraph did not prohibit—in all other circumstances—differentiations between nationals and aliens that might otherwise be deemed legally discriminatory: inclusio unius est exclusio alterius. The textual

[53] Campbell McLachlan, Laurence Shore & Matthew Weiniger, INTERNATIONAL INVESTMENT ARBITRATION. SUBSTANTIVE PRINCIPLES, p. 213 (quoting Oppenheim).

meaning is reinforced by Article 1105(3), which makes clear that the exception in paragraph 2 is, indeed, an exception.

15. Elsewhere, when the NAFTA Parties wished to incorporate a norm of non-discrimination, they did so—as one finds in Article 1110(1)(b) which requires that a lawful expropriation must, among other requirements be effected "on a non-discriminatory basis". But Article 1110(1)(c) makes clear that the NAFTA Parties did not intend to include discrimination in Article 1105(1). Article 1110(1)(c) establishes that another requirement for a lawful expropriation is that it be effected "in accordance with due process of law and Article 1105(1)". If Article 1105(1) had already included a non-discrimination requirement, there would be no need to insert that requirement in Article 1110(1)(b), for it would already have been included in the incorporation of Article 1105(1)'s due process requirement.[54]

209. Thus, neither Article 1105 nor the customary international law standard of protection generally prohibits discrimination against foreign investments. Further, it has not been shown that either the text of Article 1105 or the customary minimum standard includes the more specialized prohibitions and requirements involving indigenous peoples invoked here, much less that those requirements have been breached as to Arthur Montour.

210. It may well be, as the Claimants urged, that there does exist a principle of customary international law requiring governmental authorities to consult indigenous peoples on governmental policies or actions significantly affecting them. One member of the Tribunal has written that there is such a customary rule. Moreover, a recent study by a committee of several international law experts assembled under the auspices of the International Law Association, after an exhaustive survey of relevant state and international practice, found a wide range of customary international law norms concerning indigenous peoples, including "the right to be consulted with respect to any project that may affect them."[55] As pointed out by the Claimants, the duty of states to consult with indigenous peoples is featured in the UN Declaration of the Rights of Indigenous Peoples, particularly in its Article 19 as well as in several other articles. In its Counter-Memorial the Respondent maintained in sweeping terms that the Declaration does not represent customary international law, as did Canada in its non-disputing party submission. However, when questioned by the Tribunal on this point at the hearing, the Respondents' counsel stated that some parts of the Declaration could reflect fundamental human rights principles and emerging customary law.

211. In any event, any obligations requiring consultation run between the state and indigenous peoples as such, that is, as collectivities bound in community. Article 19 of the U.N. Declaration provides that "States shall consult with indigenous *peoples*

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[54] *Methanex Corporation v. United States*, Final Award (Aug. 3, 2005), Part IV, Chapter C, ¶¶ 14-15.

[55] ILA Committee on the Rights of Indigenous Peoples, Interim Report (2010), p. 51.

through their own representative institutions" (emphasis added). It would go well beyond any articulation of the indigenous consultation norm, as well as far beyond its conceptual foundations as understood by the Tribunal, to hold that the norm obliges consultations with individual investors such as Arthur Montour, who does not purport to have been endowed with authority to represent the First Nations communities of which he is a member in regard to the matters at hand. At the hearing, the Claimants' counsel argued, without any written authority or testimony by someone with direct relevant knowledge, that in the customs of the Haudenosaunee, sovereignty resides with the individual. Hence, as relevant here, Arthur Montour should be seen as the beneficiary of the customary international law obligation for governments to consult with indigenous communities. Thus, the argument went, NAFTA entitled him to be directly consulted before the states took any action affecting his investment. The Tribunal finds this particular argument unpersuasive and unsubstantiated.

212. That said, the Tribunal believes that a good case could be made that consultations should have occurred with governments of the Indian tribes or nations in the United States whose members and sovereign interests could, and apparently are, being affected by the MSA and related measures to regulate commerce in tobacco. Retail tobacco businesses are in many Indian reservations across the country, constituting important sources of income and catalyzing other economic activity among indigenous communities. The evidence before the Tribunal has shown many of the actual or potential effects of the MSA and related measures on reservation tobacco sales and distribution to reservations retailers. The United States federal government admits to the need for consultations with indigenous communities on legislative and administrative measures affecting them, as a matter of federal policy if not as a matter of international law.[56] However, at the hearing the Respondent's counsel, when questioned by the Tribunal, confirmed that the governments of Indian nations had not been consulted about the MSA.

213. Nonetheless, the possible existence of a customary rule calling for expanded consultation between governments and indigenous peoples does not assist Arthur Montour as an individual investor. Even if one were to indulge a supposition that a customary rule required consultations directly with an individual First Nations investor under the circumstances of this case, it would be difficult to construe such a rule as part of the customary minimum standard of protection that must be accorded to every foreign investment pursuant to Article 1105. The notion of specialized procedural rights protecting some investors, but not others, cannot readily be reconciled with the idea of a minimum customary standard of treatment due to all investments.

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[56] Cf. Pres. William J. Clinton, Executive Order 13175, Nov. 6, 2000 (consultation and coordination with tribal governments); Pres. Barack Obama, Memorandum for the Heads of Executive Departments and Agencies – Tribal Consultation, Nov. 5, 2009; Pres. George W. Bush, Executive, Memorandum: Government-to-Government Relationship with Tribal Governments, Sept. 23, 2004.

214. As stated by the Free Trade Commission's 2001 interpretive directive, "[t]he concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens." The customary minimum standard of protection is as the words say: the minimum protection to be assured to all alien investors' investments. As the *Glamis Gold* Tribunal put it:

> The customary international law minimum standard of treatment is just that, a minimum standard. It is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community. Although the circumstances of the case are of course relevant, the standard is not meant to vary from state to state or investor to investor.[57]

215. At the hearing, Claimants' counsel seemed to agree as well: "all the words end up folding into a simple concept. There's a minimum standard. There's a floor below which no one can fall, no state should be going below that ... the standard is not meant to vary ... It's an absolute standard."[58]

216. The Claimants' Second Article 1105 Claim as it applies to Arthur Montour is dismissed, as it does not establish a breach of the customary international law minimum standard of treatment of aliens.

217. *The Third Article 1105 Claim.* This claim contended that the Article 1105 obligation of fair and equitable treatment obliged the Respondent to observe their rights as members of indigenous communities under the Jay Treaty and other treaties, various human rights instruments, and U.S. constitutional provisions affecting Indian commerce. The Respondent disputed both the Claimants' interpretation of many of these rules, and whether they reflected customary international law. This claim is relevant to Arthur Montour's on-reservation operations, and so is within the Tribunal's jurisdiction.

218. This claim poses the same difficulty as the previous one. In its discussion of the Claimants' asserted reasonable expectations claims, above,[59] the Tribunal noted the Parties' opposing interpretations of international and domestic legal rules affecting, *inter alia*, Indian commerce in the United States. However, the Tribunal need not decide the many disputed points regarding the Jay Treaty, U.S. Indian law, or whether international rules have developed to provide the protections that the Claimants assert for individual First Nations investors. The more important question is whether the asserted legal protections are imported into the minimum standard of protection owed to foreign investments under customary international law and thus under Article 1105.

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[57] *Glamis Gold,* ¶ 615.
[58] Transcript, Mr. Weiler: 858-859.
[59] *See* Part 6A, *supra.*

219. The Tribunal concludes that it has not been shown that they are. As the basis of the fair and equitable treatment standard of Article 1105, the customary standard of protection of alien investors' investments does not incorporate other legal protections that may be provided investors or classes of investors under other sources of law. To hold otherwise would make Article 1105 a vehicle for generally litigating claims based on alleged infractions of domestic and international law and thereby unduly circumvent the limited reach of Article 1105 as determined by the Free Trade Commission in its binding directive.

220. The narrowly framed language of Article 1105—assuring the minimum standard of protection for investors' investment, not for the investors themselves—suggests a further complication. Many of the legal principles and instruments invoked involved Claimants' (including Arthur Montour's) individual status or rights as members of indigenous communities. These claims of individual rights may be in tension with Article 1105's limitation to protection of investments, not investors. However, the Parties did not directly engage on this issue, and the Tribunal makes no decision on it.

221. This claim as it applies to Arthur Montour is dismissed for failure to show that the rights asserted fall within the customary standard of protection of alien investors' investments protected by NAFTA Article 1105.

222. *The Fourth Article 1105 Claim.* The fourth Article 1105 claim was directed at the operation of the escrow system under the MSA, and was variously described as being for denial of justice or denial of due process. The United States agreed that protection against denial of justice, as generally understood in international law, is a core component of the customary international law minimum standard. However, as presented in the Claimants' papers, the claim did not mirror the generally held international law conception of denial of justice, which emphasizes the role of courts and judicial systems. Instead it appeared to draw on broader concepts of due process and denial of justice derived from Canadian, U.S. or other national law.[60]

223. Paulsson, an important recent writer on denial of justice, counsels against this, noting that "[n]ational laws offer fundamentally different definitions of denial of justice. It is therefore dangerous to import such definitions into international law."[61] He instead identifies denial of justice in international law as involving the failure of a national judicial system, taken as a whole, to render due process to aliens. The concept therefore involves a duty to "create and maintain a *system of justice* which ensures that unfairness to foreigners either does not happen, *or is corrected.*"[62] Brownlie likewise sees the concept as relating to the role of courts, taking the broader definition

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[60] *See*, the Claimants Reply ¶ 182 ("Claimants' ground for claiming that a denial of justice, or more properly, a denial of administrative and regulatory due process, has taken pace is that they were never sued for the same things for which Liggett and the OPMs were sued.")

[61] Jan Paulsson, DENIAL OF JUSTICE IN INTERNATIONAL LAW, p. 36.

[62] *Id.*, p. 7.

of the Harvard Research draft as "probably" the best guide to the term's meaning in international law.

> Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice.[63]

224. A treatise summarizes the recent cases:

> In practice, save in cases of a refusal to investigate or prosecute, the cases on the international minimum standard and denial of justice were almost always concerned with alleged failures in the judicial system of the host State. Any failures in administrative decision-making would not give rise themselves to an international claim, since they would first have had to be tested by the investor in the local courts.[64]

225. NAFTA tribunals have understood denial of justice in this limited sense. The *Mondev* tribunal thus spoke of Article 1105(1) as embracing "what is commonly called denial of justice, that is to say, with the standard of treatment of aliens applicable to decisions of the host State's courts or tribunals."[65]

226. However, the Claimants' materials stressed that their fourth claim did not involve any critique of the U.S. courts, either in connection with particular cases or more generally. This position presumably encompasses Arthur Montour's claims. According to the Claimants' Reply:

> It is not Claimants' position, before this Tribunal, that they have been denied due process in respect of the manner in which the dozens of cases pursued against them, or in the one case they are pursuing against the MSA States violates international principles of due process. Claimants agree that if their complaint was with the US justice system, it would be in their interest to reasonably pursue all reasonable steps before bringing and international damages claim.[66]

227. As presented in the Claimants' Memorial and Reply, this claim argued that state legislatures perpetrated a denial of justice by enacting the Escrow laws to require the Claimants to escrow funds as a condition for off-reservation sales of Grand River's cigarettes, even though those cigarettes had not been judicially determined to harm any person. Posed this way, the claim is outside the Tribunal's jurisdiction. It is

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[63] Harvard Research Draft, Art. 9, quoted in Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (6th Ed.), pp. 506-507.

[64] MacLachlan, Shore & Weiniger, *supra* note 53, p. 216.

[65] *Mondev*, ¶ 96.

[66] Claimants' Reply Memorial, ¶ 181.

precluded under Paragraph 103 of the Tribunal's July 2006 Decision on Jurisdiction, which found that the Claimants' claims relating to the original enactment of the Escrow Laws were untimely and barred by NAFTA's Articles 1116(2) and 1117(2).

228. However, at the hearing, the Claimants emphasized the more recent Allocable Share Amendments, urging that their off-reservation sales were injured only as Grand River's cigarettes lost off-reservation market share following the amendments, so that their enactment resulted in a denial of justice. The Tribunal does not have jurisdiction regarding the claims of Kenneth Hill, Jerry Montour and Grand River related to those off-reservation sales. Accordingly, the Fourth Article 1105 Claim as it pertains to those sales is outside the Tribunal's jurisdiction and is dismissed.

229. The Claimants' Memorial did not clearly set out a separate claim of denial of justice or otherwise under Article 1105 specifically related to Arthur Montour. While he and his companies have been involved in litigation in various courts in the United States, he was not heard to contend that his treatment in that litigation has not conformed to Article 1105. Moreover, as noted above, the Claimants' written materials disavowed any intention to dispute the operation of the U.S. court system, a position presumably shared by Mr. Montour. Accordingly, the Fourth Article 1105 claim as it pertains to Mr. Montour is also dismissed.

230. At the hearing, the Claimants developed a new line of argument involving Mr. Montour. The Claimants' counsel cross-examined state legal officers from California, Idaho and New Mexico regarding letters each of them sent in August 2008 to a foreign trade zone in Las Vegas, Nevada that was a distribution point for Grand River's cigarettes sold by Native Wholesale Supply. The letters were worded differently, but each served to notify the foreign trade zone that shipment of these cigarettes into the writer's state could be in violation of the state's complementary legislation. (These laws, *inter alia*, bar the import into or transport in a state of cigarettes not registered with that state and listed on its register or directory. Grand River's products were not so registered or listed in any of the three states.)

231. The Claimants' counsel argued that these letters were threatening, arbitrary and reckless, because the cigarettes Native Wholesale Supply distributed through the foreign trade zone were sold to wholesalers on Indian reservations, where the states had no jurisdiction and where their Escrow Laws could not apply. Hence, in the Claimants' view, the states could not properly warn (or as the Claimants saw it, threaten) that their complementary legislation might apply to shipments of Grand River cigarettes into their territory.

232. The Claimants did not develop this argument in their Memorial or Reply prior to the hearing, and did not clearly relate it to their claims of violations of specific NAFTA provisions at the hearing. While the Claimants criticized the complementary legislation's broad reach at the hearing, they did not contend that these laws were *per se* contrary to NAFTA, and any such claim might now be problematic under the Tribunal's 2006 Decision on Jurisdiction. Instead, the Claimants' position appeared to be, first, that that states could not apply their complementary legislation to on-

reservation sales not subject to their Escrow laws, and, second, that the complementary legislation could not be applied to commerce between Native Americans, even if it involved transportation or other activities outside of Indian country.

233. In answer to these arguments, the Respondent referred the Tribunal to state statutory language and state court decisions indicating that the states' complementary acts serve separate purposes from, and operate independently of, their Escrow Statutes. Thus, they are not limited to transactions to which the Escrow Statutes apply. The Respondent also drew on the opinion of its expert on U.S. Indian law, Professor Goldberg, to the effect that transportation of cigarettes off reservation would be regarded as taking place outside of Indian country, and therefore would be subject to regulation by U.S. states.

234. Such questions about the permissible reach of state regulation over Indian peoples and lands under U.S. law were raised in connection with the Claimant's argument of a reasonable expectation that the MSA and related measures would not apply to them, an argument the Tribunal addressed above. As before, the Tribunal is loath to purport to address these delicate and complex questions of U.S. constitutional and Indian law, which are posed by Arthur Montour's new argument. These issues of national law belong in national courts, not in an international tribunal. If a national court system fails to address these questions in a proper way, there may be grounds for a true claim of denial of justice within the ambit of the customary minimum standard under NAFTA Article 1105. That is not what is presented here.

235. In any event, no evidence was introduced to show that anything adverse happened to Arthur Montour or NWS as the result of the three disputed letters to the Las Vegas foreign trade zone. Instead, the record shows that NWS continues to distribute large quantities of cigarettes to on-reservation customers in western states. There is no evidence that this is not being done from the Las Vegas foreign trade zone. In this regard, the second report of the Claimants' valuation expert states that sales by Native Wholesale Supply's sales in California, [redacted] have grown at an annual rate of [redacted] per year for several years. The expert's second report also shows substantial continued sales through December 2008 in other western states including Idaho and Nevada.[68] The Expert's report makes no claim of damages for any impairment of on-reservation sales in Oklahoma or New Mexico, suggesting that sales are continuing there as well.[69]

236. Arthur Montour's claim of breach of NAFTA presented at the hearing involving letters sent by several states' legal officers to the Las Vegas foreign trade zone is denied.

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[67] Rebuttal Report of Wayne R. Wilson, Jr. (Mar. 3, 2009), ¶ 44.
[68] *Id.*, Ex. 4.2
[69] *Id.*, Ex. 4.3.

IX. MEASURE OF COMPENSATION – DAMAGES

237. Under NAFTA Article 1116, an investor of a Party may submit to arbitration a claim that another NAFTA Party has breached specified NAFTA obligations "and that the investor has incurred loss or damage by reason of, or arising out of, that breach." Under UNCITRAL Rule 24(1) (which applies in this proceeding), a claimant has the burden of proving both the breach and the claimed loss or damage

238. The Claimants' damages claim was largely for compensation related to off-reservation sales of cigarettes manufactured by GRE. The Tribunal found that it has no jurisdiction with respect to claims involving off-reservation sales, because the Claimants did not have an investment in the United States. There is jurisdiction over Arthur Montour's claims involving on-reservation sales, but those claims fail on the merits. The claims for damages therefore fail, and the Tribunal need not analyze them further.

X. COSTS

239. The 1976 version of the UNCITRAL Arbitration Rules applies in this case.[70] The 1976 UNCITRAL Rule relating to costs, Article 40, distinguishes between costs of legal representation and assistance and other costs, indicating that the costs of arbitration should "in principle" be borne by the unsuccessful party. There is no similar indication for costs of legal representation and assistance. Under that rule:

> 1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
>
> 2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

240. The Claimants contended that, should they prevail, they should receive all of their costs of legal representation and other costs related to the proceedings. They maintained further that, even if they should not prevail, the Tribunal should allocate up to $250,000 of their representation costs to the Respondent, on the ground that the United States impeded the proceedings by providing insufficient discovery. The Claimants also urged that, if they did not prevail, "the tribunal should consider the prevailing practice of investment treaty arbitration tribunals, which is not to award

[70] The UNCITRAL Rules pertaining to costs were amended in 2010, with effect from August 15, 2010. This case was initiated in 2004, the hearing was in February 2010, and the Parties' submissions on costs were in March 2010, all well before the effective date of the new rules.

costs against an investor/claimant when a legitimate claim has been alleged but dismissed." The Respondent maintained that it should be compensated for its representation and other costs on multiple grounds, including, *inter alia*, Grand River's strong financial performance and the deficiencies of the evidence.

241. On March 31, 2010, within the 45-day time limit specified by the Tribunal at the February 2010 hearing, both Parties filed submissions detailing their claims for costs. The Claimants sought such an award in the amount of $3,917.376.57. The United States sought an award in the amount of $2,792,592.23.

242. The Claimants' submission also specified an amount of approximately eight million dollars said to reflect professional fees they incurred through involvement in U.S. court proceedings "defending against the measures at issue in the arbitration." About half of this amount $3,977,129.50, reflected the Claimants' expenses in their suit against the U.S. states party to the MSA in U.S. federal court challenging the MSA and its related measures.

243. In an April 8, 2010 letter, the Respondent objected to this element of the Claimants' submission, portraying it as the untimely submission of a new damages claim. The Claimants disputed this, maintaining that they were not making a new or amended claim, and instead were providing an accurate specification of amounts due for injuries they had previously claimed. In view of its decisions elsewhere in this Award, the Tribunal need take no decision regarding this claim for eight million dollars.

244. NAFTA tribunals have varied greatly with respect to the apportionment of costs under the UNCITRAL Rules. Some tribunals have left each party to bear its costs of representation and divided the costs of the proceedings equally.[71] Some have left each Party to bear its costs of representation, but shifted some or all of the other costs of the arbitration to a non-prevailing party.[72] Others have allocated to the unsuccessful party both the entire costs of the arbitration and the prevailing party's legal costs.[73] The varying outcomes reflect both the varied circumstances of individual cases and the varied views of individual panels. Thus, things remain largely as the *Mondev* tribunal described them in 2002: "NAFTA tribunals have not yet established a uniform practice in respect of the award of cost and expenses."[74]

245. The Respondent has prevailed on the claims. The Tribunal lacks jurisdiction with respect to the claims involving off-reservation sales. The claims related to on-reservation sales have failed on the merits.

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[71] *Azinian v. Mexico*, Award on Jurisdiction and Merits, ICSID Case No. ARB (AF)97/2 (Nov. 1, 1999), ¶ 127; *Loewen*, ¶ 240.

[72] *Glamis Gold*, ¶ 833 (each party bears its own costs of representation; two thirds of arbitral costs to the claimant).

[73] *Methanex Final Award*, Part V, ¶ 13.

[74] *Mondev*, ¶ 159.

246. Nevertheless, the Tribunal concludes that in the circumstances, no shifting of costs is warranted, and that it is reasonable to leave the costs of both representation and of the arbitration where they now lie. Accordingly, each Party shall bear its own costs of representation, and the Parties shall bear equally the expenses of the Tribunal and of the Secretariat.

247. In departing from the "in-principle" rule of Article 40, the Tribunal has considered factors going beyond the narrow question of which party was "unsuccessful." It has taken into account, in particular, the Claimants' atypical situation as First Nations enterprises and entrepreneurs carrying on cross-border trade in the tradition of their ancestors. It is mindful of the economic difficulties faced by the First Nations communities of which they form part, as by many indigenous communities, as the result of historical factors, and of the role of Claimants' business ventures, particularly on the reservation at Ohsweken, as an important source of employment and income. The Tribunal believes that it would have been appropriate for governmental authorities in the United States to give greater recognition to, through appropriate consultations, the interests and concerns of Native American communities and entrepreneurs potentially affected by the MSA and related measures. Even if there be no right of redress established under NAFTA, the Tribunal believes that "[a]n appreciation of these matters can fairly be taken into account in exercising the Tribunal's discretion in terms of costs and expenses."[75]

[75] *Id.*

AWARD

For the foregoing reasons, the Tribunal unanimously DECIDES:

(a) That its does not have jurisdiction over the claims of Grand River Enterprises Six Nations, Ltd., Jerry Montour and Kenneth Hill because these Claimants do not have an investment in the United States;

(b) That it has jurisdiction over the claims of Arthur Montour, Jr;

(c) That the conduct of the Respondent that is the subject of the claims of Arthur Montour, Jr. did not involve any breach of Articles 1102, 1103, 1105 or 1110 of NAFTA;

(d) That Arthur Montour's claims are accordingly dismissed in their entirety; and

(e) That each Party shall bear its own costs and half of the costs and expenses of these proceedings.

Done at New York, New York.

Mr. Fali S. Nariman
President of the Tribunal

Mr. John R. Crook
Arbitrator

Professor James Anaya
Arbitrator