was potentially unable to differentiate information from irrelevant and/or independent sources. Such an example of poor precrisis planning has the potential to create an information vacuum, which can allow for unaccredited information to reach the public in the initial phase. This type of landscape can lead to the propagation of rumors, misinterpretation of messages, and the perpetuation of public distrust.[11]

Like the volcanic ash crisis, the Japanese tsunami provides an example of a high perceived risk event that can be discussed in relation to the crisis communication lifecycle. Like the ash cloud, communications following the tsunami stemmed from several sources which led to confusing messages reaching the Japanese public and the international public. Like the volcanic ash crisis, such inconsistent communications also suggests poor precrisis planning. Additionally, in this initial phase of disaster risk communication it is evident that there is a cultural difference in presenting the situation to the global audience, and the way the Japanese are managing the situation. There appears to be a specific perception of the risk of the impact of the events of Fukushima plant in the US and European countries as opposed to the perceived risk in Japan.[12] Perceptions of the severity of risk in the West appear to stem from the conflicting information resulting in a great degree of confusion and panic, particularly related to radiation from nuclear plants. This type of communication environment enhances feelings of risk and vulnerability and has the potential to be amplified by the media as has been the case in similar transnational disasters in the past.[13]

Both the volcanic ash crisis and the Japanese tsunami provide evidence of high perceived risk events that demonstrate poor precrisis planning and inconsistent messages during the initial phases of the events. This has been suggested through the positioning of both events against the *Crisis Communication Lifecycle*, which incorporates lessons learned from similar previous transnational disasters (i.e. pandemics and terrorist attacks). Neither of the events appears to have been anticipated in terms of the execution of a cohesive crisis communication strategy, and therefore the existing lessons learned failed to be appropriately adapted for both the cases discussed in this report. Rather, it appears as though communications arose from various sources of information, which are vulnerable to media amplification of risk. This has the potential to perpetuate public confusion, panic, and distrust. Such outcomes can be extremely detrimental to societal well-being in that the public needs to be confident as to whether or not risks pose actual health and safety hazards, or are just hype. Without this confidence, publics may not be able to make the decisions that are best for their own personal welfare, or of benefit to society.

11 V. Covello and P. Sandman, "Risk Communication: Evolution and Revolution", in A. Wolbarst (ed.), *Solutions to an Environment in Peril* (Baltimore: John Hopkins University Press, 2001), pp. 164–178.

12 David Spiegelhalter, "Japan Nuclear Threat: The Tsunami is the bigger Tragedy", BBC news, 18 March 2011, available on the Internet at <http://www.bbc.co.uk/news/world-asia-pacific-12785274> (last accessed on 19 March 2011).

13 R. Kasperson *et al.*, "The Social Amplification of Risk: Assessing Fifteen Years of Research and Theory", in N. Pidgeon *et al.* (eds), *The Social Amplification of Risk* (Cambridge: Cambridge University Press, 2003), pp. 13–46.

Trade, Investment and Risk

This section highlights the interface between international trade and investment law and municipal and international risk regulation. It is meant to cover cases and other legal developments in WTO law (SPS, TBT and TRIPS Agreements and the general exceptions in both GATT 1994 and GATS), bilateral investment treaty arbitration and other free trade agreements such as NAFTA. Pertinent developments in international standardization bodies recognized by the SPS and TBT Agreement are also covered. Risk regulation refers broadly to regulation of health, environmental, financial or security risks.

Of recurrent interest in this area are questions of whether precautionary policies can be justified, the extent to which policy can and should influence risk regulation and the standard of review with which international judicial and quasi-judicial bodies assess scientific evidence.

Tobacco Regulation, International Investment Arbitration and the Fragmentation of International Law – The Grand River Enterprises Case

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In the recent Grand River Enterprises case, United States public health regulations on protection from

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tobacco products successfully withstood a challenge by Canadian Native American investors under NAFTA chapter 11 arbitration. The arbitrators carefully weighed the investors' rights and the regulatory freedom of the host state under the NAFTA rules. The treatment of other norms of international law on the protection of indigenous peoples, however, merits some criticism.

I. Introduction

Investment arbitration under NAFTA chapter 11 has come under fire in public debate when the first investors challenged regulation by host states which tackles risks for public health or the environment.[1] NAFTA arbitration of investors' claims suddenly seemed to pose a threat to the regulatory autonomy of the NAFTA contracting parties. As host states they risked being condemned to pay large amounts of compensation to investors for having interfered with their investment or their investment expectations, the latter possibly arising to a finding of 'regulatory expropriation'.[2]

The *Grand River Enterprises* case[3] should ease some of the concerns about such challenges, as the United States regulatory scheme for the tobacco industry has escaped intact from the arbitration. Doubts over the effectiveness of the scheme for public health protection remain at the level of obiter dicta. Although the outcome appears reasonable in the light of the investors' claims, the important issues raised in the arbitration have not all been satisfactorily answered by the tribunal. The treatment of international norms protecting indigenous peoples in particular is unsatisfactory.

This assessment begins with an overview of the United States regulatory context and the investors' claims before turning to the tribunal's treatment of other norms of international law beyond the NAFTA treaty and finally a discussion of reasonable investment expectations in cases of legal uncertainty.

II. The 1998 Master Settlement Agreement and its implementing legislation

In the 1990s, more than 40 state attorneys brought litigation against the major United States tobacco manufacturers to claim compensation for the costs which states incurred in the treatment of tobacco-related illnesses.[4] Several attorneys and major companies reached an agreement known as the Master Settlement Agreement (MSA) in 1998. According to the MSA, participating manufacturers (PMs) were obliged to restrict their advertising and marketing practices, fund smoking prevention and cessation programmes and in particular make payments to a central fund based on their respective sales, as measured by the number of their cigarettes taxed by the participating states. The funds gathered were then redistributed to the states. Each state received a share proportional to the percentage of nation-wide MSA cigarette sales in that state.

The MSA led to an increase in cigarette prices and a consequent loss of market share for the PMs. To persuade non-participating manufacturers (NPMs) to join the scheme, the MSA provided that they could opt in to the settlement within 60 days[5] after the conclusion of the MSA and benefit from a permanent exemption from payment obligations for up to 125 % of their 1997 market share or for up to 100 % of their 1998 market share. They are the so-called subsequent participating manufacturers or SPMs. Several companies seized this opportunity and only had to pay contributions to the MSA fund based on their sales above the exempted threshold (exempt SPMs).

For NPMs, states had to adopt escrow legislation annexed to the MSA. NPMs were required to place in escrow an amount similar to what they would have had to pay as PMs of the MSA.[6] The NPM remained owner of the money, which however remained in escrow for 25 years and could be used to pay compensation arising out of judgments delivered against the NPM because of any negative health effects of its cigarettes.

1 Compare, e.g., the public outcry which followed the defeat of Mexico in *Metalclad Corp. v. Mexico* ICSID Case No ARB(AF)/97/1, Award (30 August 2000), or the applause for the rejection of investor's claims against Californian environmental regulation in *Methanex Corp. v. United States* Award (3 August 2005) 44 ILM 1345.

2 This concept is discussed in more detail in section V.

3 *Grand River Six Nations, Ltd., et alii vs. United States of America* Award (12 January 2011), ICSID (UNCITRAL), NAFTA (chapter 11). All subsequent paragraphs without different attribution refer to this award.

4 For a complete overview see paras. 8–16.

5 Later extended to 90 days.

6 The amounts differed slightly because some settlements between manufacturers and states prior to the MSA were taken into account in the calculation.

However, as a crucial exception, the escrow laws contained 'allocable share' provisions. According to these provisions, no NPM had to escrow more in one state than the relevant state would have received in funds in respect of that NPM's sales in all MSA states if it had been a PM. If an NPM sold all cigarettes in one state, it could recoup a large share of the amount in escrow. The NPM would initially be compelled to pay as if it were a PM. The state in question, however, could only keep in escrow an amount proportionate to its share of MSA funds based on its share of total national cigarette sales covered by the MSA. If a state's share of national MSA cigarette sales amounted for example to 1 %, it could thus only keep 1 % of the escrowed funds and had to release the rest. NPMs active in only a few states could therefore largely recover the funds in escrow.

III. The investors' claim and the tribunal's jurisdiction

Grand River Enterprises (GRE) is a Canadian cigarette manufacturer. The three other claimants are Canadian nationals, GRE stockholders and members of the Iroquois Confederacy (one of Canada's First Nations). One of them, Arthur Montour, had begun exporting cigarettes to First Nations reservations in the United States through a distribution company.

Around the year 2002, the claimants devised a marketing strategy to benefit from the 'allocable share' provisions and gain a share in the cigarette markets in a small number of southern US states by selling cigarettes outside of reservations.[7] The investors attributed their initial success to PMs initially raising their prices by too great a margin immediately after the MSA. Under the complex system of the MSA PMs could in fact derive benefit on the whole by losing more market share, because they simultaneously gained more through the reduction of their payments under the MSA than they actually lost in revenue.[8] By 2003 the market share of NPs cigarette sales in the United States had risen from less than 1 to more than 8 percent.[9]

As a consequence, states took measures to strengthen the enforcement of escrow laws and simultaneously amended the laws to repeal the 'allocable share' clauses. They claimed to be acting in order to secure the effectiveness of the MSA and its contribution to tackling public health risks caused by smoking. The claimants questioned the health effects of the MSA and contended that states were mainly trying to secure their revenues under the scheme.

Subsequently, the claimants brought a claim under NAFTA chapter 11, arguing that the repeal of the allocable share clauses and the enforcement actions had harmed their investments, resulting in violations of various standards of protection of investments under NAFTA. In their claims the investors relied at various stages on their status as members of First Nations and the protection with which international law has vested this status, enshrined in rules such as those of the 1794 Jay Treaty between the United States and the United Kingdom.[10]

In the assessment of its jurisdiction, the tribunal rejected the claims of GRE and two of the three stockholders and held that they did not have an investment as required by NAFTA, as a transnational link was missing.[11] Jurisdiction was thus only established for Arthur Montour's claims regarding his investment as a distributor for on-reservation sales of GRE's cigarettes.[12]

IV. Non-investment treaty rules in NAFTA investment arbitration: Towards fragmentation?

Because many of the claimants' arguments were based partially on norms of international law other than NAFTA, the tribunal had to deal with these norms' interaction with NAFTA rules. The claimants tried to convince the tribunal that the notion of investment should be interpreted more broadly. The tribunal, however, tried to draw a bright line between NAFTA as the treaty to be interpreted and other rules which could not be part of the applicable law. It seemed to confuse simultaneously issues of the applicable law, the limits of its jurisdiction and the methods of interpretation to be applied to NAFTA.

7 Para. 25.

8 Para. 18.

9 Para. 19.

10 Treaty of Amity, Commerce, and Navigation, signed at London, November 19, 1794; see in particular Article 3.

11 The cigarette plant itself was confined to Canadian territory with no place of business in the United States and only its sales of cigarettes had been harmed by the regulatory action, see paras. 87–89, 94 and 106.

12 Para. 125.

In order to delineate the applicable law, the tribunal held that, for the interpretation of NAFTA, the rules of the treaty[13] and the rules of interpretation provided by the Vienna Convention on the Law of Treaties (VCLT) were relevant.[14] However, the tribunal rejected the investors' claims that treaties between the United States and Canada on indigenous peoples, related customary law and 'fundamental human rights norms' had to be taken into account to construe the treaty term 'investment'.[15]

In the tribunal's view, NAFTA had to be understood as a 'balance of rights and obligations',[16] and the observance of the VCLT rules on treaty interpretation did not 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".[17] As a tribunal of 'limited jurisdiction', any other solution would mean to 'decide claims based on treaties other than NAFTA'.[18]

It appears difficult to ascertain whether at this point the arbitrators were discussing the applicable law or the jurisdiction of the tribunal. The tribunal's caution can be understood on the one hand because of the continuous efforts by NAFTA governments to restrict the import of outside treaty obligations into the NAFTA framework. However, the tribunal appears to be conflating the terms of jurisdiction, applicable law and interpretation. Interpretation using a broader range of norms does not necessarily amount to the adjudication of breaches of other treaties and a jurisdictional overstretch, as the tribunal seems to imply.

Instead, a closer reading of the VCLT rules could have offered a preferable solution. In the doctrine, Article 31 (3) c VCLT has been suggested as a useful tool for situations of overlap of norms.[19] This norm, often referred to as the 'principle of systemic integration',[20] provides that in the interpretation of a treaty as part of the context 'any relevant rul[e] of international law applicable in the relations between the parties' can be taken into account by the interpreter. Any adjudicator must still determine what rules could be relevant in the case at hand and what weight should be ascribed to them in the interpretative process.[21] However, the provision at least creates a framework of analysis within which arbitrators could structure their arguments as to why and to what extent they draw from extraneous rules of international law. Still, to date arbitrators in investment law have tended to avoid Article 31 (3) c VCLT.[22] In the present case, nothing would have prevented the tribunal from admitting the international rules as interpretative context in principle, only to find that they do not contribute in substance to the construction of the NAFTA term of 'investment'.

Similarly, under the national treatment standard the tribunal seems to partly sidestep the remaining investor's claim of a violation of national treatment based on his special status as a First Nations trader, preferring not to deal with the norms of international law beyond NAFTA at issue. Arthur Montour had argued that he should not have been subject to the additional enforcement measures undertaken by several states.[23] The arbitrators, however, performed a standard analysis of the issue of national treatment.[24] Thus focusing on discrimination based upon the origin of the investor instead of his special characteristics, the tribunal found no relevant differences in treatment.[25] The analysis could have been completed without changing the defensible test applied

13 Para. 62. According to Article 102(2), NAFTA itself is to be construed "in the light of its objectives […] and in accordance with applicable rules of international law".

14 Para. 64.

15 Para. 66.

16 Para. 69.

17 Para. 71.

18 Para. 71.

19 See, e.g., Pierre-Marie Dupuy, "Unification rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law", in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (New York: Oxford University Press 2009), pp. 45 *et sqq.*, at p. 58.

20 See *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission*, 58th Session, UN Doc. A/CN4/L682, p. 206, para. 410 *et sqq.*

21 *Ibid.*, p. 232, para. 461 *et sqq.*

22 See with further references to the jurisprudence Moshe Hirsch, "Conflicting Obligations in International Investment Law: Investment Tribunals' Perspective", in Yuval Shany and Tomer Broude (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity* (Oxford: Hart Publishing 2008), pp. 323 *et sqq.*, at pp. 323 *et sqq.*

23 Para. 169.

24 Paras. 165–167. The arbitrators used as comparators other domestic firms engaged in wholesale distribution of cigarettes in the United States potentially subject to enforcement actions. Their likeness was bolstered by the identical legal framework. See for a general critique of sector-based tests of national treatment and in favour of regulatory framework analysis Nicolas DiMascio and Joost Pauwelyn, "Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?", 102 *American Journal of International Law* (2008), pp. 48 *et sqq.*, at p. 85.

25 Para. 170.

or the outcome reached, had the arbitrators accepted in principle rules such as those of the Jay Treaty as relevant for the interpretation of national treatment, but had found them not to contribute anything in substance.

The reticence of the tribunal is more justifiable in its decision on the fair and equitable treatment standard enshrined in Article 1105 NAFTA. The claimants had brought forward that the content of this very broad standard[26] was shaped by the Jay Treaty, international customary law relating to indigenous peoples and customary principles of human rights law.[27] The United States relied on the Notes of Interpretation issued by the Free Trade Commission as a binding interpretation. The contracting parties have clarified in these Notes that the minimum standard of treatment enshrined in Article 1105 NAFTA must not be enlarged by drawing broadly from other international norms. There is no requirement of 'treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens' and that a breach of another provision of NAFTA or a separate international agreement 'does not establish that there has been a breach' of this standard.[28]

Bound by the Notes, the tribunal found that other legal rules may shape the 'context' of Article 1105 NAFTA, but that its 'content' could not be altered.[29] Consequently, the tribunal tried to force the non-NAFTA norms through the proverbial eye of the needle, the 'eye' in this case being the minimum standard of treatment in customary international law. The claimants asserted that the fair and equitable treatment standard implied a specific standard of non-discrimination, which, read together with the international customary rules of international law, should result in an obligation to consult indigenous peoples before regulatory action which affects them is taken.[30] The arbitrators found, however, that fair and equitable treatment does not generally prohibit all forms of differential treatment against foreigners.[31] They subsequently went to great lengths to identify a principle of customary international law requiring governmental authorities to consult indigenous peoples in such situations.[32] Even though the tribunal concluded that such a rule might exist, the latter could conceptually only exist between a state and a collectivity.[33] In the light of these findings, the arbitrators found it 'difficult to construe' such a rule as part of the minimum standard of treatment and thus denied that a breach of Article 1105 NAFTA had occurred.[34]

In some *obiter* statements, the tribunal admitted that 'a good case'[35] could be made that such consultations would have been necessary, in particular as the tobacco industry constituted an important source of economic income for many indigenous communities.[36] At this stage, the arbitrators showed great willingness to give as much weight as possible to the protection for members of First Nations in international law.[37]

Eventually, however, the arbitrators found themselves constrained by the very explicit will of the NAFTA contracting parties to avoid the fair and equitable treatment standard's being enlarged by legal rules from other treaties. The distinction introduced by the tribunal between other rules of international law which only shape the 'context' of Article 1105 NAFTA and those which change its 'content' can thus nothing but remain an empty promise, as all other norms effectively have to pass the test of being part of the minimum standard of treatment to be applied. It is difficult to see how a changed 'context' would lead to a different assessment under Article 1105 NAFTA.

In conclusion, the statements of the tribunal on the applicable law raise concern about whether there is sufficient conceptual clarity about the terms of applicable law, jurisdiction and interpretative methods to be applied in investment arbitration. The explicit

26 For a more detailed assessment of the fair and equitable treatment standard in international investment law see Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press 2008), at pp. 122 *et sqq*.

27 Para. 180.

28 Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Commission, 31 July 2001, section B. 'Minimum Standard of Treatment in Accordance with International Law', paras. 2 and 3.

29 Para. 181.

30 Para. 205.

31 Para. 208.

32 Para. 210.

33 Para. 211.

34 Para. 213.

35 Para. 212.

36 Para. 212.

37 At para. 186, the tribunal explicitly held that the US states had not been 'sensitive' to the special concerns of indigenous peoples despite the existence of 'strong international policy and standards articulated in numerous written instruments and interpretive decisions' which favoured state action to promote the rights of such peoples.

exclusion of other rules of international law by contracting parties as in the case of fair and equitable treatment under Article 1105 NAFTA leaves the tribunal in practice no leeway when attempting to apply other rules in context as suggested by Article 31 (3) c VCLT. However, under the other standards of investment protection in NAFTA more openness could be expected from tribunals as international adjudicators who arguably should not easily dismiss the relevance of valid rules of international law.[38]

Notably, the tribunal also upheld the high threshold necessary in order to find a breach of fair and equitable treatment under Article 1105 NAFTA. Part of the tribunal expressly admitted that the set-up and the enforcement of the MSA appeared to disadvantage NPMs while favouring the major manufacturers which were PMs. Furthermore, the health benefits of the scheme were also open to question.[39] However, these findings were insufficient to establish a violation of Article 1105 NAFTA.

V. Expropriation, reasonable expectations and legal uncertainty

In assessing the investor's claim of expropriation, the tribunal somewhat compensated for the rather reduced role given to the claims regarding non-NAFTA norms in other parts of the award. It had to assess whether the investor's reasonable expectations were thwarted by the states' enforcement actions. Reasonable expectations are, however, a factor of analysis created by case law and not laid down in the NAFTA legal texts. The assessment concerns the state of the domestic legal order, not the interpretation of NAFTA norms. Reasonable expectations are particularly relevant for a finding of expropriation.

As to expropriation under Article 1110 NAFTA, all state measures 'tantamount to nationalization or expropriation' of an investment must pursue a public purpose, be effected in a non-discriminatory manner and be accompanied by compensation in order to be lawful. These obligations apply to direct expropriatory measures as well as indirect measures which do not include a formal transfer of ownership. The latter mostly take the shape of host state regulation which has some economic effects on the investment and is argued to thwart reasonable expectations of the investor. The case law is split over the question of how broad indirect expropriation is to be defined.[40] Some tribunals have delineated general regulatory action as not falling within the scope of Article 1110 NAFTA.[41] As a consequence, no compensation for investors would be due for such regulatory action. Generally, the debate on the limits of indirect expropriation is, however, still ongoing.[42] For the present case, the notion of reasonable expectations of an investor proved of central concern for the arbitrators to assess whether there had indeed been an interference with Arthur Montour's investment in breach of Article 1110 NAFTA.

Remarkably, in the *Grand River Enterprises* case the arbitrators could have avoided the discussion of reasonable expectations altogether if they had so desired. The subsequent assessment shows that the allegedly 'improper' enforcement actions by various states against Arthur Montour's investment could not reach the high threshold of economic impact required for an expropriatory measure.[43] Consequently, the arbitrators seemed willing to discuss non-NAFTA international norms in the context of domestic law and reasonable expectations.

There is some legal uncertainty in United States domestic law on the question of whether commerce among Native Americans can be regulated by individual states. Some experts claim that under the Commerce Clause of the Constitution and related 'federal Indian law', only the federal government pos-

38 Compare also Valentina Vadi, "Trade Mark Protection, Public Health and International Investment Law: Strains and Paradoxes", 20(3) *European Journal of International Law* (2009), pp. 773 *et sqq.*, at p. 788, who suggests that in the *Grand River Enterprises* case norms protecting indigenous peoples as well as norms protecting public health should be taken into account.

39 Paras. 183–184.

40 While, for example, the tribunal in *Metalclad*, para. 103 (*supra* note 1), found that mere interference with the use of an investment could amount to a measure tantamount to expropriation, other tribunals such as the one in *Pope & Talbot Inc. v. Government of Canada* Merits, Phase 1, Award (26 June 2000) 7 ICSID Report 69, paras. 101–102, required a more substantial effect arising to a loss of control over an enterprise. See in more detail on the distinction between interference with the use and loss of control of an investment Alberto Salazar, "NAFTA Chapter 11, Regulatory Expropriation, and Domestic Counter-Advertising Law", 27 *Arizona Journal of International and Comparative Law* (2010), pp. 31 *et sqq*, at pp. 39 *et sqq*.

41 See, e.g., *SD Myers Inc. v. Government of Canada* Partial Award on Merits (13 November 2000), 8 ICSID Report 4, paras. 281–282; *Methanex*, part IV para. 15 (*supra* note 1).

42 For an excellent overview in NAFTA case law and beyond see Steven Ratner, "Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law", 102 *American Journal of International Law* (2008), pp. 475 *et sqq*.

43 See in particular paras. 148 *et sqq*. on the required threshold of economic impact and paras. 152 *et sqq*.

sesses competence and the individual states could not adopt the legislation under the MSA and enforce it against Native American economic actors active on reservation territory.[44] Arguments in favour of this view could also be based on several international treaties, in particular the Jay Treaty.[45] Arthur Montour alleged that as a consequence, he could reasonably expect that his business would be immune from state regulation.

The United States countered that opposite views could be found in the doctrine and that the cigarette distribution business had a substantial off-reservation impact both in economic terms and concerning public health.[46]

The tribunal declined to resolve such a highly contested question of domestic law.[47] However, the concept of reasonable expectations did not require a decision on the right answer.[48] Even if one accepted the cited legal instruments as 'conduct' of the United States,[49] they could not lead a 'prudent' investor to expect reasonably to be immune from state regulation.[50] Reasonable expectations could not arise because both sides had at least a 'colourable' argument for their opposing positions,[51] because the Jay Treaty seemed too open-worded[52] and lastly because tobacco products had always been extensively regulated in the United States.[53]

The tribunal's solution strikes a reasonable balance by using the concept of a 'prudent investor'. In situations of legal uncertainty, an investor cannot easily rely on reasonable expectations simply because he has a tenable legal position. Otherwise investors could arguably feel encouraged to bring claims even on shaky foundations. Resolving legal uncertainty in favour of the investor could thus cause regulatory chill in host states which fear challenges of regulation in NAFTA arbitration.[54]

VI. Conclusion

The award in *Grand River Enterprises* can generally be welcomed as a reasonable response to a complex challenge. The investors' claims were closely examined with regard to their claims as First Nations traders protected by special legal norms. In the end, however, their claims did not present sufficient substance. NAFTA arbitration is perhaps simply not a suitable forum for the consideration of claims based on norms for the protection of minority groups, as becomes evident in particular in the discussion of fair and equitable treatment.

Furthermore, the thinness of the tribunal's reasoning is remarkable concerning the doubtful effect of the MSA and its implementing legislation on public health and the alleged distorting effect on competition between major manufacturers and mostly smaller NPMs. The standards of NAFTA chapter 11 proved so difficult to meet that, effectively, the tribunal rejected the investor's claim without having to subject the actual effects of the MSA to deepened scrutiny. At least as long as the impact of host state measures on investors remains minor, NAFTA arbitration might thus also be an inappropriate forum for claims relating to public health measures which distort competition.[55]

However, on a less harmonious note, the introductory remarks of the tribunal on the applicable law cannot be left without criticism. In the light of the debate on the fragmentation of international law, it appears inadequate to exclude, in a rather blurry manner, non-NAFTA international norms without a viable basis in the treaty text and without even attempting to discuss the potential role which interpretative techniques such as the principle of systemic integration could have played.

44 Para. 132.

45 Para. 129.

46 Paras. 135–136. Some evidence indeed suggested that cigarette sales numbers on reservation went far beyond the possible needs of the local inhabitants.

47 Paras. 137–139.

48 Para. 140.

49 Para. 141.

50 Para. 142.

51 Para. 142.

52 Para. 143.

53 Para. 144.

54 Notably, even if no victory was granted on the merits to the investor in *Grand River Enterprises*, already the cost decision burdened the host state. The arbitrators used their discretion to distribute costs to leave half the costs of the arbitration and the costs of legal representation with the triumphant United States, based on the 'atypical situation' of the unsuccessful investors as First Nations traders, paras. 246–247.

55 Remarkably, the MSA was indeed challenged as a distortion of competition in United States domestic law, but upheld by the courts, see *Sanders v. Brown*, No 05-15676, United States Court of Appeals for the Ninth Circuit, 26 September 2007.