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September 14, 1998

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Cynthia Callard
Executive Director
Physicians for a Smoke-Free Canada,
Box 4849, Station E,
Ottawa, Ontario
K1S 5J1

Dear Ms. Callard:

Re: The Impact of the Multilateral Agreement on Investment on Tobacco Control Initiatives

You have requested our legal opinion on the certain questions respecting the impact of the proposed Multilateral Agreement on Investment ("MAI") upon tobacco control initiatives imposed by governments. In particular, you have sought our opinion on the following questions:

1. To what extent would the substantive obligations of the MAI affect the ability of national, subnational, regional and local governments to implement a comprehensive tobacco control strategy?

2. To what extent would the substantive obligations of the MAI affect the ability of World Health Organization member countries to implement an International Framework Convention for Tobacco Control?

3. What options are available to MAI countries and their subnational governments to protect their ability to implement tobacco control initiatives, and to protect their ability to implement an International Framework Convention for Tobacco Control and other similar international public policy initiatives?

Based on the factors contained in this opinion and having regard to the legal considerations that we deem relevant, we are of the opinion that:

1. The substantive obligations of the MAI may restrict the ability of governments to implement a comprehensive tobacco control strategy. Many of the measures found in tobacco control legislation may directly offend MAI obligations, in particular, the expropriation, general treatment and national treatment obligations of the MAI. Specifically, a regulation which restricts the use of a property right such as plain packaging for tobacco products, could be a measure with the equivalent effect of an

expropriation requiring the immediate payment of compensation. This, and other MAI inconsistencies could entitle investors and investments from other MAI member countries to compensation for any harm caused to them from a governmental breach of these MAI obligations.

2. The substantive obligations of the MAI could hinder the ability of WHO member countries to implement an International Framework Convention for Tobacco Control. In order to implement this framework convention, member governments would need to enact appropriate measures, such as advertising bans, labelling requirements and health warnings which could be inconsistent with a Party's MAI obligations under the general treatment and expropriation sections of the MAI.

3. In order to protect their ability to implement tobacco control initiatives, and to protect their ability to implement an International Framework Convention for Tobacco Control, MAI countries and their subnational governments must take reservations or general exceptions to the MAI.

The Substantive provisions of the MAI

The Multilateral Agreement on Investment (MAI)[1] is a proposed investment agreement being negotiated by the 29 member countries of the Organization for Economic Cooperation and Development (OECD) in Paris. If adopted, the MAI would become the most comprehensive investment protection treaty ever negotiated between developed countries. While foreign investors receive benefits under this agreement, there are no corresponding obligations placed by the MAI upon their conduct. The MAI only would impose limits on how governments (including the legislative, executive and judicial branches) treat investors and their investments from other MAI countries.

The MAI requires that all member governments protect the investments of all investors and their investments from another MAI country. The term "investment", widely used in the MAI, is very broad. It applies to *every kind of asset owned or controlled, directly or indirectly, including, businesses (incorporated and non-incorporated), shareholdings, loans, real estate, intellectual property and goodwill).*

The MAI was scheduled to be completed for signature by the OECD member states in April 1998. While this deadline was not reached, the Ministerial Statement on the MAI of April 27-28, 1998[2] re-affirmed the intention of OECD countries to complete the MAI negotiations from the fall of 1998 onwards.

***MAI* Investment Protection**

The MAI contains a number of substantive protections. These obligations include:

- national treatment;
- most favoured nation treatment;
- general treatment;
- transparency;
- performance requirements; and

[1] This paper is based on the May 1998 version of the MAI, DAFFE/MAI (98) 7/REV 1.

[2] OECD News Release, *OECD Council Meeting: Ministerial Statement On The Multilateral Agreement On Investment (MAI)*, April 28, 1998.

- compensation upon expropriation or measures equivalent to expropriation.

Of these obligations, three appear to relate to government measures aimed at the control of tobacco and tobacco products.

General Treatment

The MAI Parties undertake that each of their governments will meet certain international standards regarding the treatment of foreign investors and their investments. The MAI states:

> *1.1 Each contracting Party shall accord to investments in its territory of investors of another Contracting Party fair and equitable treatment and full and constant protection and security. In no case shall a Contracting Party accord treatment less favourable than that required by international law.*
>
> *1.2 A Contracting Party shall not impair by [unreasonable or discriminatory] [unreasonable and discriminatory measures the operation, management, maintenance, use, enjoyment or disposal of investments in its territory of investors of another Contracting Party.* [3]

The MAI does not define the extent of treatment required to be given to the foreign investor other than to state that it must be in accordance with international law. This uncertainty will require that the content of this international minimum standard be proved before any international arbitration tribunal. Some aspects of this MAI obligation may be easier to establish than others. For example, the MAI refers to the concept of "fair and equitable treatment" and "full protection and security." Full protection and security refers to rights of individuals under international law. Fair and equitable treatment refers to a number of issues, principally, procedural fairness and natural justice.

This MAI article grants a standard of treatment to investments which is separate, and perhaps more beneficial, than that provided under domestic law. State practice and international courts have established that there is a customary international law standard of treatment that must be given to foreigners and their investments.[4] For example, the U.S.-Mexican Claims Commission held in the *Hopkins* case:

> *. . . it not infrequently happens that under the rules of international law applied to controversies of an international aspect a nation is required to accord to aliens broader and more liberal treatment than it accords to its own citizens under its municipal laws...The citizens of a nation may enjoy many rights which are withheld from aliens, and conversely, under international law aliens may enjoy rights and remedies which the nation does not accord to its own citizens.*[5]

The terms "fair and equitable treatment" and "full protection and security" used in the MAI import due process and natural justice requirements into the MAI. International tribunals have used the term denial of justice to illustrate the general notion of state responsibility caused by the unfair treatment by a state to a foreigner. For example, in the 1902 French-Venezuelan Claims Commission award *Re: Antoine Fabiani*, the President of Switzerland, sitting as arbitrator, had to decide whether certain Venezuelan acts constituted

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[3] MAI Draft Investment Protection Chapter, *General Treatment,* Article 1.1 and Article 1.2. It has not yet been decided whether the Article 1.2 provision should read "unreasonable *or* discriminatory" or "unreasonable *and* discriminatory". Sweden has proposed combining these two distinct provisions into a single paragraph.

[4] Brierly, *The Law of Nations*, 2ed.,172 (1936), *I Hyde, International Laws* 266-267 (1922), *Hall, International Law*, 8th ed., by Higgins, 59-60

[5] *The United States of America On Behalf of George W. Hopkins*, v. *The United Mexican States* (Docket No. 39) 21 Am. J. Intl. Law 160, 166-167 (1926)

a denial of justice to Mr. Fabiani. In coming to his award, the arbitrator defined the term "denial of justice" as follows:

> *By reference to the general principles of the laws of nations on the denial of justice, i.e., to the rule common to most legislations or taught by doctrines, one comes to decide the denial of justice comprises not only the refusal of the judicial authority to exercise its duties, and especially to render a decision on the petitions submitted to it, but also the obstinate delays on its part in rendering its sentences.*[6]

International judicial decisions reveal that the judicial process of a country, including its rules of civil procedure, can clearly effect a denial of justice contrary to international law.[7] International tribunals have not only judged the fairness of nation's judicial procedures, but have imposed on them international minimum standards of fair and equitable treatment in relation to foreigners.

The subject of denial of justice and judicial access has also been the focus of important international studies attempting to draft a code of state responsibility. Guerrero, in his report to the League of Nations, asserted that "Denial of justice consists in refusing to allow foreigners easy access to the courts to defend those rights which the national law accords them."[8]

From the case law, the civil procedure rules of a country may clearly result in a denial of justice contrary to international law. When a foreign investor attempts to enforce its legal rights, local civil procedure rules cannot create abusive delays or deprive an investor of fundamental legal protections.

National Treatment

One of the fundamental concepts of the MAI is the requirement that governments extend national treatment obligations to investments of investors from other countries. Contracting Parties must treat the investors and investments of other Contracting Parties no less favourably than they treat any other investor or investment. The MAI national treatment obligation reads:

> *1. Each Contracting Party shall accord to investors of another Contracting Party and to their investments, treatment no less favorable than the treatment it accords [in like circumstances] to its own investors and their investments with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment, and sale or other disposition of investments.*
>
> *2. Each Contracting Party shall accord to investors of another Contracting Party and to their investments, treatment no less favorable than the treatment it accords [in like circumstances] to investors of any other Contracting Party or of a non-Contracting Party, and to the investments of investors of any other Contracting Party or of a non-Contracting Party, with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment, and sale or other disposition of investments.*[9]

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6 Moore vol 1. P.117.

7 United States of America (B.E. Chattin) v. United Mexican States, United States-Mexican Claims Commission, 1927 4 U.N.R.I.A.A. 282 at 422. Chattin, a U.S. citizen was a railroad employee incarcerated on embezzlement charges. He escaped from jail and returned to the U.S. where he brought a claim for illegal arrest, denial of justice, and mistreatment.

8 League of Nations Publication, V. Legal, 1927, V.1. (Document C 196.M.70.1927), p. 104.

9 MAI, Draft Treatment of Investors and Investments Chapter, National Treatment And Most Favoured Nation Treatment, s.s. 1, 2.

The term "national treatment" is not defined by the MAI but it has been widely used as a principle in other international trade and investment agreements such as the GATT, the WTO and the NAFTA. In addition, the meaning of the term "national treatment" has been canvassed by a number of GATT and WTO panel decisions. However, it is important to note that the application of the national treatment obligation in the MAI differs from that contained in the GATT. The GATT national treatment obligation is limited only to trade in goods whereas the MAI's national treatment obligation deals with investors and their investments. However, the basic obligation under both agreements is similar and therefore the interpretation given to the national treatment provision under the GATT should be applicable to the MAI.

MAI Parties must accord equal treatment between foreign and domestic investors and their investments. This obligation imposes a positive duty to ensure equal treatment and a corresponding duty of non-interference into the expansion, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of investments. Under the MAI, national treatment applies to:

(i) an investor of another party and the investments of investors of another MAI Party;
(ii) investments "in like circumstances" to domestic investors[10]; and
(iii) the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of investments.

Under the GATT, governments must afford treatment no less favourable to imported goods than to domestic goods. GATT Contracting Parties have an obligation to provide treatment no less favourable to imported goods which are "like" to products of national origin. In *United States - Taxes on Petroleum and Certain Imported Substances*,[11] the GATT Panel compared the end use of products to determine if they were "like" products. In this case, the Panel held that different products with the same end use were "like" products.[12]

Other GATT Panels have interpreted the "treatment no less favourable" wording to mean that there cannot be any distinction made between like products based on territoriality.[13] The principle that imported products be treated no less favourably than domestic ones includes an obligation to provide equality of treatment. Under GATT Article III:4, this equality of treatment obligation extends to the duty to accord imported products competitive opportunities no less favourable than those accorded to domestic products. Thus, in the 1992 Panel Report on *Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, the Panel emphasized that restrictions on access to markets were covered by the GATT national treatment obligation in Article III:4.[14] In certain circumstances, formally equal treatment may serve to promote discrimination. The requirement in the national treatment provision has been interpreted to be one of substantive equality, and different treatment may be necessary to achieve this goal. In the 1989 GATT Panel Report on *Section 337 of the U.S. Tariff Act of 1930*, the Panel held that there are situations where treating all equally may result in less favourable treatment for a foreigner. The Panel stated:

> *[I]t also has to be recognised that there may be cases where application of formally identical legal provisions would in practice accord less favourable treatment to imported products and a*

10 The "in like circumstances" language is still bracketed text.
11 United States - Taxes on Petroleum and Certain Imported Substances (1987) GATT Doc. L/6175 - 34S/136, 34 B.I.S.D. (1988) 136.
12 Similarly, in the WTO Panel decision, United States - Standards for Reformulated and Conventional Gasoline, the Panel found in favour of Venezuela's position that all gasoline was a like product. (Brazil, Venezuela v. United States) (1996), WTO Doc. WT/DS2/9 at 3.22.
13 Italian Discrimination Against Imported Agricultural Machinery (United Kingdom v. Italy) (1958), GATT Doc. L/833, 7 B.I.S.D. (1959) 60 at 63, 64.
14 Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies (1992), GATT Doc. DS17/R, 39S/27, Pg. 50, 51, para. 5.6.

> *contracting party might thus have to apply different legal provisions to imported products to ensure that the treatment accorded them is in fact no less favourable.* [15]

In that decision the panel went on to say that because of the different results, formally equal treatment may not satisfy the national treatment obligation of "no less favourable treatment":

> *The Panel noted that, as far as the issues before it are concerned, the "no less favourable" treatment requirement set out in Article III:4, is unqualified. These words are to be found throughout the General Agreement and later agreements negotiated in the GATT framework as an expression of the underlying principle of equality of treatment of imported products as compared to the treatment given either to other foreign products, under the most-favoured-nation standard, or to domestic products, under the national treatment standard of Article III. The words "treatment no less favourable" in paragraph 4 call for effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products. This clearly sets a minimum permissible standard as a basis.*[16]

Thus, is it not enough to treat a foreign investor equally. There can be a national treatment violation if in treating a foreign investor equally to a domestic one, there has been a difference imposed on the foreign investor or investment that has resulted in any harm.[17] The national treatment obligation is fundamentally about preventing discrimination against foreign investors and their investment. However, its very broad terms constrain legitimate government activities to assist their own citizens.

Expropriation and Compensation

The term expropriation is well-understood in international law. Expropriation refers to the act by which governmental authority is used to deny some benefit of property. This denial can be actual or constructive which means that an expropriating government need not take formal title to the affected property. The meaning of the term expropriation can differ from the specific meanings given to the concept of expropriation under any particular domestic legal system. An expropriation, or a measure equivalent to expropriation, occurs when the property of an individual or business has been substantially interfered with by a governmental authority. The MAI does not define the term expropriation, but by its terms it protects against direct and indirect measures of expropriation and "measures having equivalent effect" to expropriation.[18]

In essence, for there to be an expropriation under international law it is necessary to establish that a government has interfered unreasonably with the use of private property. This can occur in the absence of a formal taking of property.[19] In the *Sola Tiles* case ,[20] the Iran-U.S. Claims Tribunal gave the following definition of expropriation:

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15 United States - Section 337 of the Tariff Act of 1930 (1989), GATT Doc. L/6439, 36 B.I.S.D. (1989) 345 at 386, para. 5.11.
16 United States - Section 337 of the Tariff Act of 1930 (1989), GATT Doc. L/6439, 36 B.I.S.D. (1989) 345 at 386, para. 5.11.
17 Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies (1992), GATT Doc. DS17/R - 39 S/27, 39 B.I.S.D. (1992) 27; United States - Section 337 of Tariff Act of 1930 (EEC v. United States) (1989), GATT Doc. L/6439, 36 B.I.S.D. (1989) 345.
20 MAI, Draft Investment Protection Chapter, Article 2.1.
22 Harza Engineering Co. v. Iran, (1982) 1 Iran-U.S. C.T.R. 499 at 504.
23 Sola Tiles Inc. v. Iran (1987), 14 Iran-U.S. C.T.R. 223 at 231-232, para. 29.

> *It is well settled in the practice of the Tribunal, as elsewhere, that property may be taken under international law through interference by a State in the use of that property or the enjoyment of its benefits amounting to a deprivation of the fundamental rights of ownership.*[21]

International tribunals have been able to provide some general guidelines as to what types of governmental actions constitute an expropriation. The US-Iran Claims Tribunal provided a useful definition of expropriation in the *TAMS-AFFA* case where it stated that it preferred:

> *…the term "deprivation" to the term "taking", although they are largely synonymous, because the latter may be understood to imply that the Government has acquired something of value, which is not required.*[22]

Professor M. Sornarajah has examined the international decisions regarding expropriation in his treatise *The International Law on Foreign Investment*. He states:

> *Though it is clear that there are categories of takings outside the outright acts of nationalisation, the problem lies in formulating a single general principle that identifies all these takings. If one general criteria is to be attempted, it will have to involve some broad notion of governmental interference with the peaceful enjoyment of the rights of use, enjoyment and control of the property by the alien.*[23]

This principle of unreasonable interference was recognized in Article 10 of the *Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens* which states:

3(a) A "taking of property" includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.[24]

The terms of the MAI have broadened what type of activities will be considered to be an expropriation by including in Article 2.1 of the draft Investment Protection Chapter the words *measures having equivalent effect* (to expropriation or nationalization). This wording expands the scope of this obligation to cover virtually any substantial interference with a protected property right.

Section 712 of the American Law Institute's *Third Restatement on the Foreign Relations Law of the United States* on "State Responsibility for Economic Injury to Nationals of Other States" contains wording similar to the MAI. When commenting on this rule, the *Restatement* provides:

> *Subsection (1) applies not only to avowed expropriations in which the government formally takes title to property, but also to other actions of the government that have the effect of "taking" the property, in whole or in large part, outright or in stages ("creeping expropriation").* ***A state is responsible as for an expropriation of property under Subsection (1) when it subjects alien property to taxation, regulation, or other action that is confiscatory, or that prevents,***

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24 Sola Tiles at 231-232, par.29. The Tribunal goes on to cite the following cases as support for this proposition: Foremost Tehran. Inc v. Islamic Republic of Iran; Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA, Phelps Dodge Corp v. Iran; and Thomas Earl Payne v. Iran.

21 Tippets, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran (1984), 6 Iran-U.S. C.T.R. 219 at 225. Motorola, Inc. v. Iran National Airlines Corporation (1988), 19 Iran-U.S. C.T.R. 73 at 95.

25 M. Sornarajah, The International Law on Foreign Investment (Cambridge: Cambridge University Press, 1994) at 282.

26 Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens (1961), 55 A.J.I.L. (1961) 545 at 553.

> ***unreasonably interferes with, or unduly delays, effective enjoyment of an alien's property or its removal from the state's territory***.[25]
>
> (Emphasis added)

This commentary underscores the fact that an expropriation will take place whenever there is a substantial and unreasonable interference with the enjoyment of a property right.

International law imposes standards on governments when public treatment affects private property rights. In particular, the MAI imposes obligations whenever a government expropriates an investment of an investor from another MAI Party. The draft Investment Protection Chapter of the MAI does not limit the range of government regulatory actions. It merely obliges governments to compensate investors for the interference with their property rights.

Professor Rosalyn Higgins (as she then was)[26] examined the question of whether regulatory takings needed to be compensated in her lectures at the Hague Academy in 1982. Professor Higgins looked at the doctrine that required just compensation to be paid when private property was diverted to public use, but that there be no compensation when the "police power" was used to allow for a "regulatory taking". On this point, she wrote:

> *It would seem to be the case that while it is acknowledged that property may be indirectly "taken" through regulation, this does not attract the duty to compensate. The position seems to be (and the present writer finds the underlying policy difference hard to appreciate) that a taking for public use requires just compensation to be paid; whereas an indirect taking for regulatory purposes does not. The distinction seems to lie not between formal and indirect taking, but rather in the purposes of the taking.*
>
> *...Is this distinction intellectually viable? Is not the State in both cases (that is, either by a taking for a public purpose, or by regulating) purporting to act in the common good? And in each case has the owner of the property not suffered loss? Under international law standards, a regulation that amounted (by virtue of its scope and effect) to a taking, would need to be "for a public purpose" (in the sense of sense in the general, rather than for a private, interest). And just compensation would be due*.[27]

The terms of the MAI itself makes clear that the obligation to pay compensation for a regulatory taking exists. Generally, this chapter requires that compensation be paid whenever an expropriation occurs. Section 2.1 sets out the circumstances in which an expropriation can occur:

> (a) it must be for a purpose which is in the public interest;
> (b) it must be made on a non-discriminatory basis;
> (c) it must be made in accordance with due process of law; **and**
> (d) there must be "prompt, adequate and effective" compensation in accordance with the principles set out in the MAI.[28]

There is no debate that expropriations need to be fully compensated. The only debate is whether a particular action constitutes an expropriation. For example, Dolzer and Stevens state:

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28 American Law Institute, Third Restatement on the Foreign Relations Law of the United States, § 712 (g).
29 Professor Higgins is now a judge of the International Court of Justice.
30 R. Higgins, "The Taking of Property by the State" (1982) Receuil des Cours 267 at 330-331.
31 MAI, Draft Investment Protection Chapter, Article 2.1.

> *The determination of what may constitute indirect expropriation is naturally of significance both to the investor and to the host State. Thus, to the investor, the line of demarcation between measures for which no compensation is due and actions qualifying as indirect expropriations may well make the difference between the burden to operate (or abandon) a non-profitable enterprise and the right to receive full compensation (either from the host State or under an insurance contract). For the host State, the definition determines the scope of the State's power to enact legislation that regulates the rights and obligations of owners in instances where compensation may fall due. It could thus be argued that the State is prevented from taking any such measures where these cannot be covered by public financial resources.* [29]

The MAI is intended to provide effective protection for the foreign investments of MAI Party Investors in the territory of another MAI Party. The goal is that of investor protection, not state protection. In the *TAMS-AFFA* decision, the Tribunal stated:

> *The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.* [30]

In summary, the MAI envisions a broad definition of expropriation that subjects member governments to immediate liability to pay full fair market value compensation. There is no exception from the requirement that compensation be paid even for pubic safety or health measures.

MAI Investor-State Dispute Settlement

Under the dispute settlement provisions of the MAI, investors from other MAI member countries are entitled to a special remedy if a government has harmed their MAI "investor rights". The Investor-State dispute settlement process allows an investor of an MAI Party (either a natural person or a corporation) to directly bring a compensation claim against another MAI government for any breach of the MAI which results in harm to the investor or its investment.

MAI investors are entitled to dispute government measures. Measures include but are not limited to legislation, regulations, governmental policies and practices. Not only are the national governments covered by this Agreement, but so are state, provincial, territorial and local governments. Actions undertaken by these governments could also trigger an MAI claim.

The dispute settlement chapter of the MAI permits investor-state dispute resolution for:

> *…disputes between a Contracting Party and an investor of another Contracting Party concerning an alleged breach of an obligation of the former under this Agreement which causes loss or damage to the investor or its investment.*[31]

An investor is entitled to bring an Investor-State dispute regarding the breach of any MAI obligation. As in the NAFTA Investment Chapter and the BITs, the MAI provides a mechanism in which investors of another Contracting Party can directly bring claims against the government of another MAI Contracting

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32 R. Dolzer & M. Stevens, Bilateral Investment Treaties (The Hague: Martinus Nijhoff, 1995) at 99-100.
33 Tippets, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran (1984), 6 Iran-U.S. C.T.R. 219 at 225-226.
31 MAI, Draft Dispute Settlement Chapter, Article D, s. 1. a.

Party. The MAI provides that monetary damages or restitution can be paid to the investor or to the investment.[32] If requested by a Party to the dispute, the Tribunal may also provide a declaration that a Contracting Party has failed to comply with its obligations under the MAI.[33]

MAI compensation claims would be heard before a special international arbitration panel that can award financial compensation to investors harmed by government actions which infringe on the MAI's investment obligations. The panels cannot strike down MAI-infringing measures but the threat of paying enforceable damage awards can negatively affect government policy initiatives.

The MAI investor state dispute settlement process allows an investor to select from amongst four different international arbitration rules under which an investor can commence an action against a Contracting Party. However, much like the NAFTA, the MAI Investor-State dispute settlement Tribunals do not have the authority to compel Contracting Parties to change their domestic laws.

A recent high-profile example of an investor-state claim under the NAFTA can better illustrate the process. In 1996, an American chemical manufacturer, Ethyl Corp. brought a NAFTA Investor-State claim against the Government of Canada over Canada's prohibition on the importation and interprovincial trade of Ethyl Corp's octane fuel enhancer, MMT.[34] Ethyl Corp. alleged that Canada had taken its trade ban in violation of its NAFTA expropriation, national treatment and performance requirement obligations and sought compensation in excess of $250 million U.S. dollars. The Ethyl case proceeded to a Tribunal hearing and preliminary awards were issued by the Tribunal. Before the Tribunal completed its deliberations of the entire process, a settlement was reached. According to press reports, Canada agreed to remove its ban on the chemical and issued a statement indicating that there was no scientific evidence for its previous action. In addition, Canada compensated the investor by some 13 million U.S. dollars.[35] The Ethyl Case demonstrates an example where a government action can result in significant arbitration resulting in the payment of sizable damages under an international investment agreement.

The Ethyl Corp. example illustrates the extent of the consequences of the Investor-State process. The full implications of the Investor-State process cannot be underestimated. The Investor-State dispute settlement process established in the NAFTA has been described as "an untapped source of extensive private investor rights, including guaranteed access to a NAFTA panel for a private party."[36] The MAI process only differs in that its liklihood of being used by an investor is greater as the MAI has a broader definition of investment than the NAFTA and there are many more potential investors covered by the MAI than the NAFTA.

Question One:

> *To what extent would the substantive obligations of the MAI affect the ability of national, subnational, regional and local governments to implement a comprehensive tobacco control strategy?*

Governments around the world at a variety of levels have initiated a series of tobacco control measures aimed at the protection of human health and public safety. These measures attempt to regulate the ability of persons (and corporations) to do the following:

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32 MAI, Draft Dispute Settlement Chapter, Article D, s. 16.
33 MAI, Draft Dispute Settlement Chapter, Article D, s. 16. i.
34 Wall Street Journal, "Ethyl Acts to Avert Losses If Canada Bans Fuel Additive", September 11, 1996.
35 "Threat of NAFTA case kills Canada's MMT Ban" Globe and Mail July 20, 1998 at p.1.
36 Horlick, G.N., Marti, A.L., "NAFTA Chapter 11B, A Private Right of Action to Enforce Market Access Through Investments," Journal of International Arbitration, Vol. 14 No.1, March 1997, at 54.

a.) Restrict the sales of tobacco products;
b.) Restrict the advertisement of tobacco products; and
c.) Recoup the costs for health care benefits expended to treat citizens who have illness related to tobacco use.

Each of these measures has provisions which are affected by the substantive obligations of the Multilateral Agreement on Investment. The impact of the proposed MAI on tobacco control initiatives can be seen by reviewing its impact on Canadian tobacco control initiatives.

Canadian Federal Tobacco Initiatives:

The Canadian federal government has proposed a set of controversial tobacco control initiatives focussed on the restriction of tobacco marketing practices either through the control of event sponsorship or of package-based marketing.

The *Tobacco Act*

On April 25, 1997, Royal Assent was given to the *Tobacco Act*, enabling the federal government to regulate the manufacture, sale, labelling and promotion of tobacco products. The purpose of the *Tobacco Act* was to address national public health problems created by tobacco use, protection against inducements towards youths to use tobacco products, and the enhancement of public awareness of the health hazards resulting from tobacco use.[37] In general, the Act governs the production of all tobacco products and requires all manufacturers to conform with standards established under the Act.[38]
One of the many requirements imposed by the Act is the requirement that manufacturers provide the federal government with information about their products including product emissions.[39] This Act also gives the federal government a very broad regulatory power to establish tobacco product standards. This includes prescribing amounts of substances that may be found in or are banned from a product, prescribing testing methods, or prescribing information that manufacturers must provide to the Ministry.[40]

Along with input or ingredient standards, the *Tobacco Act* also imposes a number of restrictions with respect to the labelling, packaging, and promotion of tobacco products.

Tobacco Product Packaging and Labelling

With respect to packaging, the Act requires that manufacturers sell cigarettes in packages containing no less than 20 cigarettes.[41] As for other tobacco products, the act requires that they be sold in a package that contains no fewer than the "*...prescribed number or less than the prescribed quantities or portions of the product*" as set out in this section.[42] The *Tobacco Act* limits the ability to merchandise tobacco products, including:

(1) Unless exempted by the regulations, self-service product displays are forbidden;[43]

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61 Tobacco Act, S.C., 1997, c.13, s.4.
62 Tobacco Act, S.C., 1997, c.13, s.5.
63 Tobacco Act, S.C., 1997, c.13, s.6.
64 Tobacco Act, S.C., 1997, c.13, s.7.
65 Tobacco Act, S.C., 1997, c.13, s.10(1).
66 Tobacco Act, S.C., 1997, c.13, s.10(2).
67 Tobacco Act, S.C., 1997, c.13, s.11.

(2) The limited ability to sell products through the use of automatic dispensing devices;[44]
(3) Delivery of a tobacco product between provinces or to send a tobacco product by mail for consideration is not permitted, unless the delivery or mailing is between manufacturers or retailers, or an exemption exists under the regulations.[45] This includes a ban against advertising an offer to deliver or mail a tobacco product.[46]

The *Tobacco Act* also established strict requirements with respect to the labelling of tobacco products. Section 15 of the act requires that all packaging display:

> *...the information required by the regulations about the product and its emissions, and about the health hazards and health effects arising from the use of the product or from its emissions.*[47]

This information would be displayed alongside the tobacco products brand element (such as a trademark name or logo).

The federal government is given a broad regulatory authority over the packaging and labelling of tobacco products. Under this Act, the Governor-in-Council may make regulations:

> *(a) respecting the information that must appear on packages and in leaflets about tobacco products and their emissions and the health hazards and health effects arising from the use of the products and from their emissions;*
>
> *(b) prescribing anything that by this Part is to be prescribed; and*
>
> *(c) generally for carrying out the purposes of this Part.*[48]

The effect of this broad regulatory power is evident in recent reports that the federal Ministry of Health is considering changes to present tobacco products packaging. The Ministry is considering requiring tobacco product manufacturers to increase the size of tobacco warnings and include a large skull and crossbones symbol regularly found on household detergents.[49]

Tobacco Product Promotion and Sponsorship

The *Tobacco Act* also provides the federal government with the ability to govern the manner in which a manufacturer can promote its product. The act forbids tobacco product promotion that is false, misleading, deceptive or that is likely to create an erroneous impression about the characteristics, or health effects of the tobacco product.[50] This includes a prohibition against personal endorsements of the product, and depictions of real or fictional persons or animals, but this does not apply to a trademark appearing on tobacco products before December 2, 1996.[51]

General advertising of a tobacco product is also restricted under the Act. Section 22 of the act prohibits the promotion of a tobacco product by means of an advertisement which depicts, in whole or in part, "...*a*

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68 Tobacco Act, S.C., 1997, c.13, s.12.
69 Tobacco Act, S.C., 1997, c.13, s.13(1).
70 Tobacco Act, S.C., 1997, c.13, s.13(2).
71 Tobacco Act, S.C., 1997, c.13, s.15.
72 Tobacco Act, S.C., 1997, c.13, s.17.
49 Ottawa Citizen, Smoke Labels Getting Deadly, July 8, 1998.
74 Tobacco Act, S.C., 1997, c.13, s.20.
75 Tobacco Act, S.C., 1997, c.13, s.21.

tobacco product, its package or a brand element of one or that evokes a tobacco product or a brand element".[52] However, the Act does provide limited exceptions to the general prohibition as follows:

> *(2) Subject to the regulations, a person may advertise a tobacco product by means of information advertising or brand-preference advertising that is in*
>
> > *(a) a publication that is provided by mail and addressed to an adult who is identified by name;*
> >
> > *(b) a publication that has an adult readership of not less than eighty-five per cent; or*
> >
> > *(c) signs in a place where young persons are not permitted by law.*
>
> *(3) Subsection (2) does not apply to lifestyle advertising or advertising that could be construed on reasonable grounds to be appealing to young persons.*[53]

The limits to advertising found in 2(a), (b), and (c) above are also placed on the promotion of tobacco related accessories (i.e. cigarette lighters) displaying the tobacco brand element.[54] A manufacturer may display its brand element on a non-tobacco related product so long as the non-tobacco product is not appealing to young persons or is not associated with glamour, risk, vitality, excitement, recreation or daring.[55]

An area of pronounced controversy in Canada has related to tobacco control measures regarding event promotion by tobacco product manufacturers. The *Tobacco Act* permits the display of tobacco product brand elements at events subject to some qualifications. This section provides:

> *24.(1) Subject to the regulations and subsections (2) and (3), a person may display a tobacco product-related brand element in a promotion that is used in the sponsorship of a person, entity, event, activity or permanent facility if the person, entity, event, activity or facility*
>
> > *(a) is associated with young persons or could be construed on reasonable grounds to be appealing to young persons or if young persons are its primary beneficiaries; or*
> >
> > *(b) is associated with a way of life such as one that includes glamour, recreation, excitement, vitality, risk or daring.*[56]

Tobacco Companies are limited in their ability to display brand elements in instances where an event involves young people or is associated with glamour, risk or daring. In order to display a brand element in such a situation, the brand element must be displayed only on the bottom 10 per cent of the surface of any promotional display material.[57] Further, the brand element display is permitted only:

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76 Tobacco Act, S.C., 1997, c.13, s.22(1).
77 Tobacco Act, S.C., 1997, c.13, s.22.
78 Tobacco Act, S.C., 1997, c.13, s.26.
79 Tobacco Act, S.C., 1997, c.13, s.s.27, 28.
80 Tobacco Act, S.C., 1997, c.13, s.24(1).
81 Tobacco Act, S.C., 1997, c.13, s.24(2).

(1) in a publication provided by mail and addressed to an adult identified by name;

(2) in a publication with an adult readership of at least eighty-five per cent;

(3) on signs or in programs on the site of an event, activity or permanent facility; or

(4) on signs in a place where young persons by law are not permitted to attend.[58]

Where there are no young people associated with sponsorship of the event, or there is no association with glamour, risk, daring, excitement, vitality or recreation, then tobacco product related brand elements may be used in promoting the sponsorship.[59]

At present, an amendment to the *Tobacco Act*, Bill C-42, has passed first reading and is awaiting review by the Health Committee. The proposed amendment to this act would phase in the elimination of tobacco sponsorship of arts and sports groups over a five year period.[60] Bill C-42 is expected to reach second reading in the fall of 1998.[61]

Plain Packaging for Cigarette Products

Canada's attempt to control the use of tobacco through the *Tobacco Act* must be considered in light of its earlier attempt to impose generic packaging on cigarettes. In response to an earlier Canadian federal proposal to institute plain packaging for cigarette products, R.J. Reynolds Tobacco Company and Phillip Morris International Inc. commissioned former U.S. Trade Representative, Carla Hills, to prepare a legal opinion on the consistency of this proposal with Canada's international obligations. The "Carla Hills Opinion" examined the plain packaging requirement considered by the House of Commons Standing Committee on Health. The legal opinion concluded that if the federal government instituted such a regulation, then the regulation would violate the *Paris Convention for the Protection of Industrial Property*, the NAFTA, and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPs code).[62]

The Carla Hills Opinion explained that the imposition of a plain packaging requirement would amount to expropriation of the tobacco companies' lawfully registered trademarks giving rise to "*massive*" compensation claims.[63] The opinion examined the definition of investment and found that trademarks are within the scope of what is an investment for the purposes of the NAFTA Investment Chapter.[64] The opinion also noted that Article 1110(7) (the Expropriation section) provides that the "*...requirements do not apply to the issuance of compulsory licences, or to the revocation, limitation or creation of intellectual property rights, as long as such actions are consistent with...*" the intellectual property requirements in the intellectual property section of Chapter 17 of the NAFTA.[65] The plain packaging requirement was determined to be inconsistent with Chapter 17, and therefore would not be exempt under Article 1110(7).

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82 Tobacco Act, S.C., 1997, c.13, s.24(3).
83 Tobacco Act, S.C., 1997, c.13, s.24(4).
85 Ottawa Citizen, Tobacco Sponsorships Go Up in Smoke, June 3, 1998.
86 This information was provided by Chris McNabb, Legal Counsel, Health Division, Department of Justice, July 15, 1998.
62 Legal Opinion With Regard to Plain Packaging of Tobacco Products Requirement Under International Agreements, Mudge Rose Gutherie Alexander & Ferdon, May 3, 1994, at Page 2. Hereinafter referred to as the "Hills Legal Opinion".
63 Hills Legal Opinion at Page 18.
64Hills Legal Opinion at Page 20.
65Hills Legal Opinion at Page 20.

The Carla Hills Opinion concluded its examination of a plain packaging regulation with an examination of compensation. The opinion found that under the NAFTA:

> *The plain packaging requirement significantly encumbers the right to use a particular word in a trademark or a logo (a logo may include design and color), and as such, trademark rights, as defined in Chapter 17, are being expropriated. As Investors of a NAFTA Party, those U.S. enterprises who own trademarks or have investments in companies that own trademarks have the right to invoke the protection against unlawful expropriation of their investment under Article 1110(1).*
>
> *.....Even if the expropriation is lawful, it would be at great cost to the Canadian Government as the compensation claims of affected foreign trademark holders would be staggering, amounting to hundreds of millions of dollars.*[66]

Thus, the Carla Hills Opinion concluded that any plain packaging regulation undertaken by the federal government would be an expropriation of trademark rights requiring compensation under the NAFTA.

The plain packaging proposal never was implemented into law. No doubt, the impact of the international trade law implications has some impact on this decision.

A similar conclusion could be drawn under the MAI. Plain packaging regulations that restrict the use of tobacco product manufacturers' trademarks, also eliminates the ability of these same manufacturers to profit from the use of their established trademarks. Such a regulation could be found to be a measure that has the "equivalent effect" to an expropriation as found under Article 2 of the draft Investment Protection Chapter of the present MAI draft. Although the trademark is not nationalized, the regulation effectively reduces the value of the trademark to zero in the Canadian market, or in a provincial market if a province enacts such a regulation. The MAI would require a Party to make immediate payment of compensation for such an act.

The *Tobacco Products Control Act* and *RJR MacDonald Inc. v. Canada (A.G.)*

Although the proposed *Tobacco Act* appears to be unique and progressive legislation, this is not the Government of Canada's first attempt at controlling the use and sale of tobacco. The *Tobacco Products Control Act*[67] (*TPCA*) was an earlier attempt by the federal government to control the sale and promotion of tobacco products. The *TPCA* provided a general ban on the advertisement of tobacco products except in extremely limited circumstances.[68] The Act also limited the ability for tobacco product manufacturers to use their trademarks in a profitable manner. Section 8 of the *TPCA* provided that domestic manufacturers or importers of tobacco products were banned from applying their trademarks to articles other than tobacco products, or to packages or containers in which a tobacco product is sold or shipped notwithstanding that the trademark is permitted to be used, but for the *TPCA* in association with the article, service, activity or event.[69] Finally, the *TPCA* required that tobacco product packaging display certain items including unattributed health warnings and a list of toxic constituents.[70]

66Hills Legal Opinion at Page 20, 21.
67 Tobacco Products Control Act, S.C. 1988, c.20. This Act was repealed by S.C. 1997, c.13, s.64, effective April 25, 1997 (R.A.).
68 TPCA, S.C. 1988, c.20, s.4.
69 TPCA, S.C. 1988, c.20, s.8.
70 TPCA, S.C. 1988, c.20, s.9.

This legislation was challenged in the Courts of Quebec by R.J.R. MacDonald Inc. and Imperial Tobacco Ltd. The case eventually reached the Supreme Court of Canada. The Supreme Court of Canada considered whether the *TPCA* was within the legislative competence of Parliament and whether the *TPCA* violated the constitutional rights of tobacco manufacturers under the Canadian Charter of Rights and Freedoms ("the Charter"). The Supreme Court held that the *TPCA* was a valid exercise of Parliamentary power[71] however, a majority of the court held that the ban and warning requirements found under sections 4, 8, and 9 of the *TPCA* infringed on the freedom of expression right guaranteed under section 2(b) of the Charter. By striking down sections 4, 8, and 9, the Supreme Court also held that sections 5 and 6 of the Act were not severable and they were also held to be invalid. The analysis then turned to whether the offending *TPCA* sections could be saved by section 1 of the Charter of Rights and Freedoms. A majority of the Court held that the infringing sections could not be saved by section 1 of the Charter.

In her analysis under section 1 of the Charter, Justice McLachlin did not find any causal connection between an absolute prohibition against the use of tobacco trademarks on non-tobacco products and the government objective of decreased tobacco consumption. She stated:

> *It is hard to imagine how the presence of a tobacco logo on a cigarette lighter, for example, would increase consumption; yet, such is banned.*[72]

In addressing the ban against advertising imposed by section 4 of the *TPCA*, Justice McLachlin explained that advertising is in essence a form of necessary information for those who choose to smoke. She explained:

> *…the advertising ban deprives those who lawfully choose to smoke of information relating to price, quality and even health risks associated with different brands.*[73]

As for unattributed health warnings, Justice McLauchlin agreed with the government that warnings should be placed on tobacco packaging. However, she found that the government failed to show that an unattributed health warning as opposed to an attributed health warning, was needed to achieve the objective of decreased tobacco consumption.[74]

The *TPCA* has since been repealed by the Canadian federal government. By finding that the *TPCA* was, for the most part unconstitutional, the Supreme Court has made it very difficult for governments to introduce any legislation that proposes to limit or ban promotions using trademarks, or that requires certain types of warnings to be placed on tobacco product packaging. Accordingly, it is likely that shortly after the *Tobacco Act* is passed, one of the tobacco manufacturers operating in Canada may launch a Charter challenge against the "offending" legislation.

Conclusions:

The obligations found in the MAI not only apply to national governments, but apply to subnational governments (which include state, provincial, local and aboriginal governments).[75] An expropriation will

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71 RJR-MacDonald v. Canada (A.G.), [1995] 3 S.C.R. 199, at 267.
72 RJR-MacDonald v. Canada (A.G.), [1995] 3 S.C.R. 199, at 342.
73 RJR-MacDonald v. Canada (A.G.), [1995] 3 S.C.R. 199, at 347.
74 RJR-MacDonald v. Canada (A.G.), [1995] 3 S.C.R. 199, at 349.
75 Under the MAI, an Investment is defined as:"Every kind of asset owned or controlled, directly or indirectly, by an investor, including:...(viii) any other tangible and intangible, movable and immovable property, and any related property rights..". MAI, Draft Scope And Application Chapter, Article 2. viii.

take place not only when a government directly takes title to property, but also any time a measure taken by a government substantially and unreasonably interferes with the enjoyment of a property right. The issue is not the intent of the government when enacting a measure rather than the effect on the investor's property.

As a result of the impact of the MAI, we can come to the following conclusions:

1. The denial of the right to advertise a product could constitute an expropriation under the terms of the MAI. Further, a restriction on the size of a trademark relative to a health warning may also be a measure equivalent to an expropriation.

2. Tobacco control measures which require generic tobacco product packaging, or impose special warning labels could be an unreasonable and substantial interference with a tobacco manufacturers trademarks. This could constitute an expropriation and entitle the tobacco manufacturer to immediate compensation.

3. Under the general treatment obligations of the MAI, a violation will take place where an investor or an investment receives treatment less favourable than that accorded under international law. A general treatment violation could also occur where a Party enacts a measure which unreasonably impairs an investor's operation, management, maintenance, use, enjoyment, or disposal of its investments. General treatment violations may occur under tobacco control measure provisions.

4. Tobacco control measures which impose added costs of doing business for tobacco product manufacturers such as the payment of an annual licencing fees to maintain market access may be held to be an unreasonable measure which impairs the manufacturer's business operations. Further, such licencing fees could constitute a national treatment violation if local companies are exempted from payment.

5. Prescribing tobacco product substances or test methods may be cause for concern under the MAI expropriation or general treatment obligations. Further, limiting the number of cigarettes in a package, or the form or mechanisms available for merchandising tobacco products may also violate the expropriation obligation. Health warnings, and limiting the use of trademarks whether on products or in event materials could also raise international investment law concerns.

Many of the above mentioned limitations or restriction may be expropriative in nature as they would unreasonably and substantially affect a property right. This would require the immediate payment of compensation. Thus, a tobacco manufacturer whose products have been affected by any of the above mentioned limitations on the use of their trademark or unique packaging, may be in a position to commence an Investor-State dispute seeking redress under the MAI expropriation or general treatment provisions.

Question Two:

> *To what extent would the substantive obligations of the MAI affect the ability of World Health Organization member countries to implement an International Framework Convention for Tobacco Control?*

The Proposed International Framework Convention for Tobacco Control

In May 1996, the World Health Assembly, governing body of the World Health Organization (WHO), adopted a resolution to call on the Director-General to initiate the development of an International

Convention for the control of tobacco and tobacco products. The International Framework Convention on Tobacco Control (IFCTC), would provide broadly stated objectives that signatory states could pursue.[76] In this case, the objectives would deal with the international control of tobacco.

The WHO believes that the IFCTC could be a useful tool in developing international cooperation and coordination of tobacco control efforts.[77] At a minimum, the IFCTC would cover the following issues:

(1) Tobacco Smuggling;
(2) Tobacco Advertising;
(3) Duty-Free Sales of Tobacco;
(4) Tobacco Pricing and Taxation;
(5) Reporting of Production, Sales, Imports and Exports of Tobacco Products;
(6) Testing and Reporting of Toxic Constituents;
(7) Policy and Programme Information Sharing.[78]

Regarding measures restricting the advertising of tobacco and tobacco products, the WHO suggests that International Restrictions on advertising would prevent spillover of advertising from nations with fewer advertising restrictions into nations with greater restrictions.[79]

In his paper entitled *Options for the Preparation of an International Framework Convention and Related Protocols for Tobacco Control*, Eric Le Gresley explains that Protocols could be established for 8 areas of tobacco control. These areas incorporate the 7 areas listed in the WHO Fact Sheet mentioned above. Mr. Le Gresley's proposed areas of Protocol substance includes:

(1) Tobacco Content and Design:

Uniform world wide standards for tobacco products including the establishment of basic minimum product content standards.[80] Parties could maintain diversity by demanding higher or differing standards.[81]

(2) Tobacco Advertising, Promotion and Sale:

Protocols may be established to restrict the use of advertising and promotion by tobacco companies. International restrictions could limit the ability of large tobacco companies to internationalize flagship brands by "beaming" advertising across borders, spilling over into countries where the same brands are smoked.[82]

(3) Tobacco Package Design and Labelling:

Controlling package design is an important lever as Tobacco company executives acknowledge that there are few distinguishable characteristics between competing cigarette

76 WHO Fact Sheet No. 160, An International Framework Convention for Tobacco Control, 1998, at Pg. 1.
77 WHOFact Sheet No. 160, Pg. 2.
78 WHOFact Sheet No. 160, Pg. 2.
79 WHO Fact Sheet No. 160, Pg. 2.
80 Eric Le Gresley, Opinions for the Preparations of an International Framework Convention and Related Protocols for Tobacco Control. WHO/MSA/PSA/97.9 (1997) at Pg. 9.
81 Le Gresley at Pg. 9.
82 Le Gresley at Pg. 10.

product lines.[83] Tobacco control strategies could include a health message.[84] A minimum standard of message content could be set in a protocol which is agreeable to all Parties. Information that could mislead the public such as tobacco descriptions stating that the product was "light", "mild" or "smooth" could be removed from use on packaging.[85]

(4) Taxation and Pricing:

Protocols could address certain tax issues, including tax levels, forms of taxation, and measures of applying and measuring taxes.[86] An effective tobacco taxation policy would require tax increases in concert between states.

(5) Tobacco Exports:

Controls on the import and export of tobacco, in addition to higher tobacco standards in an exporting country, could increase the public health benefits.[87]

(6) Tobacco in the Public Sector:

Tobacco control policies which attempt to discriminate between types of ownership have been found to violate international trade obligations.[88]

Many of the proposed Protocols may be problematic. Restrictions on advertising, packaging or labelling could violate the general treatment and expropriation obligations found in the MAI. Tobacco control policies could not discriminate based on whether a manufacturer was state run or private as this could violate several WTO and MAI obligations. Finally, a ban against the international trade of tobacco products would have to be comprehensive, involving all MAI member states, otherwise an unilateral import or export ban could be suspect under the MAI.

Conclusion

The substantive obligations of the MAI would greatly hinder the ability of WHO member countries to implement the International Framework Convention on Tobacco Control. In order to implement the IFCTC, member governments would need to pass appropriate measures in their respective legislatures. As mentioned in Questions 1 and 2, measures such as advertising bans, labelling requirements and health warnings could be inconsistent with a Party's obligations under the general treatment and expropriation sections of the MAI. This could require the immediate payment of compensation by a Party to an affected investor or investment. Thus, the MAI effectively restricts the ability of governments to undertake policies to facilitate an International Convention on Tobacco Control without the payment of compensation to harmed investors and their investments.

Question Three:

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83 Le Gresley at Pg. 10.
84 Le Gresley at Pg. 11.
85 Le Gresley at Pg. 11
86 Le Gresley at Pg. 11,12.
87 Le Gresley at Pg. 15.
88 Le Gresley at Pg. 15, 16. Also see the GATT Panel decision on Thai Cigarettes. Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes (United States v. Thailand) (1990), GATT Doc. DS10/R, 37 B.I.S.D. (1991) 200.

What options are available to MAI countries and their subnational governments to protect their ability to implement tobacco control initiatives, and to protect their ability to implement an International Framework Convention for Tobacco Control and other similar international public policy initiatives?

Investment agreements like the MAI impose significant limitations on the ability of governments to control the use of tobacco products. International investment agreements do not permit governments to incidently harm property interests in the pursuit of public health and safety without the payment of full and fair compensation.

There are limited options available to governments that choose to implement tobacco control initiatives. These options include:

- The introduction of public policy exceptions into international investment agreements like the MAI, as has previously occurred in the regulation of finacial markets;
- Use of the precautionary principle;
- Use of reservations to the extent that they are permitted;
- Use of legitimate standards based regulations to moderate the effects of tobacco products.
- General Modifications to the Structure of Investment agreements.

Public Policy Exceptions

The MAI currently contains an exception for financial services, allow governments to take prudential measures. This purportedly permits a number of member governments to decide what is a prudential measure in the permitted areas. The MAI contains no exception that would justify a government ot take measures that would be inconsistent with the MAI for the purposes of public health or the environment. A public policy exception could permit governments to take tobacco control measures. Such an exception could read as follows:

Notwithstanding any other provisions of this Agreement, a Contracting Party shall not be prevented from taking prudential measures with respect to:

1) Health and safety;
2) Environmental protection or conservation;
3) The maintenance, enhancement or provision of social services, including but no limited to health and healthcare, education, childcare and social security or insurance; and
4) Consumer protection.

For greater certainty, no Contracting Party shall be subject to any dispute settlement mechanism under this Agreement for any prudential measure described above. The objectives of these prudential measures shall be determined entirely by the Contracting Party taking the measure.

As an alternative, the MAI could exclude entirely measures affecting public health and safety, the environment and social services. This would result in total protection for government measures affecting these areas. Such an exclusion could be worded as follows:

> *The obligations contained in this Agreement do not apply to the measures of governments of Contracting Parties affecting: Public health and safety, Environmental protection or conservation; The maintenance, enhancement or provision of social services, including but not limited to health and healthcare, education, childcare and social security or insurance; and Consumer protection. The objectives of these measures shall be determined entirely by the Contracting Party taking the measure.*

The Precautionary Principle

The Precautionary Principle is an international legal concept enshrined in the Agenda 21 process at the 1992 Rio Conference[89]. The *1992 Declaration on Environment and Development* (the "Rio Declaration") is a statement of principles based on Agenda 21, and according to which Agenda 21 is to be carried out.[90] The Precautionary Principle is set out in Principle 15 of the Rio Declaration states that:

> *Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used a reason for postponing cost effective measures to prevent environmental degradation.*

If it were recognized as a general interpretive principle of the MAI or even as a general concept of international law, the Precautionary Principle could be used as a means of justifying tobacco control measures that would otherwise offend provisions in the MAI.

The Precautionary Principle is not yet considered a basic principle of international law.[91] Agenda 21 and *The 1992 Rio Declaration on Environment and Development*[92] are merely statements of principles, providing a basis for voluntary cooperation and paving the way for the negotiation of binding agreements.[93] However, the continued use of this principle by countries in international agreements and before supranational organizations (like the WHO) could increase the acceptance of the precautionary principle as a principle of international law. This acceptance can only occur through state practice. The International Court of Justice wrote in *North Sea Continental Shelf*[94] that:

> *State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.*

To date, there are no international treaties or conventions which show that the precautionary principle has been accepted as a principle of international law. At best, the *Rio Declaration* could be interpreted as setting out a new general rule for future conduct. The adoption of the Precautionary Principle in the MAI could greatly increase the flexibility of member governments to take measures to regulate tobacco products without subjecting them to the risk of paying compensation to affected foreign investors.

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89 A/CONF.151/26 (Vol. I).

90 Report of the United Nations Conference on Environment and Development, A/CONF.151/26 (Vol. I), Chapter 1 - "Preamble," at para. 1.6 (adopted 12 August 1992).

91 The principle has been used in other treaties but it is still nascent. See P. Sands, Principles of International Environmental Law, vol 1, at pp 208-213.

92 UN Doc. A/CONF.151/5/Rev. 1 (1992).

93 M.F. Strong, "Beyond Rio: Prospects and Portents" 4 Colo. J. Int'l Envtl. L. & Pol'y 21 (1993).

94 (1969) ICJ Rep. 3 at 43.

Reservations

Reservations are unilateral statements made by a treaty Party indicating that it will not be bound to a specific treaty obligation. Reservations are not the same as general exceptions to a treaty. Exceptions apply to all obligations in a treaty while reservations apply only to those obligations specified by the terms of the treaty. Also exceptions must be agreed upon to by all Parties and form a part of the treaty itself, while reservations are usually unilateral in nature and only affect the listing country only.
The MAI has not detailed what provisions a Contracting Party may reserve against however it seems unlikely that the MAI will create a situation where a country would be able to reserve more obligations in the NAFTA than in the MAI. For example, under the NAFTA, it is not possible to reserve any measure from the expropriation obligation of the Investment Chapter. Under the *chapeau* to NAFTA Annex II, a Contracting Party could only reserve against the national treatment, most-favoured-nation, performance requirement, and senior management obligations.[95]

The lack of an ability to make reservations against the expropriation obligation can be significant. Without an MAI reservation a harmed investor, or an investment of an investor of another MAI Party, must be compensated for the loss of its property right. If the investment or the investor does not receive full compensation for its loss, it may seek compensation under the Investor-State arbitration provisions of the MAI.

Some Reservations about the Making of Reservations

The MAI provisions permitting the making of reservations is yet to be produced. When looking at reservations, it is as important to carefully examine the obligations that can be reserved against in the treaty as it is to examine the wording of the country-specific reservation. In the NAFTA, reservations were not permitted against all of its obligations. This resulted in making NAFTA member governments exposed to claims from harmed foreign investors in the areas that reservations were made for non-reservable obligations (such as expropriation).

The MAI will need to specify whether reservations could be made for existing measures or for future measures. Making reservations for future measures (known as unbound reservations), permits the widest type of protection for future governmental policy making.

Reservations represent a derogation from the general obligations of an international treaty. As a result of their effect of varying the general obligations contained in a treaty, international tribunals have interpreted reservations strictly and narrowly. Thus, the wording of reservations must be unequivocal and exceedingly clear as the reservation itself will be given a narrow reading if it ever comes before an international tribunal.

Perhaps the greatest policy concern arising from the making of reservations is the operation of the principle of rollback. Rollback refers to the automatic process whereby reserved measures will automatically expire over a certain period of time. While the MAI doe not contain rollback provisions in its text, its commentary specifically adverts to the addition of rollback provisions.

Standards-Based Regulations

There is no explicit provision in the MAI that exempts the making of standard-based regulations which would be inconsistent with the MAI which adversely affect investors from other MAI Parties or their

95 Articles 1102, 1103, 1106 and 1107 of the Investment Chapter.

investments. The MAI has proposed a clause which would recognize that Parties should not "waive or otherwise derogate from standards as an encouragement to investment".[96] The wording of this proposed text does not even consider the imposition of new standards at all.

The imposition of standards-based regulations that could have the effect of depriving an investor of some or all of its existing market. Also, depending on how it is imposed, it could also raise claims of national treatment if the regulation was intended to advantage domestic substitutes.

Many tobacco control measures depend on the ability of governments to impose standards-based regulations. The failure of the MAI to exempt this important area of government activity, would serve to limit future tobacco control measures.

At a minimum, a standards-based regulation exception should be included into the MAI that would permit governments to engage in objective standards-based regulation that would not be inconsistent with the obligations contained in the MAI. Such a clause could take the following form:

> *Notwithstanding any other provisions of this Agreement, a Contracting Party shall not be prevented from taking standards-based measures with respect to:*
>
> 1) Health and safety;
> 2) Environmental protection or conservation;
> 3) The maintenance, enhancement or provision of social services, including but no limited to health and healthcare, education, childcare and social security or insurance; and
> 4) Consumer protection.
>
> *For greater certainty, no Contracting Party shall be subject to any dispute settlement mechanism under this Agreement for any standards-based measure described above.*

General Modifications

In addition to any other action taken, it would be possible to modify the structure of international investment agreements to provide a better expert process to examine government measures oriented for the protection of health and the environment. For example, under the MAI Financial Services provisions, if a government measure is considered to be a "prudential measure" than the government would be able to freely engage in it. This process, used in the NAFTA Financial Services Chapter, insulates the reserved sectors from the scope of the Investor-State dispute settlement system. For the MAI, it would be most beneficial to build on this NAFTA example by having specific disputes arbitrated strictly by experts in the particular area of the dispute: for example: health disputes would be settled by health experts or environmental disputes settled by environmental experts.

Assumptions and Exclusions

In coming to our opinion, we have consulted the draft provisions of the AIT Energy Chapter, the provisions of the North American Free Trade Agreement ("NAFTA"), the May 14, 1997 English version of the MAI and other relevant international and municipal legal materials. This opinion relates only to the laws of Canada and to international law applicable in Canada as such laws existed at the time of the writing of this

96This wording appears to be based on NAFTA Article 1114 but all these MAI provisions only appear is bracketed text.

opinion. While we have tried to be as accurate and comprehensive as possible, this opinion is subject to the following qualifications:

> Opinions on the appropriate interpretation and application of international treaty obligations can never be entirely free from doubt. Such treaties are not the subject of binding judicial interpretation in domestic and international courts. They are drafted in the broad and general language of diplomacy, which is appropriate to treaties between sovereign states, and lack the precision normally found in domestic statutes.
>
> We have restricted our analysis to the May 1998 English version of the MAI.
>
> The MAI creates The Parties Group, which can interpret the MAI on a consensus basis. This opinion is made subject to the possible interpretation by this MAI group as it could provide binding interpretations on the MAI which need not be based on principles of international law or the MAI itself.

Please note that this legal opinion has been prepared at your request and it is not reasonable for any person, other than you, to rely upon this report without first obtaining authorization in writing from Appleton & Associates.

Respectfully submitted,

Barry Appleton
On behalf of Appleton & Associates International Lawyers