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# *THE DANGER OF INTERNATIONAL INVESTMENT AGREEMENTS FOR TOBACCO CONTROL IN CANADA*

**Submission to the Federal Standing Committee on Foreign Affairs and International Trade**

**and**

**The Hon. Sergio Marchi**
**Minister of International Trade**

**During Public Consultations**
Regarding forthcoming negotiations concerning
the Free Trade Area of the Americas and the
World Trade Organization

prepared by
PHYSICIANS FOR A SMOKE-FREE CANADA

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# THE DANGER OF INTERNATIONAL INVESTMENT AGREEMENTS ON TOBACCO CONTROL IN CANADA

## *EXECUTIVE SUMMARY*

### Background

Briefly, Physicians for a Smoke-Free Canada believe that Canada can and should play a leadership role in shifting the focus of international trade and investment agreements so that public health initiatives such as the national strategy on tobacco control are not only explicitly protected in these agreements, but are enhanced. We are convinced that the current directions of such agreements will render it impossible for governments to implement tobacco control initiatives, thereby requiring onerous public health care expenditures and effectively costing thousands of lives.

### The scope and focus of international trade and investment agreements

This submission concentrates on the investment provisions of these agreements. It is clear that the current direction for negotiations for the WTO and the FTAA are based on NAFTA and the MAI models, and that preventing tobacco use will be a far more difficult if the current direction in international investment agreements continues. It will be more difficult for societies and governments to protect our children from tobacco marketing and to reduce tobacco promotion. It will be more difficult to demand truthful labeling on tobacco products and appropriate packaging of tobacco products. It will be more difficult to reduce the availability of cigarettes. And it will be more difficult to hold the tobacco companies accountable for the lies they've promoted for decades about the health risks of cigarettes.

Our organization has concerns about the following provisions in NAFTA and the draft MAI, and each of these are reviewed in turn within the submission: the definition of investor, the general treatment /national treatment provisions, the expropriation and compensation section, and the investor-state dispute mechanism

In general, NAFTA and MAI-style agreements are designed to provide foreign investors rights without imposing corresponding obligations to the communities or countries they are in investing in. These kinds of provisions are unbalanced and fundamentally flawed. In particular, they have the following effects:

- *They constrain government*:. It will be extremely difficult to effectively implement the national strategy on tobacco control, protect youth from slick tobacco marketing, and demand truth in labeling or industry accountability.
- *They create a "compensation chill*": The fear of expensive compensation claims will constrain governments from acting in the interest of public health. Although nothing in the NAFTA or the MAI limits government's ability to legislate in the public interest, in both

cases it *requires* that compensation be paid. In practice such threats will discourage actions by governments who can ill afford such claims.

- *They undermine public accountability*: The effect of these provisions is to grant foreign companies the power to directly challenge the legitimate public health measures of democratically elected governments. Such challenges will be heard, not in a court of law based on domestic laws and values, but in a closed door investment tribunal ruling on the basis of international jurisprudence.
- *They affect both national and sub-national (provincial, local) governments*: Not only do these provisions affect the federal government, but they also expose provincial and local governments to the risk of compensation claims for any tobacco control measures they may initiate.

Government initiatives in tobacco control can be challenged by tobacco companies as substantially and unreasonably interfering with the enjoyment of a property right. In particular:

- the denial of the right to advertise a product could constitute an expropriation under the terms of these agreements. A restriction on the size and use of a trademark relative to a health warning may also be a measure equivalent to expropriation, and require compensation.
- under the general treatment obligations of the MAI and NAFTA a violation will take place where an investor or an investment receives treatment less favourable that that accorded under "international law". A general treatment violation could also occur where a measure impairs an investor's use or disposal of investments.
- any measure which add costs of doing business for tobacco products manufacturers, such as licensing fees, may be held as unreasonable. Such fees could constitute a national treatment violation if local companies are exempt.
- limiting the number of cigarettes in a package, or requiring that certain product substances (like levels of nicotine) be limited may be a concern under "general treatment" clause. Health warnings and use of trademarks at sponsoring events could raise international investment law concerns.
- many of the measures in Canada's Tobacco Act and National Strategy can be considered expropriative under the present direction Canada is taking these trade negotiations. This would require an payment of compensation. And the result of such compensation chill would be to limit government's appetite for undertaking such measures.

Consequently, the Physicians for a Smoke-free Canada stress that based on our evidence and analysis the current approach to international trade and investment agreements is wrong, and will seriously limit government's ability to implement tobacco-control initiatives. Further, we conclude that reservations for health and attempts to define expropriation through interpretive guidelines are inadequate measures to protect public health initiatives and the model of international agreements being promoted by the federal government would give commercial corporations an arsenal of weapons to use against public policy measures such as tobacco control. Such a model is absolutely unacceptable and we urge the federal government to abandon this current direction in favour of a new approach to international agreements.

**Toward A New Approach To International Agreements**

Our organization would suggests a new approach to protecting public health through international agreements that focus not on the rights of investors but on alleviating the suffering of citizens. Such an approach can be demonstrated by the International Framework Convention for tobacco control proposed by the World Health Organization (WHO).

Physicians for a Smoke-free Canada think the federal government should provide leadership at the WTO by working towards such an international framework agreement on tobacco. Similar to the visionary leadership role Canada has played in the strategy to ban anti-personnel land mines, our country's reputation could be used to initiate a progressive health agreement, rather than a flawed investment agreement which would cause a great number of people around the world agonizing illness and death.

**Recommendations**

Physicians for a Smoke-free Canada have carefully analyzed the current direction of the federal government in its approach to international trade and investment agreements and have concluded that such agreements as presently constituted will make it impossible for governments of all levels to effectively implement a tobacco control strategy without the threat of expensive compensation challenges.

Consequently, we make the following general and specific recommendations:

- The federal government should abandon NAFTA or MAI-style agreements as a model for future trade and investment negotiations, since such models are inadequate to ensure governments retain the effective ability to implement public health strategies such as tobacco control.
- In particular, the federal government should impose a moratorium on negotiating new investment protection and investor-state dispute mechanisms based on NAFTA or the MAI until such time as the effects of such provisions have been analyzed and canvassed by both governments and civil society. Particular attention should be paid to evaluating the effect of NAFTA Chapter 11 in light of the present challenges before Canada.
- Any trade and investment negotiations must be transparent and accountable, and should include the release and circulation of Canada's draft positions for comments by sub-national governments and NGOs.
- Canada should play a leadership role in defending governments' responsibilities to protect the public health by:
    - completely exempting actions by governments for public health purposes from expropriation and compensation provisions, and
    - by promoting parallel international public health measures such as the WHO International Framework Convention on Tobacco Control.

In addition, if Canada persists in pursuing NAFTA style international agreements, Canada should adopt the following specific positions:

- Expropriation should be narrowly defined and compensation should not be required where the government action is in the interest of public health, safety and environmental protection.
- There should be an explicit public policy exception, (similar to NAFTA exceptions for financial services) which excludes any measures affecting public health, safety or the environment.
- Governments should not negotiate provisions in agreements that they do not know to have a positive effect on public health. By adopting the precautionary principle from the Rio Declaration, governments would not act if the effect of such action on public health is uncertain or potentially negative.
- Reservations for health, if used, must be comprehensive and effective, and must include full protection against compensation.
- Government's regulatory powers must be explicitly affirmed in all agreements , and not be subject to compensation claims, and
- The dispute resolution mechanism must be transparent and must not over-ride domestic courts.

## 1.0 Background

*1.1 Physicians for a Smoke-free Canada*

Physicians for a Smoke-Free Canada (PSC) is a national health organization, founded in 1985 as a registered charity. We are a unique organization of Canadian physicians who share one goal: the reduction of tobacco-caused illness through reduced smoking and exposure to second-hand smoke.

PSC provides leadership for the medical profession on tobacco issues. With almost 1,500 members and representation in each region and province of Canada we are a national voice on tobacco and health.

PSC is funded primarily by its individual members with occasional donations from corporations, and recent support from Health Canada. We work in collaboration with governments, with the Canadian Medical Association and other non-governmental health agencies. PSC is a member of the Canadian Council on Smoking and Health, of the Steering Committee of Health Canada's National Strategy to Reduce Tobacco Use and an active player in the National Campaign for Action on Tobacco.

In 1994 PSC was awarded the Canadian Cardiovascular Society's Dr. Harold N. Segall Award of Merit for our contribution to the prevention of cardiovascular disease in Canada.

This submission outlines the PSC's key concerns about the direction of international investment agreements and Canada's present negotiating positions, and summarizes the analysis which has led to these concerns. And, we make a number of general and specific recommendations on Canada's position and role in the WTO and the FTAA discussions.

Briefly, we believe that Canada can and should play a leadership role in shifting the focus of such agreements so that public health initiatives such as the national strategy on tobacco control are not only explicitly protected in these agreements, but are enhanced. We are convinced that the current directions of such agreements will render it impossible for governments to implement tobacco control initiatives, thereby costing thousands of lives and public health care expenditures.

*1. 2 Smoking and Public Health Protection*

Tobacco is the primary cause of preventable death in Canada, and is currently responsible for one in five Canadian funerals. The 45,000 Canadians who are killed by tobacco are among the 3 million victims worldwide. Although the death toll is predicted to decrease in Canada, it will grow rapidly in developing nations. Within 20 years, the global death toll will exceed 10 million, 7 million of these deaths will occur in developing countries.

Cigarettes are the only consumer product which enjoy trade mark and trade right but which, when used exactly as intended, kill. Tobacco disables its users, and it cripples the health care budgets of their governments.

Governments have a role in protecting the public from serious health hazards. As one of the most hazardous health risks in Canada, tobacco has increasingly been the battleground between modest government attempts to control tobacco and the industry's aggressive responses to such controls. Governments at all levels have grappled with their responsibilities to curb tobacco use, and have developed measures which vary from regulations over labeling, to bans on advertising in certain media, and bans on smoking in work and public places.

Not only do governments have the obligation to protect the health of citizens, they also have the fiscal responsibility towards the costs of tobacco use, including those spent on public health care as a result of smoking-related illnesses. This has led to litigation by U.S. State governments, and recently by the government of British Columbia. Other provinces, including Ontario and Newfoundland have indicated their interest in also pursuing action.

Rarely have governments attempted to make progress in the areas of tobacco control without intense counter-action on the part of the tobacco industry.

Canadian governments and health agencies have worked together for more than a decade on a National Strategy to Reduce Tobacco Use. The current directional paper is attached: it is the measures contained in that paper which PSC is anxious to see protected in any forthcoming trade agreements.

*1.3 The Tobacco Industry*

The tobacco industry is a multi-million dollar, multi-national industry which makes its profits by selling a product that kills people. As smoking behaviour in North America decreases, the industry has developed a focus on two specific markets: 1) targeting youth in North America and 2) aggressively marketing in developing counties.

In fact, the U.S. tobacco industry has used international trade agreements such as GATT to successfully threaten trade sanctions against Japan, South Korea, Taiwan, Thailand and China unless they opened their market to U.S. cigarettes. In each case, the U.S. government used tobacco industry studies to argue that there were no health aspects to these trade threats. After South Korea opened its market to U.S. companies in 1988 smoking rates nearly tripled.

Public concern at these trade actions prompted the U.S. government to reverse its policy. In 1997, the U.S. congress passed a law to prohibit the use of public money to work against foreign tobacco control measures. In 1998, this law was expanded to cover all U.S. government agencies. The Canadian government has issued no similar directives.

Tobacco use threatens public health and it threatens the world's economies. In 1993, the World Bank estimated that the use of tobacco results in a global net loss of US$200 billion per year, with half of these losses occurring in developing countries.

Increasingly, the problems of tobacco use are becoming 'globalized.' Global cigarette exports increased 42 % between 1993 and 1996, while cigarette consumption increased by 5% in the same period (Chalopka, 1998). The world's three largest transnational tobacco companies (Philip Morris, RJ Reynolds and British American Tobacco Company, each of which operates through one of Canada's three tobacco subsidiaries) had combined tobacco revenues over $65 billion.

At the same time as the tobacco industry is expanding to new markets, they are also actively litigating against governments for introducing limited controls on their product at home. Indeed, tobacco companies are know as a litigious lot, mounting expensive and lengthy law suits against government initiatives. In Canada, for example, the tobacco industry went to court in 1988 to strike down the federal ban on tobacco advertising, and they are back in court again right now trying to strike down the 1997 advertising restrictions. They have made similar suits against the BC government for some of its initiatives for tobacco control.

Tobacco companies are aggressively protecting their interest in the courts and on the multi-national stage because they understand that there is an irreconcilable difference -- a zero sum game -- between the tobacco industry making profits and public health. Anything a government does to benefit public health in this area will have a negative effect on industry profits. Likewise, anything that helps industry directly and measurably reduces the health of the targeted population. Unlike the environment example where industry and government can strive for "sustainable development", there is no such thing a "sustainable smoking". Tobacco industry interests and public health are always on a collision course and it is government's role to make decisions on this conflict.

The tobacco industry knows this, which is why they have been so active in the business lobby to expand trade agreements into broad investment agreements that would have the impact of limiting government's abilities to act to control tobacco. They are seeking to tip the balance in favor of profits over public health.

### *1.4 Summary*

There is an irreconcilable conflict between big tobacco companies and public health. What is required is both strong domestic legislation and a complementary international framework in order to enhance government's ability to protect public health initiatives.

In the following section we outline how Canada's current approach to trade and investment agreements, modeled after NAFTA and the draft MAI, tilts the balance away from public health and in favour of tobacco companies.

## 2.0 Scope And Focus Of International Trade and Investment Agreements:

Although there are a number of important issues arising from the scope and focus of international trade and investment agreements, this submission will concentrate on the investment provisions of these agreements. The expansion of trade agreements into investment rules is not merely a minor addition to these agreements, but a major policy approach with significant impacts on public health initiatives. Consequently, we feel it is important that the Department of Foreign Affairs and International Trade (DFAIT) maintain an open consultative process through every stage of those negotiations, provide draft agreements to non-governmental organizations (NGOs) for review, and play a leadership role in ensuring that other partner countries are also consulting with their citizens. In this era of globalized economies, trade and investment rules can no longer be created through exclusive discussions between governments and large business interests. Civil society should be partners with government in these negotiations.

This section outlines some of the content of current international agreements and provides an analysis of the federal government's international objectives and its effect on tobacco control strategies.

### *2.1 Current Directions - NAFTA and the MAI*

The website for DFAIT states that one of its key objectives for 1999 is to "do for investment what it has done for trade" by promoting foreign investment in Canada. Further, the *Consultation Paper on WTO/FTAA Investment* , prepared by DFAIT for these consultations, states explicitly that it is pursuing an agenda that is based on expanding the WTO to include investment systems. It states that "WTO members have reached the general conclusion that international investment has a positive impact on growth and development" and that "a comprehensive instrument" is necessary to counter the current problem with existing WTO rules that "neither the goods nor services sectors are accorded the protection elements seen in bilateral investment agreements such as protection from expropriation without compensation". The DFAIT paper then outlines the elements of NAFTA as a model for the WTO investment negotiations, including the expanded definition of investor, the "most favoured nation" clause, "national treatment" clause, rules on expropriation and compensation, and the dispute resolution mechanism. Although the paper outlines that Canada has maintained the right to adopt protective measures in areas such as public health and the environment it makes no mention of what these measures are. If they are modeled after the NAFTA or MAI -style reservations, then, as we will see below, these are not sufficient to protect Canada's national strategy on tobacco control, or any future policy directions aimed at limiting the damage done by cigarettes.

It is clear, then, that the current direction for negotiations for the WTO and the FTAA are based on the NAFTA and the MAI models. Indeed, statements from the federal Trade Minister Sergio Marchi support this assertion:

- When MAI negotiations folded in Paris, the Globe and Mail reported federal Trade Minster Sergio Marchi saying *"...Ottawa has not abandoned its quest for a deal on investment....* He plans to push his suggestions for future negotiations at the World Trade Organization..." (Globe and Mail, Oct. 21, 1998, p. 61)

- On Oct. 22, 1998 the Globe and Mail reported that the "World trade powers seek a new home for MAI negotiations..." and that "Canadian officials are actively pushing for investment talks at (the) World Trade Organization".

As well as statements from DFAIT and the Trade Minister on the future directions of trade and investment agreements, the Physicians for a Smoke-Free Canada are also cognizant that the federal government receives pressure from national business lobby groups and organizations to expand the NAFTA investment measures in the WTO and the FTAA. We know that the tobacco industry has played a role in the lobby efforts for GATT and the WTO in the past and we are concerned that these efforts appear to render a disproportionate influence on the federal government's actions in spite of broad based concern about the effect of these investment agreements on the public health sector.

Since it is clear that the predominant direction for the current and upcoming round to negotiations is based on the NAFTA and the MAI models we will analyze those agreements in light of the potential effect on a tobacco control strategy. Such an analysis has led us to conclude that the substantial obligations under the NAFTA and the MAI-style provisions could restrict government's ability to implement the kind of comprehensive tobacco control strategies which the federal government has been taking part in as part of the "New Direction for Tobacco Control in Canada - A National Strategy" (attached).

It is clear to us that preventing tobacco use will be a far more difficult if the current direction in international investment agreements continues. It will be more difficult for societies and governments to protect our children from tobacco marketing and to reduce tobacco promotion. It will be more difficult to demand truthful labeling on tobacco products and appropriate packaging of tobacco products. It will be more difficult to reduce the availability of cigarettes. And it will be more difficult to hold the tobacco companies accountable for the lies they've promoted for decades about the health risks of cigarettes.

### *2.2 NAFTA and the MAI as models*

Our organization has concerns about the following provisions in NAFTA and the draft MAI

- the definition of investor
- the general treatment /national treatment provisions
- the expropriation and compensation section, and
- the investor-state dispute mechanism

*Definition of Investor*

A fundamental issue in the upcoming negotiations is the definition of investor and investment, which Canada has been using. In the MAI draft, for instance, the definition of investor is broader than that found in the NAFTA, resulting in far more potential "investors" covered by the MAI wording. In fact, "investment" is defined so broadly in the MAI that everything is covered unless explicitly exempted. Essentially, this definition protects every aspect of the tobacco industry including packaging, trademarks and every kind of asset owned or controlled both directly and indirectly. It includes the "goodwill" of the business relations between tobacco companies and the events they sponsor, or their retailers. It includes the recipe for the chemicals they include in cigarettes (a controversial "trade secret" which, it has been discovered, includes the intentional adding of nicotine to maximize the addictive qualities). And it includes all of their marketing strategies from brand names on clothes and other products to the sponsorship of cultural and sporting events.

Such a definition implies that any present or potential business relationship is an "investment" which is then protected from "expropriation" as defined below. The draft MAI makes no distinction between benign and dangerous industries or investors. This definition serves to capture a broad-based set of activities which are, by this definition, covered by the provisions of the rest of the agreement.

*General Treatment/National Treatment*

The draft MAI wording contains a General Treatment clause which states that there must be "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 law." (1.1) Since the MAI does not define the kind of treatment to be enjoyed by the foreign investor, it falls in accordance with "international law" and requires that international minimum standards be proven before an international arbitration tribunal.

We are advised that this article grants a standard of treatment to investors which is separate and perhaps more beneficial than that provided under domestic law. Indeed, existing international tribunals have not only judged the fairness of national judicial procedures but have imposed on them international minimum standards of fair and equitable treatment in relation to foreigners. International case law also points to the potential for civil procedure rules of a country to result in a denial of justice contrary to international law. Thus, it is possible that the rules of international law may require governments to treat foreign investors not just the same as domestic investors (which is defined a "formal equality"), but according them greater, broader, and more liberal treatment than it accords its own citizens -- a sort of "affirmative action" program for foreign investors.

This concept of "formal equality" may not satisfy the obligations for "national treatment" either. The term "national treatment" has been widely used as a principle in GATT, the WTO and

NAFTA, and requires that a government extend national treatment obligations to foreign investors no less favorably than they treat domestic investors. Although in GATT and WTO the obligation is only limited to trade in goods, this treatment was expanded to include investors and investments in the draft MAI, and is expected to be added to the WTO negotiations as well.

National Treatment imposes a positive duty on the part of governments to ensure equal treatment and a duty of non-interference into the expansion of investments. This may include the lifting of any restrictions to market, as is presently the case in GATT, or any other constraint which may affect profits. In the case of tobacco companies, this could mean that tobacco companies could market more dangerous imported cigarettes with higher additives and riskier health effects than Canadian cigarettes, with the no additional labeling or warning required.

*Expropriation and Compensation*

The term expropriation has a history in international law and refers to the act by which governmental authority is used to deny some benefit or property, although the specific meaning may differ under different domestic laws. This denial can be actual or constructive -- which means that an expropriating government need not take formal title of the affected property. Expropriation, or measures "equivalent to expropriation" (as both NAFTA and a concept that occurred in the draft MAI), occurs when the property of an individual or a business has been "substantially interfered with" by a government authority. International case law supports the concept that expropriation can include a "deprivation" or a government interference with the peaceful enjoyment of rights of use, control, and disposal of private property.

The MAI made it explicit what type of activities could be deemed expropriation by including the term "measures having an equivalent effect" -- wording which expands the scope of this obligation to cover virtually any substantial interference with a protected investment. Indeed, legal opinions have concluded that an expropriation will take place whenever there is a substantial and "unreasonable" interference with the enjoyment of a property right, and although it does not limit the range of regulatory actions by government it obliges them to compensate investors for the interference. Indeed, in the draft MAI there is a clear obligation to pay compensation for a regulatory taking -- it requires that compensation be paid *whenever* expropriation occurs.

The expropriation and compensation provisions in both NAFTA and the draft MAI gives investors money-back guarantees for compensation upon expropriation or measures equivalent to expropriation. Any time government takes an action which could materially affect profits it subjects that member government to immediate liability to pay full fair market value compensation. There is no exception from the requirement that compensation be paid, even for public safety or health measures. And it is the potential reality of such compensation suits that can constrain government's practical leeway in making regulatory decisions.

Plain packaging of cigarettes is a good example of how expropriation provisions of this type will constrain tobacco control strategies. When the federal government contemplated introducing plain packaging as a way to mitigate against the health impact of cigarette smoking in Canada

the tobacco industry struck back. During the hearings held on this proposal by the Health Department, tobacco giants Philip Morris and R.J. Reynolds, mostly know for the Marlboro Man and Joe Camel, (and also the owners of two of Canada's three tobacco companies) argued against plain packaging by threatening trade action. They brought with them the former US trade representative Carla Hills and former NAFTA negotiator Julius Katz who said that if such "expropriation" was lawful under domestic law, it would be at a great cost to the Canadian government since NAFTA compensation claims would be "staggering -- around the hundred of millions of dollars". Soon afterward, plain packaging was dropped by the federal government, and to this day Health Canada officials say that plain packaging is a non-starter because of trade and investment agreements like NAFTA. The very threat of NAFTA compensation clearly has a chilling effect on government's ability to implement health strategies to protect the next generation of kids from dying horrible deaths due to smoking addictions.

In order for governments to maintain the practical ability to protect the health of its citizens such expansive provisions for expropriation and compensation must be discarded.

*Investor-State Dispute Mechanism*

Both NAFTA and the draft MAI provide for a mechanism in which investors can directly bring claims against a government. The investor-state dispute settlement mechanism, for example, gives extremely wide powers to foreign investors to challenge government measures designed to protect public health, to preserve the environment and other important goals. Partly this is because of the very broad definitions of "investment" as identified above. But it is also because the mechanism itself is not accountable to citizens or the public interest.

The investors-state dispute resolution process in NAFTA, for example, takes place behind closed doors away from public scrutiny, is decided by a three person tribunal which is not accountable to a legislative body, is pre-disposed to large international commercial interests, and has the power to by-pass laws passed by elected parliaments - laws that all other citizens have to follow. Further, there is no appeal against tribunal rulings.

Thus, the NAFTA and MAI -style mechanisms provide tobacco companies with the ability to directly challenge the legitimate decisions of democratically elected governments -- not only through the domestic courts, but through specially constructed dispute processes. Although neither the NAFTA nor the MAI panels can strike down the infringing measures, the threat of paying enforceable damage awards can negatively affect government policy initiatives.

A case in point is the example of the Ethyl Corp., outlined below. It illustrates the extent of consequences of the Investor-State Dispute process -- the full implications of which cannot be underestimated for the effect they will have on the regulation of tobacco for public health purposes.

### *2.3 Impacts of NAFTA/MAI style investment provisions*

In general, NAFTA and MAI-style investment provisions are designed to provide rights to foreign investors without imposing corresponding obligations to the communities or countries

they are in investing in. These kinds of provisions are unbalanced and fundamentally flawed. In particular, they have the following effects:

- *They constrain government*:. It will be extremely difficult to effectively implement the national strategy on tobacco control, protect youth from slick tobacco marketing, and demand truth in labeling or industry accountability.
- *They create a "compensation chill"*: Not only will governments feel constrained to act in the interest of public health, they will fear expensive compensation claims. Although nothing in the NAFTA or the MAI limits government's ability to legislate in the public interest, in both cases it *requires* that compensation be paid. In practice such threats will discourage actions by governments who can ill afford such claims.
- *They undermine public accountability*: The effect of these provisions is to grant foreign companies the power to directly challenge the legitimate public health measures of democratically elected governments. Such challenges will be heard, not in a court of law based on domestic values, but in a closed door investment tribunal which cares little about public interest compared to investor rights.
- *They affect both national and sub-national (provincial, local) governments*: Not only do these provisions affect the federal government, but they also expose provincial and local governments to the risk of compensation claims for any tobacco control measures they may initiate. The case of British Columbia is a prime example of a government at risk for NAFTA challenges because of their tobacco control strategies.

### *2.4 Recent Cases*

The following NAFTA cases are a brief illustration of the kinds of compensation claims which can occur with such broad trade and investment agreements.

#### *Ethyl Case*

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 inter-provincial trade of Ethyl Corp.'s octane fuel enhancer MMT. Ethyl 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 US$250 million. 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 US$13 million. 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.

*S. D. Myers case*

In 1998 a similar case was brought against Canada by SD Myers of Ohio concerning PCBs. The company is claiming US$20 million in compensation under a number of clauses including national treatment, performance requirements and expropriation. The case has yet to be heard.

*Sun Belt Water case*

Another disturbing case is the Sun Belt Water Inc. of California which is claiming compensation due to the BC government's environmental ban on bulk water removals. Under NAFTA Chapter 11 the company is claiming between US$105 - 220 million for loss of potential profits. Notice of an intention to file was given in December of 1998.

*Pope and Talbot case*

Finally, Pope & Talbot, a forestry company based in Oregon, is suing the federal government for US $ 30 million plus legal costs under the national treatment and performance requirement section of NAFTA due to reductions in their allocation of quota under the Canada-US softwood lumber accord.

### *2.5 Effect on National Tobacco Control Strategy*

As the above cases demonstrate, investors are challenging, and will continue to challenge, the responsibilities of domestic governments to protect the public interest. Even if such challenges are found without merit (although that has yet to be the case) the current scope of international investment agreements force public institutions to defend themselves against such claims and spend scarce tax-payer dollars which could better be diverted to improving health care in Canada.

Government initiatives into tobacco control can be challenged by tobacco companies as substantially and unreasonably interfering with the enjoyment of a property right. In particular:

- the denial of the right to advertise a product could constitute an expropriation under the terms of these agreements. A restriction on the size and use of a trademark relative to a health warning may also be a measure equivalent to expropriation, and require compensation.
- under the general treatment obligations of the MAI and NAFTA a violation will take place where an investor or an investment receives treatment less favourable that that accorded under "international law". A general treatment violation could also occur where a measure impairs an investor's use or disposal of investments.
- any measure which add costs of doing business for tobacco products manufacturers, such as licensing fees, may be held as unreasonable. Such fees could constitute a national treatment violation if local companies are exempt.

- limiting the number of cigarettes in a package, or requiring that certain product substances (like levels of nicotine) be limited may be a concern under "general treatment" clause. Health warnings and use of trademarks at sponsoring events could raise international investment law concerns.
- many of the measures in Canada's Tobacco Act and National Strategy can be considered expropriative under the present direction Canada is taking these trade negotiations. This would require an immediate payment of compensation. And the result of such compensation chill would be to limit government's appetite for undertaking such measures.

The Physicians for a Smoke-free Canada stress that based on the evidence and our analysis the federal government's current approach to international trade and investment agreements is wrong, and will seriously limit Canada's ability to implement tobacco-control initiatives.

## 3.0 Federal Government's Proposed Solutions are Inadequate

In response to concerns about international investment agreements, and in particular in response to both the failure of the MAI and the growing number of challenges under NAFTA, the federal government has attempted to respond to these concerns by clarifying its position on both the strength of reservations and the definition of expropriation. We looked at each of these proposed "solutions" in turn.

### *3.1 Reservation for health*

The Department of Foreign Affairs and International Trade (DFAIT) has stated that it will seek reservations for health in all future trade and investment agreements, and this will protect the ability of governments to regulate in areas such as tobacco control. Upon close review, it is clear that the reservations proposed to date are simply inadequate.

Reservations are unilateral statements made by a 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 the areas specified. And, reservations are not comprehensive. Under NAFTA, for example, it is not possible to reserve any measure from the expropriation obligation of the investment chapters. This is a significant restriction, the result of which is that Canada's reservations do not protect Canada from compensation claims by tobacco companies.

The reservations for health that are found in NAFTA and repeated in the draft MAI do not provide any definition of key terms such as health, social service or public purpose. It is known that the U.S. promotes an extremely restrictive meaning of these terms, asserting that they apply only to services provided fully in the public sector. Consequently, within this definition most of the Canadian health care system would not be protected.

Finally, all reservations are temporary measures that are therefor subject to future negotiations, and "roll-backs".

Consequently, the existing forms of reservations in current use by DFAIT are clearly inadequate to protect the ability of governments to implement tobacco control measures. Any reservations must make governments' ability to act without exposure to compensation exceedingly clear, especially considering the fact that international trade panels have tended to give narrow readings to such reservations.

### *3.2 Definition of Expropriation*

Recently the DFAIT has been developing interpretive guidelines to address the concerns about expropriation in NAFTA. They state that NAFTA was not intended to create new forms of expropriation and reaffirm the ability of government to implement measures for the protection of health and safety and other issues without compensation. In effect, these interpretive guidelines attempt to define government regulation as falling outside the meaning of expropriation.

To its credit, the federal government has recognized the inherent conflict developing between government's ability to regulate and the expropriation and compensation clauses of NAFTA and other international agreements, and is purporting to attempt to rectify this problem. However, this attempt at solving the problems created by NAFTA by working through such interpretative guidelines fall far short of what is necessary to eliminate the negative impact of the expropriation provisions.

For example, the draft guidelines focus solely on NAFTA article 1110 as a way to resolve the issues in Chapter 11. This proposed solution does not go far enough, since such a note cannot override the other provisions within NAFTA that "read in" rules of expropriation and compensation. Without a strong clause which is paramount to any other aspects of the agreement, expropriation claims will remain a powerful tool for tobacco companies to threaten government initiatives.

Consequently, the interpretive guidelines currently proposed by Canada are inadequate to address the inherent problems in NAFTA, and certainly not suitable for approaching new negotiations. They are tantamount to closing the barn door after the horses have escaped. Instead, if we are to have any hope of implementing a tobacco control strategy in Canada, the definition of expropriation and the resulting compensation claims must be explicitly restricted so as not to expose governments to liability if acting in areas of public health.

### *3.3 Summary*

Regardless of the federal government's attempt to assuage concerns that the public health policies are at risk under international investment agreements, it is clear that the present approach to reservations and interpretive guidelines are inadequate to address the very real challenges which tobacco companies could mount against a tobacco control strategy. In fact, as the first report of BC's Special Committee on the MAI stated, the model of international agreements would give commercial corporations "an arsenal of weapons to use against public policy measures" such as tobacco control. Such a model is absolutely unacceptable and we urge the federal government to abandon this current direction in favour of a new approach to international agreements. .

## 4.0 Toward A New Approach To International Agreements

It is clear to the Physicians for a Smoke-free Canada that using the NAFTA and draft MAI agreements as models for the upcoming WTO and FTAA negotiations is inappropriate. Such models give preferential treatment to tobacco companies over public health because they are first and foremost based on a premise of expanding rights for investors without corresponding obligations. Further, they place issues of public health and public interest as afterthoughts in what is primarily an agreement to enhance trade and investment, thereby ensuring that such public policy issues are vulnerable to the narrow interpretations of international trade and investment jurisprudence. Not only is this an ineffective way to protect Canada's public health initiatives, it also suggests that the federal government is abrogating its responsibilities to public health by promoting such agreements.

Instead, our organization would like to suggest a new approach to protecting public health through international agreements that focus not on the rights of investors but on alleviating the suffering of citizens. Such an approach can be demonstrated by the International Framework Convention for tobacco control by the World Health Organization (WHO).

*International Framework Convention (WHO)*

Tobacco use should be considered first and foremost a health issue, not a trade or investment issue. This reality was recognized by the World Health Organization (WHO) when it adopted a resolution a the World Health Assembly in May of 1998, to initiate the development of an International Convention for the control of tobacco products. Such a Convention would be designed to develop international cooperation and coordination of tobacco control efforts between the 140-plus member nations and is intended to respond to the devastating effect the tobacco industry is having on the world's health. The international framework would be a legal instrument in the form of an international treaty in which the signatory states would agree to pursue broadly stated goals on tobacco control such as:

- establishing world-wide standards for tobacco products including basic minimum product content standards, to constrain the ability of use of the most toxic and addictive chemicals,
- drafting protocols to restrict cross-border advertising and promotion,
- developing labeling standards of tobacco packages to include health warnings,
- developing protocols for tax levels and a coordinated taxation policy, and
- developing controls on the import and export of tobacco.
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This way, WHO could assist both governments and non-governmental organizations (NGOs), especially in developing countries, who often lack the economic resources and political clout to resist the predatory marketing and trade actions of tobacco corporations. The WHO Convention

would set a regulatory standard for member states -- a floor rather than a ceiling -- on what governments could do to protect public health, and such a Convention should take precedence over trade and investment agreements.

In a global economy we need global rules. This is as much the case for public health issues as it is for trade and investment. And such global rules should be created in tandem so that clear paramountcy for public health can be established on the world stage and referred to in the international agreements. Global rules on tobacco control are necessary to ensure that the tobacco industry does not simply shift from one vulnerable population to the next in its attempt to find expanded markets for an addictive and hazardous substance.

However the present direction of WTO and FTAA negotiations could scuttle the attempts of WHO to establish this Convention. For example, the World Trade Organization recommends a total ban on tobacco advertising. However NAFTA and MAI-style provisions allow tobacco companies to claim that advertising bans are expropriation. The WHO recommends a ban on tobacco promotion of race-cars, jazz festival and fireworks displays. Under the draft investment agreements however, tobacco companies could claim that these restrictions are also expropriation and demand compensation. The WHO recommends that adequate warning s be put on cigarette packages. (The warnings on Canadian packages are voluntary). Under NAFTA and MAI-style provisions any government measures to improve warnings could be met with the demand for immediate payment of compensation.

Clearly, if governments were serious about meeting their obligations for public health they would support agreements such as that endorsed by WHO, and ensure that negotiations under trade and investment agreements such as WTO or GATT or the OECD do not compromise the strength and effectiveness of the WHO Convention. Indeed, the WHO convention is a model for how public health issues should be dealt with within this globalized sector and Canada's position should be to enhance the ability to create and maintain such conventions.

### *4.3 Canada could be a leader*

Physicians for a Smoke-free Canada think the federal government should provide leadership at the WTO by working towards such an international framework agreement on tobacco. Similar to the visionary leadership role Canada has played in the strategy to ban anti-personnel land mines, our country's reputation could be used to initiate a progressive health agreement, rather than a flawed investment agreement which would cause a great number of people around the world agonizing illness and death.

## 5.0 Summary and Recommendations

In summary, the Physicians for a Smoke-free Canada have carefully analyzed the current direction of the federal governments in its approach to international trade and investment agreements and have concluded that this model or type of agreement will make it impossible for governments of all levels to effectively implement a tobacco control strategy without the threat of expensive compensation challenges.

Consequently, we make the following general and specific recommendations:

- The federal government should abandon NAFTA or MAI-style agreements as a model for future trade and investment negotiations, since such models are inadequate to ensure that governments retain the effective ability to implement public health strategies including tobacco control.
- In particular, the federal government should impose a moratorium on negotiating new investment protection and investor-state dispute mechanisms based on NAFTA or the MAI until such time as the effects of such provisions have been analyzed and canvassed by both governments and civil society. Particular attention should be paid to evaluating the effect of NAFTA Chapter 11 in light of the present challenges before Canada.
- Any trade and investment negotiations must be transparent and accountable, and should include the release and circulation of Canada's draft positions for comments by sub-national governments and NGOs.
- Canada should play a leadership role in defending governments' responsibilities to protect the public health by:
    - completely exempting actions by governments for public health purposes from expropriation and compensation measures in investment agreements, and
    - by promoting parallel international public health measures such as the WHO International Framework Convention on Tobacco Control.

In addition, if Canada insists on moving forward with international investment agreements modeled on the NAFTA or the MAI, Canada should adopt the following specific positions:

- Expropriation should be narrowly defined and compensation should not be required where the government action is in the interest of public health, safety and environmental protection.
- There should be an explicit public policy exception, (similar to NAFTA exceptions for financial services) which excludes any measures affecting public health, safety or the environment.
- Governments should not negotiate provisions in agreements that they do not know to have a positive effect on public health. By adopting the precautionary principle from the Rio

Declaration, governments would not act if the effect of such action on public health is uncertain or potentially negative.

- Reservations for health, if used, must be comprehensive and effective, and must include full protection against compensation.
- Government's regulatory powers must be explicitly affirmed in all agreements , and not be subject to compensation claims, and
- The dispute resolution mechanism must be transparent and must not over-ride domestic courts.