The Trans-Pacific Partnership:
A Corporate Trojan Horse
TPP Chapter 9: Investment

Scope

• Chapter 9 applies to measures adopted or maintained by:
  
  (a) the central, regional or local governments or authorities of a Party; and
  
  (b) any person, including a state enterprise or any other body, when it exercises any governmental authority delegated to it by central, regional or local governments or authorities of that Party.
Article 9.4: National Treatment

“Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.”
TPP Chapter 9: Investment (cont’d)

Article 9.5: Most-Favoured Nation Treatment

“Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.”
Article 9.6: Minimum Standards Treatment

Each party shall accord to covered investments treatment in accordance with applicable customary international law principles, including fair and equitable treatment and full protection and security.
Article 9.8: Expropriation and Compensation

No Party shall expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation (expropriation), except:

(a) for a public purpose;
(b) in a non-discriminatory manner;
(c) on payment of prompt, adequate and effective compensation in accordance with paragraphs 2, 3 and 4; and
(d) in accordance with due process of law.
TPP Chapter 9: Investment (cont’d)

Article 9.10: Performance Requirements

1. No Party shall, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement, or enforce any commitment or undertaking:

[...]
(b) to achieve a given level or percentage of domestic content;
(c) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
[...]
(f) to transfer a particular technology, a production process or other proprietary knowledge to a person in its territory;
[...]
Article 9.17: Corporate Social Responsibility
The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party.
TPP Chapter 9: Investment (cont’d)

Article 9.20: Consent of Each Party to Arbitration

1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement.
Article 9.21: Conditions and Limitations on Consent of Each Party

1. No claim shall be submitted to arbitration under this Section if more than three years and six months have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 9.19.1
Ontario *Limitations Act, 2002*

The *Limitations Act* accords only two years to ordinary citizens to commence legal claims.
TPP Chapter 9: Investment (cont’d)

Article 9.22: Selection of Arbitrators

1. Unless the disputing parties agree otherwise, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.
Canada’s Roster of NAFTA Arbitrators

35 Arbitrators: a Who’s Who of Bay Street:
Alan Alexandroff (Munk School of Business)
William Code (Calgary corporate law firm)
Glenn Cranker (Bay Street lawyer and corporate lobbyist)
Richard Dearden (Bay Street lawyer)
Calvin Goldman (Bay Street lawyer)
Roy Heenan (Bay Street lawyer)
Article 9.24: Transparency of Arbitral Proceedings

2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. If a disputing party intends to use information in a hearing that is designated as protected information or otherwise subject to paragraph 3 it shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect such information from disclosure which may include closing the hearing for the duration of the discussion of that information.

3. Nothing in this Section, including paragraph 4(d), requires a respondent to make available to the public or otherwise disclose during or after the arbitral proceedings, including the hearing, protected information, or to furnish or allow access to information that it may withhold in accordance with Article 29.2 (Security Exceptions) or Article 29.7 (Disclosure of Information).
Article 9.29: Awards

1. When a tribunal makes a final award, the tribunal may award, separately or in combination, only:

   (a) monetary damages and any applicable interest; and

   (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.
Article 28.13: Rules of Procedure for Panels

1. The Rules of Procedure, established under this Agreement in accordance with Article 27.2.1(f) (Functions of the Commission), shall ensure that:

(a) disputing Parties have the right to at least one hearing before the panel at which each may present views orally;

(b) subject to subparagraph (f), any hearing before the panel shall be open to the public, unless the disputing Parties agree otherwise;

(c) each disputing Party has an opportunity to provide an initial and a rebuttal written submission;

(d) subject to subparagraph (f), each disputing Party shall:
   
   – (i) make its best efforts to release to the public its written submissions, written version of an oral statement and written response to a request or question from the panel, if any, as soon as possible after those documents are filed; and
   
   – (ii) if not already released, release all these documents by the time the final report of the panel is issued;

(e) the panel shall consider requests from non-governmental entities located in the territory of a disputing Party to provide written views regarding the dispute that may assist the panel in evaluating the submissions and arguments of the disputing Parties;

(f) confidential information is protected;

(g) written submissions and oral arguments shall be made in English, unless the disputing Parties agree otherwise; and

(h) unless the disputing Parties agree otherwise, hearings shall be held in the capital of the responding Party.
The Guardian (U.K.) just reported that, in an April 2014 meeting with EU officials, executives of Chevron, which had initiated an ISDS proceeding in relation to an Ecuadoran court judgment for massive environmental damage, argued that “the mere existence of ISDS is important as it acts as a deterrent.”
“it has become clear that the arbitration industry has a vested interest in perpetuating an investment regime that prioritises the rights of investors at the expense of democratically elected national governments and sovereign states.”

“Arbitrators tend to defend private investor rights above public interest, revealing an inherent pro-corporate bias.”

“Investment lawyers, including elite arbitrators, have aggressively promoted investment arbitration as a necessary condition for the attraction of foreign investment, despite evidence to the contrary.”

“There is a revolving door between investment lawyers and government policy-makers that bolsters an unjust investment regime.”