

# Re-thinking the Trans-Pacific Partnership

## The Issue of Investment

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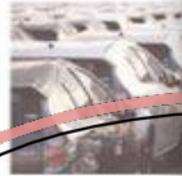
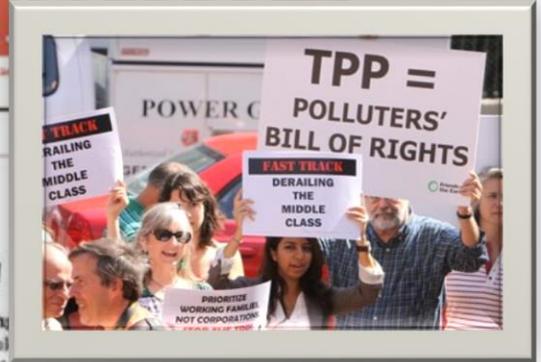
# THE GLOBE AND MAIL

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## TPP AGREEMENT

# A BIG DEAL

The politics of... While Stephen Harper began... The long... trust... the benefits of the trade deal... could talk... Thomas... required to ratify a final legal text



...the countries... trans-Pacific... ership

Harper: 'This is a once-in-a-lifetime agreement'

NDP's Mulcair vows to kill trade pact if elected

# A HISTORIC DEAL!

# DEAL!



# TPP Chapter 9

## Investment

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- The TPP's Investment Chapter is largely based on the US model investment agreement (2012/2004).
- Very broad scope of application (measures/sectors), and a broad definition of investment.
- The chapter's focus is on:
  - Investment protection (expropriation; MST/FET; free transfer of capital)
  - Non-discrimination: NT and MFN
  - Investment liberalization through:
    - National treatment that extends to pre-establishment phase on a negative list basis.
    - Far-reaching mandatory prohibitions on performance requirements.
- Broad application of investor-state arbitration.
- No investor obligations.

# Limits on the Right to Regulate Through Broad Investment Protection Standards



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## Insufficient clarification on indirect expropriation (Annex 9-B).

TPP uses the US-style clarification of indirect expropriation and contrasts with other approaches (i.e. Canada model, ACIA).

1. The determination of indirect expropriation may include: economic impact, **reasonable investment-backed expectations**; and the character of the government action.
2. Limited carve-out: Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health and safety, do not constitute indirect expropriations, **except in rare circumstances**.

# Limits on the Right to Regulate Through Broad Investment Protection Standards (cont.)



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## Minimum Standard of Treatment/Fair and Equitable Treatment (Art. 9.6)

- TPP applies a traditional US model standard (does not apply newer approaches of CETA, Vietnam-EU, Indian model).
- Links the concept of MST and FET to the customary international law (CIL) minimum standard of treatment of aliens.
- Despite this (CIL) limitation, tribunals have interpreted the standard broadly, in particular relying on the concept of 'legitimate expectations.'
- New clarification in TPP:
  - 9.6.4. For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.*
- This will not solve the problem but entrenches it.



# Most Favoured Nation (MFN): Importing Guarantees From Other Treaties

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- The MFN provision appears to allow for substantive guarantees to be imported from other treaties.
- This means that investors can ‘pick’ more favourable provisions from the other treaties that the host country has signed, ‘undoing’ the negotiated deal.
- In contrast to recent practice elsewhere, TPP only partially addresses this problem (for procedural issues):
  - Art. 9.5.3. For greater certainty, the treatment referred to in this Article does not encompass international dispute resolution procedures or mechanisms, such as those included in Section B.*

# Attempts to Safeguard Policy Space Through General or Specific Exceptions

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## Article 9.15: Investment and Environmental, Health and other Regulatory Objectives

- *Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure **otherwise consistent with this Chapter** that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.*

This formulation is circular and does not protect states' policy space.



# No Investor Obligations

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Only very weak voluntary Corporate Social Responsibility provision.

Article 9.16: 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.*

# Investor-State Arbitration (ISDS)

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- Takes traditional arbitration approach, which has been widely criticized.
- CETA and Vietnam-EU agreement seek to address these concerns (TPP does not):
  - Independence and impartiality of arbitrators/judges through a court-like construction.
  - Predictability through appeals mechanism.
- No requirement to exhaust local remedies.
- Extends ISDS to all areas of the chapter, including pre-establishment and prohibition of performance requirements (in contrast to CETA, VN-EU).
- Broadens application of ISDS beyond violations of the treaty protections to ‘investment agreements’.
- No opt-in / opt-out; however, note side letters excluding ISDS between parties (NZ-Australia).



# The Special Case of Tobacco Control

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## Article 29.5: Tobacco Control Measures:

- *A Party may elect to deny the benefits of Section B of Chapter 9 (Investment) with respect to claims challenging a tobacco control measure of the Party. Such a claim shall not be submitted to arbitration under Section B of Chapter 9 (Investment) if a Party has made such an election. If a Party has not elected to deny benefits with respect to such claims by the time of the submission of such a claim to arbitration under Section B of Chapter 9 (Investment), a Party may elect to deny benefits during the proceedings. For greater certainty, if a Party elects to deny benefits with respect to such claims, any such claim shall be dismissed. (footnotes omitted)*

If this is needed for tobacco control measures, why is it not needed for other public health and environmental measures?



# The Clash of Approaches: TPP vs CETA

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On 29 February 2016 Canadian Trade Minister Chrystia Freeland announced the revised CETA text, saying:

*“Our dispute resolution process is brought up in this agreement to the 21st century democratic standards that Canadians demand”.*

While CETA does not resolve the issue of investor protection and the democracy concerns linked to ISDS, it raises the question of what this means for TPP which has not undergone any transformation whatsoever.



# Thank You

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