Transparency *in* and *of* the Trans Pacific Partnership (TPP)

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Transparency and trade

• Emerging principle of International Economic Law (IEL) but...
  – Trade and investment agreements negotiated behind closed doors
  – Investment disputes resolved in “secret trade courts”
  – So what does transparency mean in this context?
TRANS-PACIFIC PARTNERSHIP

"The Largest corporate power grab you've never heard of"

12 COUNTRIES
AND COUNTING...
Transparency Issues in TPP

• Treaty negotiations
• Transparency chapter (regulatory transparency)
• Investor-state dispute settlement
Treaty Negotiations

• Began in 2010, ongoing
• Confidentiality agreement: all documents kept secret for 4 years
• Key issues:
  – Democracy vs. diplomacy
  – The need for “nerds”
  – Unequal access
Democracy vs Diplomacy

• Democracy
  – Need transparency in order to hold governments accountable for agreements that will constrain domestic policy making

• Diplomacy
  – Need confidentiality in order to negotiate effectively and maintain good inter-state relations
Diplomacy in the age of Wikileaks
The need for “nerds”

- Negotiations are highly complex
- Government negotiators are often not experts on issues like IP, investment
- Corporate lobbyists provide one-sided expertise
- Transparency allows input from greater range of experts
Unequal access

- Trade Advisory Committees

\[\text{Private industry and trade groups} \quad \text{Government} \quad (\text{Academia, law, other}) \quad \text{Trade group} \]

Non-governmental organization \quad Labor \quad Industry

\text{represent the lion's share of committee members - 480, or 85% of the total.}
Unequal access

TPP LEGISLATORS FOR TRANSPARENCY

We, the undersigned legislators from countries involved in the negotiation of the Trans-Pacific Partnership Agreement, call on the parties to the negotiation to publish the draft text of the agreement before any final agreement is signed with sufficient time to enable effective legislative scrutiny and public debate.
Regulatory Transparency

• Investors require transparency so that they have sufficient info on which to base their investment decisions

• Publication of laws and regulations also benefits the public: win-win

• Concerns:
  – Capacity of developing countries
  – Influence of foreign corporations
  – Enforcement through ISDS
Capacity of developing countries

• “Transparency disciplines” in trade agreements require publication of all laws and regulations but also often transparency of administrative rulings and procedures

• Imposes significant costs on poor countries with limited capacity
Influence of Foreign Corporations

- Some agreements also impose "due process" requirements, which means that investors must also be given an opportunity to comment on proposed changes to law.
- Trade expert has questioned whether US is in compliance with KORUS.
- Concern that foreign corporations will have even greater influence on domestic policy-making as a result.
Enforcement through ISDS

- “Transparency disciplines” also crop up in Investment Chapter
- “Fair and Equitable Treatment” has been expansively interpreted by tribunals in investor-state dispute settlement
- ISDS allows foreign corporations a direct means of enforcing transparency disciplines
Transparency in ISDS

- ISDS based on the model of commercial arbitration (confidentiality is key)
- Historically, no requirement to:
  - Notify public of the existence of a dispute
  - Open proceedings
  - Publication of documents or awards
- This is now changing...but in a piecemeal fashion through:
  - Provisions in new treaties
  - Changes to arbitration rules
ISDS Transparency in TPP

• Most recent leaked draft of Investment Chapter indicates:
  – Notification of existence of a dispute
  – Open proceedings
  – Publication of documents and awards

• Protected information
  – Parties can ask for information to be redacted
  – Arbitrators determine whether information should be protected
Changes to Arbitration Rules

• TPP allows disputes to be resolved through:
  - ICSID
  - UNCITRAL
  - Any other arbitration rules

• ICSID Rules revised in 2006
  - Proceedings can still be closed if one party wants them closed

• UNCITRAL Rules revised in 2013
  - Open proceedings
  - Came into effect in April 2014 (so will apply to TPP)
A win for democracy?

- Transparency in ISDS is definitely an improvement
- Other issues remain:
  - Individuals can act as legal representatives in one case and arbitrators in another (potential conflicts of interest)
  - Only investors can initiate claims (systemic bias?)
  - No appeals process (lack of accountability)
- Has transparency given ISDS (undeserved) legitimacy?
Conclusions

- Transparency is what you make of it
- Important to question whether claims are legitimate (is it really a call for *transparency* or something more?)
- Secrecy is easy to understand – makes an easy rallying cry for or against a process. More complex/esoteric issues might be equally important, but more difficult to campaign on
Thanks!

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The research for this article was supported by an Australian Research Council Discovery Early Career Award (DECRA)