

Article notes
Citizen Trade Policy Commission

Articles from December 2015, January, February and March 2016 and earlier dates

***Profiting from injustice: How law firms, arbitrators and financiers are fueling an investment arbitration boom;* (Corporate Europe Observatory and the Transnational Institute, November 2012)-** This lengthy paper examines the recent growth in the use investment arbitration in various international investment treaties which the authors define as “agreements between states [re nations] that determine the rights of investors in each other’s territories”. The report’s key findings include the following:

- The number and costs of investment arbitration cases have increased dramatically in recent years going from 38 cases in 1996 to 450 known cases in 2011 with 151 cases in 2010 involving a total of at least \$100 million in claims;
- The increase in investment arbitration cases has resulted in a great deal of business for investment lawyers that are paid by taxpayer funds; elite law firms charge as much as \$1,000 per hour for their work on these cases and investment arbitrators are paid relatively high salaries with as much as \$1 million dollars paid to arbitrators in one case;
- Arbitrators and investment lawyers are drawn from an elite and highly paid small group of individuals;
- Arbitrators tend to prioritize private investor rights over those of the public interest;
- Investment arbitrators and lawyers tend to encourage governments to approve investment treaties which favor and encourage the use of excessive arbitration; and
- There is a “revolving door” between investment lawyers and arbitrators and government regulators which encourage arbitration procedures which favor corporate interests.

***A Dirty Deal: How the Trans-Pacific Partnership Threatens our Climate;* (The Sierra Club, December 2015)-** This paper asserts that the TPP does not in any meaningful way address the threats posed by climate change. In addition, the authors allege that the TPP poses the following threats to the world’s climate:

- The TPP will empower fossil fuel corporations to attack climate policies in private tribunals;
- The TPP would maintain existing fossil fuel production by encouraging natural gas exports;
- The TPP would result in an increase of harmful carbon emissions by shifting US manufacturing overseas; and
- Passage of the TPP would result in new limits in any government’s effort to combat climate change.

The TPP SPS chapter: not a “model for the rest of the world”; (*Institute for Agriculture and Trade Policy, 11/12/15*)- This article maintains that, contrary to the public claims of USTR Michael Froman, the TPP chapter on Sanitary and Phytosanitary measures (SPS) pertaining to issues of food safety does not meet his description as “a model for the rest of the world”. Instead, the TPP chapter on SPS is relatively short (18 pages out of the total 6,194 TPP text) and contains very few specifics regarding SPS protections. The article maintains that:

- Many SPS issues have been inaccurately located in Chapter 2, “National Treatment and Access for Market Goods” which means that SPS issues will be judged through a lens of market access as opposed risk assessment based on human health or the environment;
- The TPP creation of an SPS consultative committee which is to be led by trade officials has the potential to weaken and/or conflict with global standards on food and plant safety; and
- The existing weakness of the relevant US regulatory agencies to provide the appropriate level of SPS protections will be further hobbled by confidentiality requirements.

Upgrading & Improving Investor-State Dispute Settlement, (*USTR; ustr.com, 2015*)- This fact sheet, developed by the USTR, maintains that the ISDS provisions included within the TPP provide new safeguards and clarity that improve the ISDS process over that of any other FTA agreement that the US is party to. More specifically, the fact sheet claims that basic facts about ISDS include the following:

- The TPP specifically protects the rights of sovereign governments to regulate to protect the public interest;
- The TPP includes provisions to ensure higher standards and stronger safeguards for ISDS; and
- The US government has never lost any of the 13 ISDS cases brought against the US.

The USTR factsheet on ISDS in the TPP specifically enumerates how the TPP upgrades and improves the TPP:

- Governments retain the right to regulate in public interest including the policy areas of health, safety, the financial sector and the environment;
- Investors bear the burden of proof in all ISDS cases under the TPP;
- The TPP includes a provision allowing the expedited review and dismissal of frivolous ISDS claims;
- The TPP clarifies that investor “expectations” do not alone constitute a claim under the ISDS process;
- The TPP includes new and clarified sections regarding the ethics for ISDS arbitrators ensuring their independence and impartiality;
- The TPP includes new rules which clarify that ISDS tribunals must distinguish whether the challenged regulation(s) pertain to legitimate public welfare objectives; and
- The TPP limits the scope of awardable damages to those that an investor has actually incurred as opposed to those damages arising from cross-border trade activity.

In addition, the USTR factsheet also enumerates a number of ISDS safeguards included in the TPP which include:

- Transparency; ISDS arbitration panels must conduct hearings open to the public with appropriate public notice to all proceedings;
- Public participation; members of the public and public interest groups are allowed to make *amicus curiae* submissions to ISDS arbitration panels;
- Remedies are limited to monetary damages and cannot include changes in public laws or regulations;
- All ISDS awards are subject to subsequent review by domestic courts and/or international review panels; and
- An ISDS arbitration panel is empowered to award attorney's fees for all claims it deems to be frivolous.

The TPP's Investment Chapter: Entrenching, rather than reforming, a flawed system;

(Columbia Center on Sustainable Investment, November 2015) – This article seeks to refute most of the claims made by the USTR in the previously cited factsheet on ISDS provisions in the TPP:

- Despite claims that the TPP clarifies the right of countries to regulate in the public interest, it does nothing to protect that right;
- The alleged clarification that the burden of proof lays with the claimant in ISDS cases; this is nothing new and has always been assumed in previous ISDS provisions in other FTAs. More specifically, frequent ISDS claims under the “free and equitable” principle have generally been held to a low standard for a burden of proof and the TPP does nothing to change that;
- While the TPP establishes that investor “expectations” cannot be a sole basis for a ISDS claim, these expectations can be used as part of the legitimate rationale for a claim;
- With regards to the USTR claims that frivolous cases and the award of attorney's fees are dealt with in the TPP ISDS provisions, these same provisions exist with little real effect in other FTAs;
- Measures designed to ensure arbitrator fairness and impartiality are only established as goals within the TPP and have yet to be formulated;
- Claims of additional transparency and public participation are misleading; through the application of differing national standards of freedom of information, the TPP subtly represents an actual diminishment of these rights;
- Stating that remedies are limited to financial awards and may not actually result in the repeal of national laws or regulations is nothing new to FTAs and ignores the fact that an ISDS ruling can effectively negate most regulations or laws; and
- The claim that ISDS rulings under the TPP can be reviewed by domestic courts and international review panels already exists in previous FTAs and in fact, the TPP actually serves to newly limit the ability of domestic courts to review ISDS awards under the TPP.

TPP Fine Print: Biotech Seed Companies Win Again; (Institute for Trade and Agriculture Policy, 11/16/15) – This article argues that, through the use of intellectual property provisions, the TPP maintains strong patent protections which maintain the “rights of seed companies over farmer rights”, thereby allowing biotech corporations to maintain patent claims over a huge variety of seeds.

how investor rights in EU trade deals sabotage the fight for energy transition; (corporateeurope.org, December 2015) – This article focuses on describing the increasing use of ISDS provisions in various FTAs and the alleged negative impact on governmental efforts to combat climate change. Aside from the ever-increasing use of the ISDS process by investors to sue governments for a claimed loss of profits due to specific regulations, going from 3 known cases in 1997 to more than 50 new cases filed in each of 2013 and 2014, the authors cite the increasing proportion of these cases, 35%, that pertain to oil, mining, gas and electricity. The authors assert that international energy corporations are employing a deliberate strategy of using ISDS provisions to hinder, if not completely negate, governmental efforts to regulate and impede climate change.

Hidden in the Omnibus: To Comply With World Trade Organization, Congress Kills Country-of-Origin Meat Labels That 90 Percent of Americans Support, (Common Dreams.org, 12/18/15) – This article seeks to refute President Obama’s claim in 2015 that “No trade agreement is going to force us to change our laws” by citing the fact that Congress recently repealed the country-of-origin meat labeling (COOL) laws in direct response to WTO ordered sanctions of \$1 billion in annual trade sanctions until the policy or laws were terminated.

The dismissal of a case against plain cigarette packaging is good news for taxpayers; (theage.com, 12/20/15)- This Australian news article reports that the Australian government has prevailed over a Philip Morris claim that Australian laws requiring plain packaging for cigarettes violated the company’s intellectual property rights. The claim was dismissed in an ISDS proceeding on the grounds that Philip Morris had been guilty of “treaty shopping” by forming a subsidiary in a country with an applicable FTA that mandated a ISDS process for the sole purpose of challenging the Australian law.

TPP is a giftwrapped wealth-transfer to China; (boingboing.net, 12/27/15)- This Canadian news piece reports on the conclusions of Dan Breznitz, University of Toronto Chair of Innovation Studies, regarding the TPP. Mr. Breznitz asserts that the secretly negotiated TPP will result in the enrichment of multi-national corporations to the detriment of the American and Canadian economies and to the ultimate benefit of China.

The Year Ahead: TTIP In Push For 2016 Deal, Regulatory Agenda May End Up Being Pared Back; (Inside US Trade Today, 12/29/15)- This article reports on the current negotiating status of the TTIP by stating the apparent goal of US negotiators for 2016 is a de-emphasis on the concept of “regulatory cooperation” and a new focus on a series of “modest” government procurement market access offers.

TPP Faces Uncertain Future, With No Signing Date, Objections In Congress, (Inside US Trade Today, 12/30/16)- This news article reports on the troubled prospects of having Congress approve the TPP sometime in late 2016. The article cites significant opposition from Republican members of Congress to provisions regarding biologics, financial services and tobacco. More specifically, objections to these provisions include the following:

- Biologics; the current intellectual property protections are inadequate;
- Financial services; certain objections are being raised which exempts financial services from a prohibition that governments cannot require data to be stored on a local server; and
- Tobacco; the tobacco industry objects to the carve-out of tobacco-related public safety laws from challenge under ISDS provisions.

Trading Down: Unemployment, Inequality and Other Risks of the Trans-Pacific Partnership Agreement, (Global Development and Environment Institute at Tufts University, January 2016) – This summary of a much larger article seeks to identify and discuss perceived risks posed by the TPP which include:

- Contrary to previous claims made about the TPP, the agreement would actually reduce projected GDP in the US by 0.54 % over the next 10 years with a 0.12% decline in Japan over the same time period;
- For other TPP countries, projected economic gains would be less than 1% over 10 years for developed countries and less than 3% for developing countries over the same time period;
- Adoption of the TPP would result in the projected loss of 771,000 jobs with 448,000 of these lost jobs occurring in the US;
- As measured by changes in the share of national income, adoption of the TPP would result in a greater degree of inequality; and
- Adoption of the TPP is projected to result in significant GDP losses for non-TPP countries in Europe as well as GDP and employment losses in India and China.

Empty Promises and Missed Opportunities: An Assessment of the Environmental Chapter of the Trans-Pacific Partnership; (Professor Chris Wold, Lewis & Clark Law School, 1/4/16)- In this lengthy scholarly article, Professor Chris Wold of the Lewis & Clark Law School, disputes the USTR claim that the TPP represents “*the most robust enforceable environment commitments of any trade agreement in history.*” Instead, Professor Wold asserts that careful analysis of the Environment Chapter of the TPP shows that the TPP is filled with “*vague and empty promises*” and that inclusion of the ISDS process will have the effect of negating any meaningful progress in environmental regulation for TPP member nations.

Levin To Lay Out Demands For ITC's TPP Report During Three-Day Hearing; (Inside US Trade, 1/7/16) – This article reports that the ranking minority member of the House Ways and means Committee, Representative Sander Levin (D-MI), has requested that the US International trade Commission include the following analysis of the TPP in its required economic analysis of the TPP:

- how the TPP will affect wages and income inequality;
- an examination of whether the ITC's economic model should assume full employment;
- an analysis of who will experience gains or losses as a result of TPP;
- an economic evaluation of TPP's non-tariff provisions;
- consideration of elements left out of TPP, such as enforceable currency disciplines; and
- an evaluation of the impact increased imports may have on the U.S. economy.

The article further reports that the ITC report is anticipated to be released on May 18, 2016.

The Corporation Behind Keystone XL Just Laid Bare the TPP's Threats to Our Climate; (The Sierra Club, 1/7/16) – This opinion piece, written under the auspices of the Sierra Club, discusses the decision by TransCanada, an energy corporation backing the proposed construction of the Keystone pipeline, to sue the US government for \$15 billion in damages resulting from the decision to cancel the pipeline. TransCanada will be using the ISDS process authorized by NAFTA to try to secure these alleged damages.

Final TPP Auto ROO Package Differs From Expected Outcome In Two Ways; (Inside US Trade, 1/7/16) – This article reports that final TPP rules-of-origin pertaining to Regional Value Content (RVC) for certain auto parts differ significantly than originally described by TPP officials. More specifically:

- Originally, it was stated that the RVC of certain auto parts would be established at 40 to 45%. Instead, the final TPP RVC rules are now understood to require a 35% RVC value; and
- Final RVC calculations which were initially thought of as applying only to finished automobiles are now understood to apply to auto parts as well.

The article goes on to report that critics of these final RVC rules claim that they will allow higher RVC content from non-TPP countries such as China thereby having a negative economic impact on the automobile industry in the US and other TPP countries.

Political Timing Cramping TTIP; (Washington Trade Daily, 1/26/16)- This brief news article reports that due to political developments in the US and elsewhere, it is not anticipated that the TTIP will be finished and approved by the end of 2016. Further, if the TTIP is not finalized by the end of 2016, it is now projected that completion of the agreement cannot be anticipated for as long as a 4 year period.

Peterson Institute Study Shows TPP Will Lead to \$357 Billion Increase in Annual Imports; (Center for Economic and Policy Research, 1/26/16)- This article critically examines a recent report from the Peterson Institute which had highlighted a projected increase of \$357 billion in US exports by 2030 as a result of the TPP. The article points out that the authors of the Peterson Institute report chose not to emphasize the other projection of the report which concluded that in that same time frame that the US would also experience a projected net increase of the same amount in imports, thereby having no net effect on the US GNP. The authors of this article also question the assumption within the report of full US employment as a basis for their projections.

Economists Sharply Split Over Trade Deal Effects; (New York Times, 2/1/16) – This news article reports on the widely differing evaluations of the TPP by several economists. On the one hand, the recent report from the Peterson Institute reflects favorably on the TPP by concluding that incomes in the US would increase by half a percentage point as a result of the TPP. In contrast, a recent report from the Global Development and Environment Institute at Tufts concluded that US incomes would decline by half a percentage point as a result of the TPP.

Portman to oppose trade deal as opposition back home builds; (Washington Post, 2/4/16)- This article reports that former USTR and current US Senator, Rob Portman (R-Ohio) has announced his opposition to the TPP in its current form. More specifically, Senator Portman is opposed to the TPP because, “it doesn’t provide that level playing field”. The article also reports that Senator Portman is facing a tough reelection battle in Ohio- a state in which the TPP and other FTAs have not been popular.

As Pacific trade deal is signed pharma holds key to US ratification; (Financial Times, 2/4/16) – This news article reports that one of the main obstacles to approval of the TPP in Congress is the objections of Senator Orin Hatch (R- NV) and others to less than adequate intellectual property protections for biologics. As presently written, the TPP provides a period of 5 to 8 years of intellectual property protections- this contrasts with the protection of 12 years afforded by current US laws.

Obama trade deal taking a hit in presidential race; (thehill.com; 2/9/16)- This article reports on the widespread opposition to the TPP that is occurring in the presidential race as well as within Congress. The article further reports that significant opposition exists within both major political parties. Within the presidential field, Donald Trump and Senator Bernie Sanders have both taken strong stands against the TPP and Hillary Clinton has announced her opposition to the TPP after supporting it when it was being negotiated during her tenure as Secretary of State.

White House Predicts TTIP Will Not Conclude Under Obama Administration; (US Trade Daily News, 2/9/16)- This news article reports on a public statement from White House Press Secretary Josh Earnest who commented that “I do not believe that we’re going to reach a TTIP agreement before the president leaves office, but he’s certainly interested in moving those negotiations forward and in a direction where we can be confident that the economy of the United States will be enhanced through the completion of an agreement hopefully under the leadership of the next U.S. President.”

Levin on TPP: 'I cannot support it' in current form; (Politico, 2/18/16)- This news article reports that the ranking Democratic member of the House Ways & Means Committee, Representative Sander Levin (D-MI), has announced his opposition to the TPP by stating that the agreement "...is short of acceptable, and I cannot support it... There are four key areas - worker rights, currency manipulation, the rules of origin and investment - where the results are wholly inadequate."

Ryan Raises Possibility TPP Will Never Pass Congress; Details Objections; (Inside Trade, 2/19/16) – This article reports that House Speaker Paul Ryan (R-WI) stated that he believes it possible that Congress will not approve the TPP, further stating that he was not sure that the votes necessary for passage would ever be there. He specifically mentioned a number of concerns in the TPP including provisions on cross-border data flows, dairy and biologic drugs.

5 things to watch on TTIP; (Politico, 2/25/16) – This news article reports on 5 significant and unresolved issues faced by TTIP negotiators:

1. Regulatory cooperation – harmonizing regulatory standards which could result in the adoption of lower US standards for overall consumer protection;
2. Investor-state arbitration – many in the EU are opposed to ISDS and have proposed an alternative dispute settlement court- a proposal that the US negotiators are not enthusiastic about;
3. Buy (not just) American – more open public procurement contracts are a significant issue for EU members with particular opposition to current the current US Buy American Act;
4. Financial services – the EU strongly favors defining common standards for banks, traders and rating agencies; the US is somewhat resistant to this overall proposal; and
5. Protecting (European) food names – the EU also strongly favors protections for geographical indications which is another issue not particularly favored by US negotiators.

TTIP: EU and US vow to speed up talks on trade deal; (The Guardian, 2/26/16)- Aside from a general review of the status of the TTIP negotiations, this article reports that TTIP negotiators hope to speed up the process and reach a final agreement by the end of 2016 before President Obama leaves office.

Malmstrom Seeks TTIP Deal This Year, But Says It Must Deliver On EU Priorities; (Daily News, 3/10/16)- This article also reports that chief EU negotiators would like to finalize TTIP negotiations by the end of 2016 but specifically reports that EU Trade Commissioner Cecilia Malmstrom has stated that the TTIP must contain the following provisions for final agreement:

- More access to the US government procurement market;
- More protection for food names known as geographical indications;
- An innovative regulatory cooperation chapter; and

- An alternative to the ISDS process in the form of a more transparent investment arbitration court.

Mexico Seeks To Retaliate On \$472.3 Million In Trade With U.S. In Tuna Dispute; (*myinforms.com, 3/15/16*)- This article reports that Mexico has notified the WTO that it intends to hike tariffs on \$472.3 of US imports due to the failure of the US to modify its current rules regarding dolphin-safe labeling requirements for tuna fishing. The US intends to appeal this action through arbitration.

On Trade, Angry Voters Have a Point; (*New York Times, 3/15/16*)- This opinion piece holds that the alleged benefits of free trade for the American economy held by many prominent economists, may be overstated. The author, Eduardo Porter, maintains that while global trade has many benefits to the economy, the significant impact may be distributional in nature resulting in measurably less wealth to many US workers. He further suggests that expanded trade with China with a significant imbalance in imports to exports has been much more harmful to American workers than the overall effects of NAFTA.

Assuming Away Unemployment and Trade Deficits from the TPP; (*Global Development and Environment Institute at Tufts, 3/20/16*)- This article further responds to assumptions in a recent study released by the Peterson Institute which concluded that after 15 years the TPP will result in 0.5% in overall income gains for US workers, minimal job displacement and the creation of new jobs that will replace displaced jobs. This paper maintains that the Peterson Institute study is significantly flawed in its underlying assumptions that the US will experience "full employment" and an absence of trade deficits during this time period. The GDAE paper holds that previous experience with FTAs shows the exact opposite with a significant downward shift in overall employment opportunities and a sizeable trade deficit.

Trade Backers Pin Pacific-Pact Hopes on Lame-Duck U.S. Congress; (*Bloomberg.com, 3/22/16*)- This article reports that Congressional supporters of the TTIP have concluded that their hopes for passage are now centered on a vote during post-election lame duck session of Congress.

Administration Faces April 3 Deadline For Submission Of TPP Legal Changes; (*Inside US Trade, 3/29/16*)- This article reports on the upcoming statutory deadline of April 3rd by which the Obama administration must submit a list of those US laws which must be changed as a result of certain provisions in the TPP. Of considerable significance is the need to restructure the merchandise processing fee which is part of the main US customs fee and pertains to the ad valorem (a fee assessed in proportion to the estimated value of the goods) nature of the current fee structure.

