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The Blurring of Insiders and Outsiders: The TPP Transparency Campaign

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ABSTRACT

As a unit of focus, this paper analyses the transnational civil society campaign for greater government transparency in the negotiations of the Trans Pacific Partnership (TPP). The mega preferential trade agreement was a particularly important moment for international Intellectual Property Rights (IPR). The TPP negotiations were kept secret for over five years and civil society actors tried to influence the negotiations by any means possible. The campaign was coordinated by a transnational advocacy network (TAN) of actors, primarily from NGOs and academia. In light of the failure of the transparency campaign, this article examines the ways civil society attempted to influence trade negotiations from the “inside” and “outside.” It contributes to research on TANs while expanding the study of civil society participation in contemporary trade regimes. The case study provides evidence that a high level of secrecy and extreme technicality led to a blurring of roles within civil society. Thus, I argue that the traditional division between insiders and outsiders is less applicable in the context of extreme secrecy and technicality.

Keywords

Civil Society

Trade Negotiations

Trans Pacific Partnership

Transnational Advocacy Networks

Transparency

Intellectual Property

International Trade

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ACRONYMS

ACTA - Anti -Counterfeiting Trade Agreement

EFF - Electronic Frontier Foundation

IP - Intellectual Property

IPR - Intellectual Property Rights

ITAC - Industry Trade Advisory Committee

NGO - Non Governmental Organization

PIPA - Protect IP Act

PITAC - Public Interest Trade Advisory Committee

PTA - Preferential Trade Agreements

RCEP - Regional Comprehensive Economic Partnership

SOPA - Stop Online Piracy Act

TAN - Transnational Advocacy Network

TiSA - Trade in Services Agreement

TPP - Trans Pacific Partnership

TRIPS - Trade -Related Aspects of Intellectual Property Rights

TTIP - Transatlantic Trade and Investment Partnership

USTR - United States Trade Representative

WIPO - World Intellectual Property Organization

WTO - World Trade Organization

INTRODUCTION

After five years of negotiations, the Trans Pacific Partnership (TPP) was signed by the leaders of twelve countries on February 4th, 2016. It is the largest multilateral free trade and investment agreement in history.¹ The treaty is part of a new era of “mega preferential trade agreements” (mega-PTAs), which also includes the Transatlantic Trade and Investment Partnership (TTIP), the Trade in Services Agreement (TiSA) and Regional Comprehensive Economic Partnership (RCEP) (Kim, Mansfield and Milner, 2016). These agreements cover vast fields of policy and, if they go into effect, would affect domestic policies within many issue areas and across many countries. The TPP includes provisions that extend beyond the terms agreed upon by members of the World Trade Organization (WTO). For example, it extends beyond the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which currently serves as the international framework for Intellectual Property (IP) protections. In the first century of its existence, the United States refused to protect foreign IP works, but as a modern net exporter of IP, has a greater incentive to pass IP protection than most other countries (Käseberg, 2012: 254).

IP civil society actors played a leadership role, as insiders and outsiders, in a transnational advocacy campaign (TAN) for greater TPP transparency and employed a variety of methods to substantively influence the text of the agreement. Calls for greater transparency and participation were largely unanswered by governments, yet civil society actors generally agree that they were able to make a substantive impact. This paper examines *how civil society attempted to influence the secret trade negotiations*. The expectation was that there would be a greater diversification of methods in response to the opaque process and the high technicality of the IP issues. Evidence was found which indicates diversification was greater when secrecy and technicality were higher. After careful analysis, it appears that traditional categories of civil society participation, such as insider and outsider, may not apply in situations of extreme secrecy and technicality.

To fully develop the argument, I begin with a literature review of TANs and their role in trade negotiations. The theoretical framework which follows serves to introduce important concepts and situates this research within International Relations theory. The research methodology is justified and the method of analysis is described. The TPP Transparency Campaign is introduced as a single case study providing a deep view into the workings of a TAN in the context of a mega-PTA. The research is discussed through the structure of the independent variables of secrecy and technicality. Moreover, the influence of the release of leaked drafts of the negotiating text is considered. Finally, I argue that

¹ In January 2017, after this dissertation was submitted, the United States officially pulled out of the TPP. Without the US, the agreement cannot go into effect. Nevertheless, the value of this research is unaffected and the findings may be applied to other forums.

the high levels of secrecy and technicality caused the blurring of insider and outsider roles within the TAN.

TANs IN TRADE

This paper builds on theories of transnational advocacy networks (TANs) (Keck and Sikkink, 1998). TANs are part of a body of literature on transnational civil society begun in the early seventies (Kaiser, 1971; Nye and Keohane, 1971). The TPP Transparency Campaign is taken as an example of a TAN employing a normative argument and is thus connected to an extensive body of literature on TAN campaigns to challenge norms (Keck & Sikkink 1998; Risse & Sikkink, 1999; Carpenter, 2007). Specifically, my research findings add to literature on IP TANs (Sell & Prakash, 2004; Olesen, 2006; Sell, 2013). However, much of the TAN literature related to IP issues focuses on successful campaigns involving patents (Olesen, 2006; Benkler, et al, 2015; Chorev, 2012; Forman, 2013; Sell, 2001) and less often copyright (Kapczynski, 2008; Sell, 2013). Moreover, there is an “oft-heard criticism that research on transnational civil society or norms does not examine failures” (Price 2003: 585). In the case presented below, the TPP Transparency Campaign failed to persuade governments to increase procedural transparency. In addition, it is a TAN formed by actors who historically focused on either patents or copyright but came together for a common *cause celebre*.

In the context of international trade, there are several examples of TANs involved in trade negotiations (Von Bülow 2010, 2011; Spalding, 2007; Trommer, 2014). However, some issues are given more attention in the literature on TAN involvement in trade than others. In addition to impacts on Access to Medicine, trade related environmental (LaForgia, 2015) and labor issues (Trubek, Mosher & Rothstein, 2000) are a common focus of TAN literature. TANs against free trade negotiations in South America (Von Bülow, 2010, 2011; Cabezas, 2014) have arguably played an important role in the region’s trade politics. As of the writing of this paper, articles addressing mega-PTAs (Morse and Keohane, 2014; Kim, Mansfield, and Milner, 2016; Benvenisti, 2016) have not examined the role of TANs in these agreements.

Some literature serves as a great introduction to the case study. In her article titled “Revenge of the Nerds,” Susan Sell (2013) discusses the agency of domestic actors from the United States in their successful fight to stop domestic IP legislation.² David Levine discusses a similar group of IP actors in his 2012 article “Bring in the Nerds”. Mercea and Funk (2014) use social movement analysis to demonstrate how the same group used social media to mobilize an international social movement to

² The Stop Online Piracy Act (SOPA) and the Protect IP Act (PIPA) were bills defeated in the U.S. congress after many popular websites shut down and posted messages encouraging internet users to mobilize.

stop the Anti-Counterfeiting Trade Agreement (ACTA). The same group of actors who successfully stopped domestic (SOPA/PIPA) and international (ACTA) IP legislation failed to get what they wanted during the five years of TPP negotiations examined here. The normative framing used by the TAN in the campaign for global copyright reform does not explain the alternating successes and failures (Marcellin and Kawooya, 2014). Therefore, their efforts in the TPP demand the further analysis presented below. Camroux and Damro (2014: 339) noted that whether or not the TPP and TTIP are ratified, “the processes of declaratory diplomacy, summitry and negotiations embarked upon are in themselves a means as well as an ends.” Researchers have not ignored the emergence of mega-PTAs, but this paper seeks to fill the gap of the largely unexplored participation of civil society.

THEORETICAL FRAMEWORK

Civil society can be defined in many different ways and there are ongoing debates about the existence of a global civil society. For the purposes of this paper, civil society is understood as the “third sector” independent of private corporations and government. This includes NGOs, scholars, public interest groups and any other groups or individuals. The constructivist theory of transnationalism, which emphasizes multi-local resistance to hegemonic forces (Guarnizo and Smith, 1998), is necessary to situate the research question in theories acknowledging the importance of non-state actors in international relations.

The TPP Transparency Campaign specifically responds to Price’s (2003: 588) observation of “a need for systematic research on the practice of including civil society actors in government negotiation delegations.” Elected government officials, technology companies and the private sector also called for transparency but are not considered part of the campaign. Thus, the greater transparency and participation solicited by the campaign relates to recently documented “shrinking space” or closed opportunity structures for civil society in global forums (UN, 2014; Sikkink, 2005; Tucker, 2014). Political opportunity structures can be thought of as channels of participation or “the degree to which groups are likely to be able to gain access to power and to manipulate the political system” (Eisinger, 1973: 33). The TAN did, however, spark participatory procedural change,³ which reinforces theories of civil society creating its own opportunity structures (Tarrow, 1996; Gramson and Meyer, 1996). Nevertheless, this paper will focus on the strategies that intervene between norms and outcomes (Sell and Prakesh, 2004: 150).

³ The creation of Stakeholders Days is discussed below as an example of a change created by civil society.

Insiders and outsiders are commonly identified as major organizational categories in the literature on transnational network strategies (Sikkink, 2005; Smith and Korzeniewicz, 2007; Tarrow, 2010). Public interest groups often use lobbying methods on the “inside” of the formal institutions (Berry, 1977), while protesters, demonstrators and other contentious actors constitute the “outside” (Florini 2000). Methods used within the formal institutional structure are “inside” and those that operate without regard to institutional rules are “outside.” Some authors have noted the increasing coalitions between insider and outsider organizations (Sikkink, 2005; Tarrow, 2005). This paper does not deeply engage with debates of “purist versus pragmatic” and “principled versus compromise” when discussing insiders and outsiders, as to do so seems to interfere with impartial scholarly analysis (Price, 2003: 585). Recently, Anna-Liisa Aunio (2012: 96-97) noted that “no studies have thus far considered that insider and outsider identities could be strategically cast and played by activists.” Uhlin and Kalm (2015) critiqued the division of research on insiders and outsiders by noting the tendency to prescribe one side greater legitimacy, ignore that some actors use both methods and overlook organizational cooperation which crosses the divide. Moreover, Walton (2016: 17) notes that outsiders do not always contest neoliberal policies. In light of the recent observations that actors swap roles and that contention is not inherent on the outside, this paper adds to research on the increasingly blurred division of civil society as insider-outsider. Leaks further complicate any structural division. By their nature, they are an “outsider” action carried out by an “insider” to solicit help from “outsiders” for the benefit of both. Even the rule-following insiders use the leaks for analysis which are not acknowledged by the institutional framework.

Countries who are the net exporters of intellectual property, or the location of the “rights holders,” are often at odds with developing countries when setting international standards (May and Sell, 2006). The regulation of international standards of intellectual property shifted from the purview of an international organization, WIPO, to an multilateral trade agreement, WTO, largely due to the “urging of corporate intellectual property owners” in the United States (Helfer, 2004: 21; Kaminski, 2014). The United States had struggled to get stronger regulations through WIPO and therefore employed this method of forum shopping. TRIPs was written over 20 years ago and countries are now negotiating TRIPs-plus bilateral and multilateral agreements. Morse and Keohane (2014) refer to this form of competitive regime creation via mega-PTAs as contested multilateralism.

Shifting the issue into a new forum also brought experts into the new process. When IP advocacy groups tried to engage in the TPP, they faced a higher level of negotiation secrecy than they were accustomed to at WIPO and the WTO. Most of these actors advocate for either digital human rights or global public health, but they joined together in a loose coalition and created a campaign against secrecy in an effort to create an opportunity structure for NGOs in mega-PTA negotiations. This

merging of interests is a sort of “principled instrumentalism” put forth by Mitchell and Schmitz (2014). Nevertheless, the TAN employed a vast array of strategies to influence the outcome of the final text of the TPP.

This rise in activism around intellectual property may be what James Boyle (1997) called “Environmentalism for the Net,” in which he compared the intellectual property movement of the 1990s to the environmental movement of the 1950s and 1960s and noted that there seemed to be a similar building of common interest around the internet. Perhaps this joint coalition of IP actors seeking a common request for procedural transparency can be seen as a uniting in the common interest of access to the negotiations while continuing their independent battles for Access to Knowledge (A2K) and Access to Medicine. Scholars interested in digital freedom of speech (Levine & Sandeen; 2015), biosimilars generics (Jorge, 2013), access to academic research (Willinsky, 2006) and international political economics (Stiglitz and Jayadev; 2010), among others, are all watching the evolving space of IPR by following these mega-PTAs.

METHODOLOGY

The TPP is currently a highly contentious issue in International Relations. It is the first mega-PTA to be finalized and signed by the leaders of all 12 countries involved. This dissertation seeks to examine the participation of civil society in what seems to be an emerging trend of mega-PTAs. Given the vast number of issues being negotiated by a dozen countries, it is practical to choose one area of focus. The Intellectual Property chapter of the TPP was a typical case when compared to the dozens of other chapters of the treaty, yet the abundance of information, made available by leaks, made it an ideal case study. This category includes modern issues such as knowledge technology, internet, copyright, trademark and patent issues. The IP chapter was leaked more than any other chapter and the issues being negotiated were extremely technical. Some members of civil society were more concerned about issues in the highly contested Intellectual Property and Investment chapters than in the chapters which directly cover their expertise due to the threats from business standards, regulations and enforcement strategies included in the IP and Investment chapters.⁴ Therefore this case presented an ideal opportunity to observe whether the independent variables of secrecy and technicality led to the mixing of strategies and the blurring of insiders and outsiders within civil society.

I adopted an inductive approach to, “describe, explain, interpret, and/or understand a single case as an end in itself” (Levy 2008: 4). Prior to creating the research design, it was evident that leaked

⁴ Interview with Beachy, Sierra Club, 7 June 2016.

documents played an important role. An inductive, exploratory approach was chosen in order to capture the authentic impact of processes, turning points and mechanisms (George & Bennett, 2005). Elite interviewing was chosen as an appropriate method for getting details and depth about a specific group (Fenno, 1978; Kingdon, 1989) and to uncover what a set of people did (Aberbach and Rockman, 2002). It was important to get information about the deep inner workings of the group (Patton, 2002). Moreover, by speaking directly with participants, it was possible to probe beyond what was reported in official documents to reconstruct the event (Tansey, 2007).

I conducted semi-structured interviews with a script as a guide (Patton 2002). The semi structured interview format allowed me to adapt each interview to make the interviewee feel more comfortable while also maintaining uniformity. The validity of findings can be verified by other interviewees or primary sources. The script for the interviews followed the general format explained by Beth Leech (2002): a “grand tour” question followed by “example” questions, with “prompts” interspersed throughout the interview. The grand tour question asked respondents to explain their experience of participating in the negotiation rounds. This question usually answered many other questions on the list and helped to build an understanding of what will be called the Transparency Campaign below. Example questions were used to solicit details about mechanisms, resources and processes. Prompts were used to elicit details when an informant was close to giving specific information. It was found to be true that when “used in combination, grand tour questions and floating prompts are sometimes enough to elicit almost all of the information you need in a semistructured interview” (Leech, 2002: 668).

Defining the sample was an important part of the research. Initially, I expected to interview key informants, across many different issue areas, who attended TPP negotiations between 2010 and 2015. However, online research of civil society coalitions and sign-on letters showed that there was strong leadership from NGOs interested in IP topics. After further research of the e-coalitions calling for transparency (e.g. A Fair Deal, TPP Abierto, A Digital Future, Stop The Secrecy, Expose the TPP), I determined which organizations were leaders in these coalitions. Similarly, sign on letters were commonly addressed to the governments with many signatories but often indicated a coordinator or lead drafter. By reading the blogs and websites of these organizations, I determined which individuals had attended TPP negotiation rounds. An initial sample of around 20 individuals was collected. I sent emails to these individuals explaining the aim of my research and requesting semi-structured interviews.

Response rates to emails varied throughout the process. Some participants declined to participate and others did not respond. However, a benefit of semi-structured interviews is the ability to determine the views of non-respondents (Goldstein, 2002). Data found on blogs and websites offered personal

testimony from some non-respondents and the views of their organizations were available from policy reports, marketing materials and sign-on letters. Twelve interviews were conducted from May 2016 - July 2016 and were either phone calls or skype calls. Three included video but 9 used audio only. After the first few interviews, the frame was expanded slightly to include actors from the private sector, government trade agencies and NGOs in other issue areas who also attended negotiations. These interviews helped to verify preliminary findings and prevent negative effects from snowballing in the sample frame. At the same stage of research, it became clear that, while they often collaborated, actors interested in IP were predominantly interested in either Access to Medicine or Access to Knowledge. After this observation, emphasis was placed on conducting more interviews with key informants from the Access to Medicine campaign to balance the representation across the IP sample frame. After the first ten interviews, a level of saturation was reached when new mechanisms and processes were no longer “illuminating the concept” (Bryman, 2015: 568).

Many of the respondents agreed to be cited by name only and did not want their views to be representative of their affiliated organizations. For some, this was because their views may not match the organization’s, while others had worked for multiple organizations during the 5 years of TPP negotiations and wanted to prevent confusion. Where possible, organizational affiliations are noted in the analysis. All of the interviewees were granted the option to speak off the record or without attribution when it was requested during the interview or prior to the interview. One full interview with a government official was requested to be entirely off record and one interview with a member of the private sector was requested to remain without attribution by name or organization. However, both had attended many rounds of negotiations and provided useful insights that aided in the analysis.

Recordings, notes and transcripts from semi-structured interviews produce a lot of difficult to analyse, yet reliable information. The reliability of information is more important than a rigorous analysis of less reliable information (Aberbach and Rockman, 2002). In an effort to systematically analyse the data collected from qualitative research, a thematic coding method was employed. Semi-structured interviews allow the interviewer to follow clues gathered in especially informative interviews, but coding controls for any bias of a “colorful interviewee or especially enjoyable story” (Aberbach and Rockman, 2002: 676). The method also shed light on common phrases or words, called in vivo codes (Strauss, 1987), used by respondents, and highlighted recurrent sociological observations. Thematic coding places special attention on repetitions and patterns of relevant information to the core question both within and across interviews (Bryman, 2015: 580). Coding was useful for many reasons but the author acknowledges that this research would be strengthened by cross-checking the coding results of a second coder. It would greatly increase the reliability of findings from analysis.

Reliability and validity were considered while undertaking this research project. The relatively small sample size could raise issues of reliability. However, this project does not attempt to make broad generalizations about an entire population of decision makers and therefore is less susceptible to random or systematic error (Goldstein, 2002: 669). Validity was enhanced by using multiple sources from multiple sectors. Moreover, avoiding long conversations about the respondent's impact was a way to avoid reliability issues (Berry, 2002). The repeatability of the interviews, with the interview script on file with the author, ensures reliability. The supporting literature, primary sources and cross-checking interviews with key informants from other sectors ensures the accuracy and validity of the findings (Golafshani, 2003).

THE TRANSPARENCY CAMPAIGN AND THE TPP

In the case of the TPP, the TAN campaign used a normative narrative to attempt to create an opportunity structure to influence the secret negotiations. The two sides used “strategic social construction” to frame their views (Risse & Sikkink, 1999). Keck and Sikkink (1998: 8) define campaigns as “processes of issue construction constrained by the action context in which they are carried out: activists identify a problem, specify a cause, and propose a solution, all with an eye toward producing procedural, substantive and normative change in their area of concern.” In the TPP transparency campaign, civil society actors identified the process of limited participation as a problem created by states. The TAN called for a change in governmental procedure to increase transparency and participation.

An *in vivo* code arose in the interviews describing the TAN as a “loose, networked coalition.”⁵ The horizontal network, without a hierarchy, may have been the result of limited funding and the five year duration of the negotiations. There were no overarching principles, obligations or managers. The flexibility might stem from the diversity of opinions on the substantive issues being negotiated. Civil society actors commonly agreed on the need for procedural changes but were very often at odds on the exact level of participation necessary. The loose coalition allowed for participation with minimal internal conflict. Moreover, the group of IP civil society actors was relatively small. Most of them have been in the space for many years. One interviewee suggested that many of these actors worked together on ACTA and SOPA/PIPA and perhaps as far back as the founding of the Creative Commons.⁶ Thus, the relationships between members of the coalition were often thick even though the specific network around the TPP was not solidified. These relationships held the TAN together when other priorities or limitations arose.

⁵ Interview with Anderson, Open Media, 16 May 2016.

⁶ Interview with Rossini, 13 June 2016.

The TPP Transparency Campaign intended to persuade the negotiating countries to release the negotiating text. Each country agreed to keep the text secret upon joining the negotiations. Governments legitimized their procedure on grounds of national security, public interest of workers, and path dependency; while the TAN based its claims on a democratic deficit caused by secrecy⁷ and the greater need for more experts in light of the extreme technicality of the issue.

Advocacy NGOs often come into conflict with states on who represents the national interest (Fox & Brown 1998). Carol Guthrie, Assistant United States Trade Representative (USTR) for Public & Media Affairs, used defended the interest of workers by explaining that “putting text of a partially negotiated agreement online could weaken the hand of U.S. negotiators as they work strategically to get the best deal possible for American workers and businesses,” (quoted in Carter, 2012). Carol Guthrie also stated that the USTR “could not release the agreement text without breaching its commitment to its trading partners not to do so without their agreement” (quoted in Carter, 2012). In Canada, the United States and Chile, domestic civil society requested the release of only domestic negotiation positions and were met with the assertion that all negotiations require secrecy. Civil society refused to be sidelined on the grounds of the public interest of workers or government reluctance to break with tradition and initial negotiation terms. The USTR and the private sector have “increasingly aimed to co-constitute each other’s interests and preferences” since at least 1979 (Sell, 2010: 770). In recent years, advocacy groups have disregarded justifications for secrecy and instead aimed to shift the IP regime away from the “capture” of private interests (Kaminski, 2014).⁸

THE SECRECY OF THE TPP

Beyond assuring United States workers that it represented their interests, the USTR explicitly countered the Transparency Campaigns narrative by stating that there was already a high level of participation. Civil society disagreed and demanded the creation of channels for participation at the early rounds. “Stakeholder Days” were organized by host countries at several, but not all, rounds of negotiations. Members of civil society attending the rounds, or “stakeholders”, were occasionally given a scheduled time to make a short presentation or set up an information table. Professor Jane Kelsey attended early rounds of negotiations and watched the Stakeholder Days develop as part of the

⁷ The democratic deficit was also a common issue highlighted outside of the IP TAN. In a letter to the USTR, Democratic congresswoman, Elizabeth Warren stated that she appreciated the limited congressional access but added, “I do not believe that is a substitute for more robust public transparency” (Warren, 2013). Nobel Prize winning economist Joseph Stiglitz (2013) highlighted the inequality in a letter to TPP negotiators stating that it “should not be shrouded in mystery to the general public, while the same provisions are routinely discussed with advisors to big corporations.”

⁸ For example, in August 2011, nearly 200 advocates and scholars drafted a *Washington Declaration on Intellectual Property and the Public Interest* (Flynn, 2012).

process. In a statement to the author she said “there was no formula for the early ones; governments made it up under pressure from their national constituencies and growing pressure from civil society and business stakeholders for a systemic process.”

The USTR claimed that this process allowed for more outsider participation than any previous US trade negotiation. Assistant USTR Carol Guthrie replied to a transparency request by stating that “TPP negotiations have been more transparent and consultative than any U.S. trade agreement in history” (as quoted in Masnick, 2013). Almost every member of civil society interviewed for this paper expressed frustration with the Stakeholder Days that, for some, were “like talking into an echo chamber.”⁹ These interactions were further complicated by the lack of access to the negotiation text. Without knowing what issues were being discussed, the stakeholders interviewed had no way of engaging in useful dialogue with negotiators or making informative presentations.

In some countries, such as Canada, the United States and Chile, domestic civil society requested the release of only domestic positions. Governments responded by asserting that negotiations cannot function without secrecy.¹⁰ However, Doctors Without Borders’ Access Campaign emphasized that this secrecy was a departure from standard practices in other IP fora such as WIPO.¹¹

National security issues were also used to justify the opaque process. A leaked version of the draft included a cover page stating that the information was classified (Kaminski, 2015). Obama’s Executive Order 12356 Section 1.1(a) states that information must be a threat to national security to be “classified.”¹² The Freedom of Information Act does not apply to National Security Information and, therefore, attempts by the TAN to use the judicial branch to order the release of the text failed (Levine, 2012). In 2015, the District Court of New York ruled in *Intellectual Property Watch and William New vs. USTR* that the draft text could remain secret under the Freedom of Information Act but ordered the USTR to release its communications with the private sector via the Industry Trade Advisory Committee (ITAC). The release of these emails without the negotiating text exemplifies the complexity of transparency debates.

The TAN called for greater transparency but governments claimed they could not change the agreed-upon process. The USTR stated it “could not release the agreement text without breaching its commitment to its trading partners not to do so without their agreement” (quoted in Carter, 2012).

⁹ Interview with Malcolm, 2 May 2016.

¹⁰ Canada’s chief TPP negotiator Kirsten Hillman told the Canadian House of Commons Trade Committee that “there has to be a certain amount of negotiating confidentiality or it just won't work. Nobody can negotiate in the public eye” (Parliament of Canada, 2014).

¹¹ Interview with Rius, Doctors Without Borders, 1 July 2016.

¹² See www.whitehouse.gov/the-press-office/executive-order-classified-national-security-information, accessed 11th September 2016.

Similar rhetoric was used when Derechos Digitales tried to solicit documents from the Chilean government but were denied access. The digital rights group does “not agree with the notion that an agreement which has been closed since the beginning cannot be opened eventually.”¹³ Subsequently, drafts of the IP chapter were leaked by US congressmen (Congressman Darrell Issa), NGOs (Knowledge Ecology International) and anonymous sources via WikiLeaks. The leaks also helped the insiders make strategic political decisions. In addition to possessing expert knowledge, the insiders could focus on lobbying specific country delegations. One respondent shared that she kept an analysis private and sent it to a delegation to use as their own idea.¹⁴ Everyone used the recurring leaks of the IP chapter to track country positions and changes in the text.

The leaks also helped strengthen the transnational advocacy network of actors interested in Intellectual Property. Derechos Digitales in Chile started engaging with the TAN after the leaks.¹⁵ The Intellectual Property chapter was leaked more than any other chapter and there are different opinions as to why that is the case. Issue salience and the agency of IP actors were noted as possible explanations. There is, however, an obvious risk to leaking classified documents and respondents were often hesitant to talk about details of leaks. One source stated that negotiators would “clam up” after some leaks because they had personally been accused of leaking the text. There is no doubt that parts of the text were being shared by diverse actors involved on all sides of the process. The decision to share that information was very political and a point of divergence among respondents.

THE EXTREME TECHNICALITY OF THE IP CHAPTER

The TAN also claimed that there was a lack of participation of experts from outside the private sector. Acknowledging the complexity of such highly technical issues, the USTR considered creating a Public Interest Trade Advisory Committee (PITAC) in 2014. The committee would have advised the USTR on public health, international development and consumer protection to represent the public opinion on whether trade agreements promote the interests of the United States (USTR, 2014). Many experts from civil society who were nominated to serve on PITAC were not willing to sign Non-Disclosure Agreements, which would prevent them from sharing what they learned with their affiliated organizations and the public.¹⁶ Perhaps for this reason, the committee was never created (Inside Trade, 2015).

¹³ Interview with Lara, Derechos Digitales, 16 May 2016.

¹⁴ Interview with Cox, 22 July 2016.

¹⁵ Interview with Lara, Derechos Digitales, 16 May 2016.

¹⁶ Interview with Malcolm, 2 May 2016.

The extremely technical nature of the IP chapter also meant that members of civil society needed resources and expertise. Resources are needed to send IP lawyers to negotiations and it takes many hours to analyse a treaty text and produce a well informed analysis. In the US, industry groups funded by multiple companies pay lobbyists to represent their collective interests in trade regimes (Sell, 1995). Many private sector lobbyists see the draft text of the agreement and directly advise the USTR via its advisory committees. Chile, among other countries, utilizes a similar process of seeking input from private industries for technical expertise.¹⁷ Many negotiation rounds were not publicly announced until days before they were held. This made it very expensive for civil society to send valuable experts to the negotiations.

Of course, funds were not distributed evenly among members of civil society. Some organizations with greater resources employed methods of horizontal scale shifting to increase TAN membership from the less developed countries. Funds provided by Google allowed one organization to finance travel for members of civil society from some Asian countries to attend a workshop and networking event hosted in New Zealand.¹⁸ The Open Society Foundation allowed Knowledge Ecology International to manage a travel grant under its subsidiary NGO called the Union for the Public Good. The grant was then disbursed to civil society organizations in TPP countries who could not otherwise afford to attend the negotiation rounds.¹⁹ The D.C. based organization Public Knowledge even offers free training in IP issues to activists in Latin America as a way of making new connections in the region.²⁰

The extreme technicality of the IP chapter created a resource interdependency between state and non-state actors. The Public Citizen Access Campaign was present at most negotiation rounds and was a key source of highly technical, country specific analyses.²¹ Their experts relied on leaks to provide information that negotiators needed and may not have been able to get from within their own national negotiation team. Each country had a different number of IP negotiators. The smallest country, Brunei, only had one IP negotiator.²² Seen in this light, resource interdependency was often greater for smaller countries and in the early stages of negotiations before the drafts of the text were leaked. Therefore, the levels of the secrecy and technicality varied across time in the case study. When there was less secrecy, and therefore clarity on technical issues, civil society strategies overlapped less. However, factors like resources and expertise did not impact the likelihood of mixing insider and outsider tactics. The TAN sought transparency on the basis of principle and instrumentalism. Sell and Prakesh (2004:

¹⁷ Interview with Ibáñez, DIRECON, 9 June 2016.

¹⁸ Idem.

¹⁹ Interview with Cox, 22 July 2016.

²⁰ Interview with Rossini, 13 June 2016.

²¹ Interview with Kilic, Public Citizen, 3 June 2016.

²² Idem.

149) point out that the two can coexist. Civil society inherently demands some degree of transparency and participation; yet, in the case of the IP chapter, it needed to access the text to understand the implications of the highly technical issues. Many of these technical issues are not written in clear law at the international or even domestic level, something that cannot be said for every issue in the TPP. Given the importance of the exact phrasing used in the IP chapter, civil society needed access to the text in order to keep the public informed and to attempt to shift the accountability of negotiators from corporate interest to the public interest. Without this access, mixed strategies were used.

BLURRING THE INSIDE AND OUTSIDE

The actual negotiations were secret and, therefore, it is difficult to determine definitive causes for the exact language of the final text, but the findings of this research show that organizations and individuals were employing diverse tactics to influence the negotiations. In the realm of trade negotiations, civil society participation has traditionally been divided into the categories of insiders and outsiders. At an organizational level, insiders tend to be public interest groups and advisory committees while outsiders are often grassroots organizations outside the formal participation channels. At an individual level, lobbyists and formal advisors are considered insiders while protestors, demonstrators and public organizers are considered outsiders. Yet, these categorical divisions are extremely difficult to draw out of the research presented here. For example, an “insider” public interest lobbyist may partake in “outsider” protests while representing an organization which releases analyses of the text for negotiators and simultaneously conducts outsiders events.²³ Many civil society leaders have attended trade negotiations since 1994 and openly claim to adopt insider and outsider strategies.²⁴

The categories are so pervasive in civil society discourse and research that five of the 12 interviewees used the terms “inside” and “outside” without being prompted.

In the IP community, we distinguished the inside game and outside game and we acted like the lobbyists. (Interview with Kilic, 3 June 2016.)

If I were asked, how do we win at trade? I would probably say get a bunch of these groups together and get funding for a two year collaborative network campaign where people are playing their different roles. Some people are in the inside game and then civic engagement people are mobilizing and consistently giving them more space. (Interview with Anderson, 16 May 2016.)

²³ This is a hypothetical case which summarizes the responses from an interviewee who will remain unidentified in this instance.

²⁴ Gathered from interviews with Love and Kilic.

Yet, many of the respondents who acknowledged a division actually utilized tactics from both sides. Interview responses suggest that the lack of access to the highly technical issues being discussed left civil society with no choice but to try anything they could to influence the negotiations. This blurred the lines between insider and outsider roles until the leaks surfaced, decreasing the secrecy, and allowed experts to analyse and decode the highly technical issues. By the end of the negotiations, the insider and outsider division had somewhat increased due to the decrease in the independent variables. This suggests that the secrecy and extreme technicality of the issue may have blurred the lines between the traditional division of insiders and outsiders

Actors specializing in both roles acknowledge the importance of the other. Those who work on the outside acknowledge the importance of the insiders. A grassroots organizer noted the importance of creating public awareness to pressure negotiators to ask civil society insiders to help them deal with the citizens who are being so loud.²⁵ Insiders also acknowledged the importance of protests and direct action. One interviewee went off record to mention their frustration with the fact that their organization wanted them to write analyses and attend protests. Not everyone is comfortable with the blurring, but its existence is undeniable.

Members of the IP TAN were often engaging in activities beyond their self-identified roles as insiders and outsiders. This included participating in official stakeholder events and formal meetings with negotiators, but also informal lobbying, direct action and technological tactics among others. For example, Doctors Without Borders used outsider tactics by flying a plane carrying a political statement over a negotiation venue and on another occasion paid for ad space in the Washington D.C. subway system to get their message to negotiators. The organization was also active with text analysis and insider lobbying efforts.

It's important to be a technical expert and a medical expert, but it is important to also use your political voice and to do political advocacy in both the public and private arena. For us, we believe this is our responsibility to not only do technical analysis but also to explain to the general public. (Interview with Rius, Doctors Without Borders Access Campaign, 1 July 2016)

On the website of a leading US digital rights organization, the Electronic Frontier Foundation (EFF) stated that it was “attending the first days of the [TPP] meeting, both to engage with the negotiators at the USTR-run stakeholder events and to speak and rally outside the meetings to raise public awareness of these shady proceedings” (EFF 2012). Open Media, a Canadian digital civil rights NGO, allowed members of the public to collaborate and produce a publicly crowdsourced draft proposal of the TPP

²⁵ Interview with Anderson, Open Media, 16 May 2016.

IP chapter. A member of their team showed negotiators this tool during a presentation at a TPP Stakeholder Event. Open Media also coordinated with technical experts from other members in the TAN to check their messaging before posting information to their broad audience.²⁶ While the organization largely sees its role as outsider, it did participate within the institutional framework for participation while collaborating extensively with insiders.

Derechos Digitales, a Chilean digital rights group, participated in a national project created by the government of Chile called *Cuarto Adjunto*, meaning side room. The Chilean trade negotiators created this process which allowed members of the private sector and civil society to meet with TPP negotiators. Over 90 meetings were held and Derechos Digitales attended the meetings relevant to digital rights. While they participated in this domestic, insider process, the organization publicly criticized the state's program as an insufficient substitute for transparency and real participation.²⁷ Moreover, Derechos Digitales led the outsider movement for TPP transparency in Latin America via a coalition called TPP Abierto. In the final years of negotiations, the Chilean NGO joined a coalition to stop the TPP called *Chile Mejor Sin TPP* (Chile Better without TPP), but continued to participate in the insider processes of attending negotiation rounds and the domestic *Cuarto Adjunto* meetings with Chilean trade negotiators.²⁸

In light of the blurred lines between insider and outsider strategies, many actors voiced the perceived risks of being seen using both tactics. There is a higher perceived risk involved for insiders who use outsider strategies. This is largely because of the importance of relationship building in lobbying.

It's a little bit risky because if they see you in a protest outside the venue, then they don't want to talk to you face to face. so you kind of have to make a choice. Are you going to go inside track or outside track? And literally some people in the protests were wearing masks so that they wouldn't be recognized if they wanted to have face to face meetings with negotiators. (Interview with Malcolm, 2 May 2016)

We could not appear to be publicly saying that TPP was bad and that we should reject it outright and then at the same time going to the negotiating rounds and speaking technically about technical issues and trying to salvage some of the technical points. It would be strategically a bad idea to say 'no' publicly and 'yes but this way' in private. (Interview with Lara, Derechos Digitales, 16 May 2016)

Yet, the research presented here suggests that mixing methods is useful and a common practice in light of secrecy and highly technical issues. In the context of extreme secrecy, there is less resource interdependence between civil society and states. Therefore, in the presence of secrecy, there is less at

²⁶ Idem.

²⁷ Interview with Lara, 16 May 2016.

²⁸ Idem.

stake for the insiders who participate as outsiders. Seen in this light, the binary division of inside and outside does not accurately represent the reality of individuals and organizations from civil society in the context of mega-PTAs negotiations.

CONCLUSION

This research explored how civil society attempted to influence the secret trade negotiations of the Trans Pacific Partnership. Due to high levels of secrecy and technicality, civil society groups had to employ mixed methods to influence the text, thus blurring the traditional division of insiders and outsiders. Leaked drafts of the negotiation text decreased the levels of secrecy across time. As information about the negotiation text became available, traditional divisions of insiders and outsiders were more noticeable. This can be seen as a within case comparison which reinforces the main finding that instances of greater secrecy were met with greater blurring of methods.

Mega-PTAs influence a wide variety of issues that bring together diverse civil society actors. This research contributes to new analyses of mega-PTAs. Additionally, it builds on research of contemporary channels of participation for civil society. The transnational advocacy campaign for greater transparency and participation in the TPP Intellectual Property chapter failed to convince the negotiating countries to release the text to the public. Nevertheless, members of the TAN used diverse methods to influence the negotiations in light of the opaque process. The findings suggest that civil society can create its own channels for participation and influence.

In order to ascertain how civil society engaged with the TPP, a single case study presented the views of key informants interested in the Intellectual Property chapter. This research presents a deep, thorough analysis of one group of actors from a single case in order to uncover the inner workings of a complex advocacy network. This warranted an exploratory approach to the research question, but not without associated limitations. In the future, the findings presented here should be compared and contrasted with other cases of TANs campaigning for transparency. Moreover, having problematized the dichotomy of insiders and outsiders, a call for further study into the impact of secrecy on civil society behavior is warranted.

Limits on length prevented a more thorough presentation of the highly contentious issue of intellectual property rights. International and domestic regulations are quickly adapting to advancements in technology and globalization. The immense technicality and novelty of IPR enhanced the TAN's desire to challenge the secrecy of the TPP. Civil society experts sought to explain the possible implications of the trade agreement on the future of digital rights. No one person can be an expert in

every area of IPR, but it effects every citizen's access to vital areas such as knowledge, medicine and freedom of speech. In the future, the spaces for international standard-setting for IPR and other issues will likely shift and evolve with varying degrees of transparency, but it seems civil society groups will find new methods and channels for participation when the need arises.

ANNEX

List Of Interviews

Name (Last, First)	Affiliation at Time of Interview	Title	Date of Interview	Country	Type
Anderson, Steve	Open Media	Founder, Senior Strategist, and Internet Governance Analyst	May 16, 2016	Canada	NGO
Anonymous	Government negotiator		June 22, 2016		Govt
Anonymous	Tech company representative		July 1, 2016	USA	Private sector
Beachy, Ben	Sierra Club	Senior Policy Advisor	June 7, 2016	USA	NGO
Cox, Krista	Association of Research Libraries	Director of Public Policy Initiatives	July 22, 2016	USA	NGO
Flowers, Margaret	Popular Resistance	Co-Director	June 1, 2016	USA	NGO
Ibáñez, Carolina	DIRECON	Cabinet Advisor	June 9, 2016	Chile	Govt
Kilic, Burcu	Public Citizen, Access Campaign	Legal and Policy Director	June 3, 2016	USA	NGO
Lara, Juan Carlos	Derechos Digitales	Research & Policy Director	May 16, 2016	Chile	NGO
Levine, David	Elon University	Associate Professor of Law	July 20, 2016	USA	Academia
Love, James	Knowledge Ecology International	Director	July 25, 2016	USA	NGO
Malcolm, Jeremy	Electronic Frontier Foundation	Senior Global Policy Analyst	May 2, 2016	USA	NGO

Rius, Judit	Doctors Without Borders (MSF), Access Campaign	US Manager & Legal Policy Adviser	July 1, 2016	USA	NGO
Rossini, Carolina	Public Knowledge	VP for International Policy and Strategy	June 13, 2016	USA	NGO

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