Environmental Science & Technology

Letter

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Policy Implications of Environmental Research Remain Untouched by Proposed Trade Agreements

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Baveye and Charlet have recently voiced their concern that the proposed Transpacific Trade Partnership (TTP) and Transatlantic Trade and Investment Trade Agreement (TTIP) would make policy implications of environmental research irrelevant, especially through their provisions on Investor-State Dispute Resolution (ISDR).[1] Although we share the view that it is not up to policy makers or the political process to invalidate the societal relevance of scientific research, we disagree on the premise that ISDR in these new trade agreements would necessarily cause such effect.

All the countries that are today negotiating TPP and TTIP have already signed and are bound by several investment treaties, and almost all of them include provisions on ISDR. Without TPP, TTIP, or some eventual mega-regional agreement that consolidates the existing odd thousands of investment agreements now in force, there will be no normative coherence on ISDR.

What is being proposed in the TPP and TTIP negotiations is closely based on U.S. and Canada Model Bilateral Investment Treaty (BIT) and EU Investment Policy, all instruments which have explicit provisions on transparency, limitations on the interpretation of what regulatory expropriation is, and commitments to maintain labor or environmental standards.[2] These explicit provisions are missing in the majority of the thousands of existing investment agreements. On the other hand, even if the main ISDR rules—ICSID and UNCITRAL[3]—have been recently reformed, they have yet to adhere fully to expected transparency standards, and any consolidating agreement that improves transparency should be welcomed.

Of course there are no good justifications that would lead us to condone secretive negotiations. Thus the initiative from the EU Trade Commissioner Karel de Gucht announced on January 22, 2014, to consult the public on the investment provisions of the future EU–US trade deal is very welcome.[4]

It is also not accurate that in ISDR "corporation sovereignty" is the rule, and studies show that at least $^1/_3$ of the cases are settled among the parties and awards dismissing and upholding claims are equally likely.[5] Of the three cases cited, the NAFTA MMT reformulated gasoline had also its own legal play in the U.S. where Ethyl corporation eventually obtained a favorable ruling after it failed in four separate instances to obtain a waiver from the EPA.[6] Furthermore, the State of Ecuador has not yet been forced to pay Occidental Petroleum, as this case is still pending an annulment process. Thus caution should be used, and quick conclusions avoided, before studying the particular circumstances of each case. Here law and science are not far, and it is in the details and minutia that what from the distance looks alike, can be found to be very different upon closer study.

We note that the ink is not dry in either of these trade agreements. The research community is advised to keep abreast the progress of the negotiations. Should the clauses of the proposed agreements not meet the criteria of fact based policy making, then all should work toward preventing the ratification and entry into force of such an agreement.

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Notes

The authors declare no competing financial interests.

ACKNOWLEDGMENTS

We thank the Swiss National Science Foundation: National Competence Center for Research in Trade Regulation, and Swiss State Secretariat for Economic Research (SECO) for funding our work.

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(4) European Commission. Commission to consult European public on provisions in EU-US trade deal on investment and investor-state dispute settlement - Trade - European Commission **2014** http://trade.ec.europa.eu/doclib/press/index.cfm?id=1015 (accessed February 3, 2014).

Received: February 5, 2014
Accepted: February 18, 2014

   dx.doi.org/10.1021/es500605u | *Environ. Sci. Technol.* XXXX, XXX, XXX–XXX

(5) International Centre for Settlement of Investment Disputes. The ICSID Caseload - Statistics https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics (accessed February 4, 2014). In ICSID Caseload statistics, 36% of arbitrations have been settled or discontinued and awards upholding claims in part or in full represent 46% vis-à-vis 54% of awards were claims are dismissed.

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