

The Obama administration recently [notified Congress of its intent to sign](#) the Trans-Pacific Partnership trade agreement (TPP) and released [the text](#) to the public. The TPP has proven extraordinarily contentious, splintering political party lines, with likely more Republicans supporting the agreement than Democrats, and dividing environmental groups, as well, with the [Sierra Club](#), [Greenpeace](#) and [NRDC](#) opposed and [WWF](#) and [The Nature Conservancy](#) supporting. Why such a divide in the environmental community?

I have had a ringside vantage to this issue as a member of the [Trade and Environment Policy Advisory Committee](#), a stakeholder group created after NAFTA that provides advice to the EPA Administrator and U.S. Trade Representative on trade and environment issues. TEPAC has been drafting its official review of the TPP and, while I can't comment on the internal discussions, I highlight below the major issues that have arisen in public debate.

In many respects, the TPP was intended as a counterweight to growing Chinese economic influence in the Pacific rim. The twelve countries negotiating the trade agreement include the United States, Japan, Australia, Indonesia, Canada, and Peru, among others, but excluding China. As with other large-scale trade agreements such as NAFTA and MERCOSUR, the TPP covers trade disciplines across a wide range of sectors, from intellectual property rights and government procurement to agriculture and environmental protection.

The Obama administration has portrayed the final agreement [as a win](#) for American economic interests, reducing 18,000 different tariffs applied to U.S. products, strengthening (indeed ensuring) America's economic influence in the Pacific region, and creating jobs at home. Moreover, the administration claims, its provisions will increase labor and environmental standards within the region.

Opponents paint a starkly different picture, framing the agreement as a great deal for corporate America but terrible for the average American. It will pave the way for corporations to move U.S. jobs overseas, impose restrictive IP protections and create a process that will undercut environmental, health and labor standards. Indeed, Hillary Clinton has come out as a [vocal critic](#), reversing her former strong support of TPP while Secretary of State.

[Environmental opposition](#) to the TPP has primarily focused on a process known as Investor-State Dispute Settlement (ISDS). ISDS originated from experiences in the 1950s and 1960s when former colonies, following independence, nationalized private businesses such as oil companies with no compensation. These confiscations obviously represented major losses to the investors and trade agreements since NAFTA have routinely included protections

against expropriations.

Direct expropriation has become rare in recent times, though, and the real battle has been over claims of indirect expropriations. Similar to the debate in American law over regulatory takings, the ISDS controversy concerns the threat to laws that arguably act as the equivalent to expropriations, and therefore compensable following an arbitration process. Supporters argue that ISDS protects American companies operating abroad from arbitrary discrimination in the application of domestic laws. Opponents counter that ISDS is unfairly biased against protective environmental, health and safety standards and will lead to large monetary judgments against governments as a result.

It is certainly true that arbitration panels are generally composed of trade law experts with little or no exposure to environmental law. As a result, one can expect they would likely be more sensitive to commercial than environmental interests. Similar charges have been made about the composition of dispute panels at the WTO. The bigger concern, though, lies in the potential of losing before the arbitration panel. Consider the claim below from [the Sierra Club](#):

“The TPP will include provisions that give corporations the right to sue a government for unlimited cash compensation — in private and non-transparent tribunals — over nearly any law or policy that a corporation alleges will reduce its profits. Using similar rules in other free trade agreements, corporations such as Exxon Mobil and Dow Chemical have launched over 600 cases against more than 100 governments.”

The Obama administration [has countered](#) that “ISDS cannot change law in the United States or any other country. No government measure (federal, state, or local) can be blocked or reversed under the ISDS provisions or any other part of TPP. The United States would never negotiate away its right to regulate in the public interest, and we don’t ask other countries to do so either.”

Perhaps not surprisingly, each side’s advocacy has been both accurate and misleading. For the Sierra Club’s charge, while there have been many actual and threatened ISDS actions under various trade agreements, only a handful have successfully challenged environmental protections and none against American measures. To win a case, corporations have to do more than show a reduction in profits. That said, however, the possibility of chilling environmental protections over concern from having to defend ISDS actions (even if meritless) could prove significant, particularly for countries with limited institutional capacity.

The Obama administration, for its part, is largely attacking a straw man argument. Critics are not claiming that the TPP will require changing U.S. law but, rather, that implementing the law will become too costly because of threatened arbitration losses and therefore chill effective protections going forward. The record to date of very few successful ISDS challenges favors the Obama administration's claims, but the chilling concerns of opponents can't easily be dismissed.

Environmental supporters of the TPP focus not on the ISDS provisions but, rather, on the substantive provisions on environmental protection in [Chapter 20](#). In particular, [the TPP is stronger on conservation issues than any other broad trade agreement](#). It specifically addresses illegal fishing, wildlife trafficking, and illegal logging, going beyond the commitments in the CITES convention. It also directly prohibits a number of important fishery subsidies.

As WWF-US [has stated](#):

“No major trade agreement before this one has gone so far to address growing pressures on natural resources like overexploited fish, wildlife and forests... With the right implementation and compliance procedures, the conservation commitments in this trade agreement could be game-changers.”

It is hard to see how significant progress for conservation of many natural resources will make headway without major Asian efforts. Consider that the TPP countries represent fully one-quarter to one-third of the trade in fisheries, timber and pulp and paper, and a disproportionate share of the world's illegal trade in wildlife. From WWF's perspective and that of other environmental group supporters, the option to rejecting TPP is not a better deal. Instead, it is the current reality of China's trade agreements with Asian countries that contain no environmental safeguards at all. Moreover, they view TPP as a benchmark for environmental measures in the upcoming trade agreement with Europe (the TTIP).

As with many difficult political choices, there is merit to both sides' arguments. ISDS does seem weighted against environmental concerns. The chilling effect of ISDS challenges to environmental regulation could be large. Equally, the environmental provisions in the TPP really are much stronger than those in prior trade agreements, and rejecting this deal may well kill the prospects for any meaningful future agreement. At the end of the day, environmental groups need to decide whether their concerns over ISDS represent enough of a downside to reject TPP's substantive environmental provisions.

TEPAC is required to submit its review of the agreement within 30 days of its submission to

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Congress and I will post it on Legal Planet. Stay tuned.