

Representatives of U.S. environmental negotiations have shown up in Paris to campaign against the new TPP trade agreement. ([here](#)) They've also been actively engaged in discussions with Democratic law-makers, in an effort to block approval. A key objection is that the TPP will undermine climate policy. Jim Salzman had a great [post](#) last week on the TPP and the environment last week, but I want to focus a little more on the climate dimension and go into more depth on one or two things. Before I get to the serious part of the discussion, I can't resist mentioning the fear of some [right-wing commentators](#) that the TPP is actually a Trojan horse for Obama's climate policy. The concerns of environmentalists are a good deal more factually based than that! In the end, however, I think the environmental concerns are greatly overstated.

Unfortunately, so far the debate has been short on specifics, which makes the environmentalist critique somewhat hard to evaluate. As far as I've been able to figure out so far, there are [three](#) major complaints relating to climate specifically. One issue is whether trade agreements produce higher emissions because they lead to higher production levels and more international shipping. Increased shipping is a definite problem since emissions from international transport are poorly controlled. Increased manufacture could also produce more emissions. But the TPP could also produce new markets for green technology. The U.S. solar industry, for instance, has come out in favor of the agreement. In any event, we don't know how big any possible increase in emissions would be.

A second, related issue, is that the agreement would increase trade in fossil fuels in particular. The Sierra Club argues that the TPP will lead to much more use of liquified natural gas. Even if true, it's not clear how bad this would be. For instance, it could help Asian countries move away from use of coal. This issue is really just a piece of the much larger debate over natural gas as a bridge fuel. I tend to favor transition from coal to natural gas as a step toward ultimate decarbonization. It's true, as the Sierra Club points out, that LNG is more carbon intensive than natural gas (it has to be liquified and shipped), but even so, [the research](#) suggests that the exporting more LNG would produce a net reduction in emissions. So from my point of view, this is a potential plus for the climate, not a negative.

The third issue relates to the [investment chapter](#) of the TPP. Like many existing bilateral agreements, the TPP provides protection for foreign investors against allegedly unfair or discriminatory actions by host countries. Agreements of this kind are quite controversial in general. About half of the parties to the TPP already have such agreements with the U.S. The TPP would give similar rights to the other half. As Jim pointed out, however, those earlier agreements haven't posed much of a problem for American regulations so far. In any event, the final agreement seems to make a serious effort to mitigate potential problems for

environmental regulators. Nevertheless, the agreement does pose at least some potential barrier for climate mitigation efforts, which might or might not be offset by positive effects in terms of prying open markets for green technology. (There are more details at the end of this post for those who are interested.) On balance, I think I would count the investment chapter as a negative in terms of climate policy, but not a huge one.

To sum up, the TPP has possible negative climate effects in terms of increased emissions from increased international transport, shifting production to more carbon-intensive locations, and the possible chilling effect of the investment chapter on environmental regulation. These negative effects may be offset by positive effects for green technology and displacement of coal by LNG, and perhaps by other environmental benefits from the environmental chapter. I would hesitate to argue that the TPP is a win for the environment., but it seems unlikely that the net negative environmental effect is going to be substantial, assuming it exists.

Of course, if you think free trade is a terrible thing, there's no particular reason to make an exception for this agreement. But if what you care about is addressing climate change, my advice would be to keep your eyes on the prize: getting a positive outcome in Paris and getting it implemented within the U.S.

---

### **The Investment Chapter and Environmental Regulation**

One TPP provision involves discrimination against foreign firms versus domestic ones.

Footnote 14 to Article 9.4 indicates that, in determining whether discrimination exists, a relevant factor is "whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives." That language should be very helpful to regulators.

Another tricky issue involves "minimum standards of treatment" of investors under customary international law. This seems to be fairly narrowly defined, however, based on "a general and consistent practice of States that they follow from a sense of legal obligation."

Moreover, "the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result." Also, discontinuance of a subsidy is not a violation of minimum treatment. Moreover, like the WTO, the investment chapter recognizes exceptions for regulations "necessary to protect human, animal or plant life or health; or related to the conservation of living or non-living exhaustible natural

resources.”

The agreement also provides compensation for “direct or indirect expropriation,” which is defined in language borrowed from the U.S. Supreme Court’s *Penn Central* case. This is a vague test, but at least in the U.S. setting, has not proved conducive to takings claims. A caution against finding expropriation is also provided by the following language: “Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances.” I would be happy if the U.S. Supreme Court would adopt that language.

Overall, as investment agreements go, this one is pretty good. That’s a relative judgment, of course. There’s a much bigger debate about investments agreements, partly in terms of how much they restrict legitimate national policies and partly in terms of how much they really encourage foreign investment. But that general debate is too big and complicated to get into here.