



**How the Trans Pacific Partnership
will expand fracking in Australia and around the globe**



FRACKING THE PLANET

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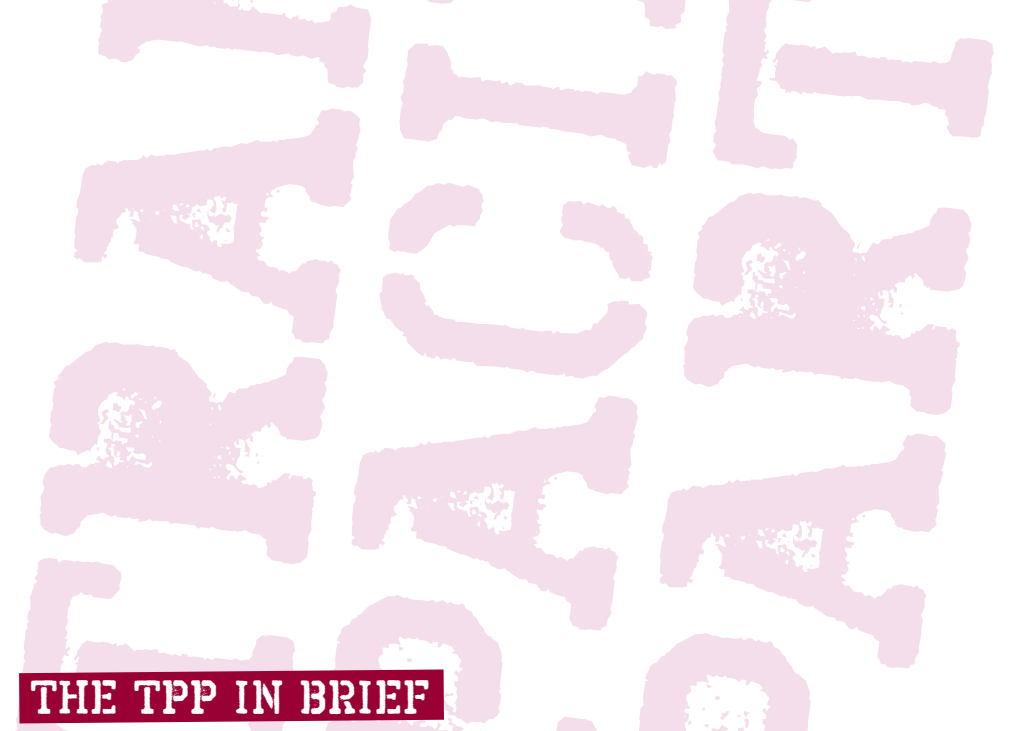
An expansive new 'trade' deal known as the Trans Pacific Partnership (TPP) is being negotiated by 12 Pacific Rim countries, spearheaded by the United States. The secretive deal includes Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. The TPP covers approximately forty percent of the global economy and will impact over eight hundred million people in the twelve partnering nations.

The TPP covers a vast range of issues including food safety, genetic modification, chemical use, polluting fuels and environmental protections. The negotiations are likely to favour safeguards for corporate investments over safeguards for citizens and the environment, allowing companies to seek compensation when government decisions have the potential to affect their profits. This will benefit companies seeking to exploit natural resources, through hazardous new technologies, whose activities may be affected by environmental or health regulations.

This brief analyses how the TPP will limit our government's ability to regulate the development and expansion of the unconventional gas mining technique known as hydraulic fracturing (fracking). It makes clear that the TPP has the potential to impede governments' abilities to protect citizens and the environment. It examines how the TPP could mean that Australia would be forced to pay millions, perhaps even billions of dollars in compensation to corporations whose projected profits are affected by tighter regulations.

Friends of the Earth Australia believes that the current moratorium on fracking in Victoria, as well as other regulations of the unconventional gas industry, are threatened by the ISDS mechanism within the TPP and the lack of protections afforded by the Environment Chapter.

Fracking the Planet: How the Trans Pacific Partnership will expand fracking in Australia and around the globe
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THE TPP IN BRIEF

By signing off on the TPP, the Australian Government would tie Australia to a trade deal that does more to secure the interests of corporations than to look after the peoples of any individual country. Amongst the wide variety of impacts of the TPP, it will:

- Limit access to medicines by extending monopoly protections for pharmaceutical giants
- Prioritize large-scale corporate agriculture over sustainable local farming
- Restrict consumer choice by preventing food labelling for country of origin or GM products
- Restrict internet innovation and increase surveillance of online interactions
- Undermine indigenous rights and human rights
- Suppress working conditions, environmental standards and public regulations

It will also allow large corporations, including fossil fuel companies, to sue the government. Though the TPP deals have been conducted in secrecy, several chapters of the agreement have been leaked through WikiLeaks, including the Environment and Intellectual Property (IP) Chapters, as well as an important chapter on the Investor State Dispute Settlement (ISDS).



WHAT IS ISDS?

ISDS grants foreign investors access to an international tribunal or 'arbitration panel' if they believe actions taken by a government will affect their future profits in a country.¹ The provisions have been described as a 'ticking time-bomb'² because they allow foreign investors the ability to seek compensation from the Australian Government through private international tribunals. If, for example, the Government chooses to increase environmental protections, and doing so affects the projected profits of an international mining company, it could be sued for millions if not billions of dollars. The arbitrators on these tribunals heavily favour foreign investors and the corporations involved.³ The number of ISDS cases has surged in the last two decades with the dispute resolution process overseen by private sector-dominated arbitration lawyers aggressively promoting ISDS and pursuing tribunals with a pro-corporate bias.⁴

Internationally there have been over 600 ISDS lawsuits launched against nations, with many mining and energy companies successfully suing foreign governments. In 58% of cases, companies were partially or completely successful. By early 2013, one in three cases related to oil, mining or gas, up from one in four in 2000. A recent case launched by Bilcon against the Canadian Government saw the corporation awarded CDN\$300 million in compensation. An environmental impact assessment led Canada to reject Bilcon's proposal to blast-extract basalt from an important cultural and ecological area in Nova Scotia. The verdict, described as 'a significant intrusion into domestic jurisdiction'⁵, saw an international corporation successfully sue a foreign government because of the way in which they interpreted their own laws. Similarly, the Swedish energy giant Vattenfall is suing the German Government for €3.7 billion due to its phase-out of nuclear power stations.⁶ Legal costs in investor-state disputes average over US\$8 million, and exceed US\$30 million in some cases, and are not always awarded to the winning party.⁷

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In 2011, after being sued by Phillip Morris Tobacco, the Australian Government said that it *'[The Australian Government] does not support provisions that confer greater legal rights to foreign businesses than those available to domestic businesses. Nor does the Australian Government support provisions that would constrain the ability of Australian governments to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign business'*.⁸

The current Government's involvement with the TPP, however, would suggest otherwise. Kyla Tienhaara observes that 'arbitrators have made it clear that they can, and will, award compensation to investors that claim to have been harmed by environmental regulation'⁹, the abundance of cases such as Bilcon vs. Canada making this undeniably clear. The TPP will give over thirty-one percent of total foreign investment in Australia (inward stocks from the United States and Japan) access to ISDS for the first time.¹⁰ This will cement the unjust private arbitration system for years to come, greatly increase foreign corporations' abilities to sue the Government for environmental protections, and hinder ISDS reform. Over the past decade, arbitration cases surrounding investment have exploded; the majority of modern disputes 'revolve around public policy measures and implicate sensitive issues such as access to drinking water, development on sacred indigenous sites and the protection of biodiversity'.¹¹

At a TPP roundtable event organized by the Friends of the Earth Melbourne, academics, politicians, union officials, health professionals and lawyers made public statements about the agreement. Dr Matthew Rimmer stated:

'The Investment Chapter serves to boost the corporate rights and powers of multinational companies with [ISDS] – at the expense of democratic governments and domestic courts. The leaked text shows that this agreement is more about corporate power than 'free trade'. ISDS is really a form of corporate sovereignty. Investor clauses will be able to be used as Trojan Horse clauses against a wide range of government regulation – including public health, access to medicines, tobacco control, labour rights, environmental regulation and climate action'.¹²

CASE STUDY: BILCON VS CANADA

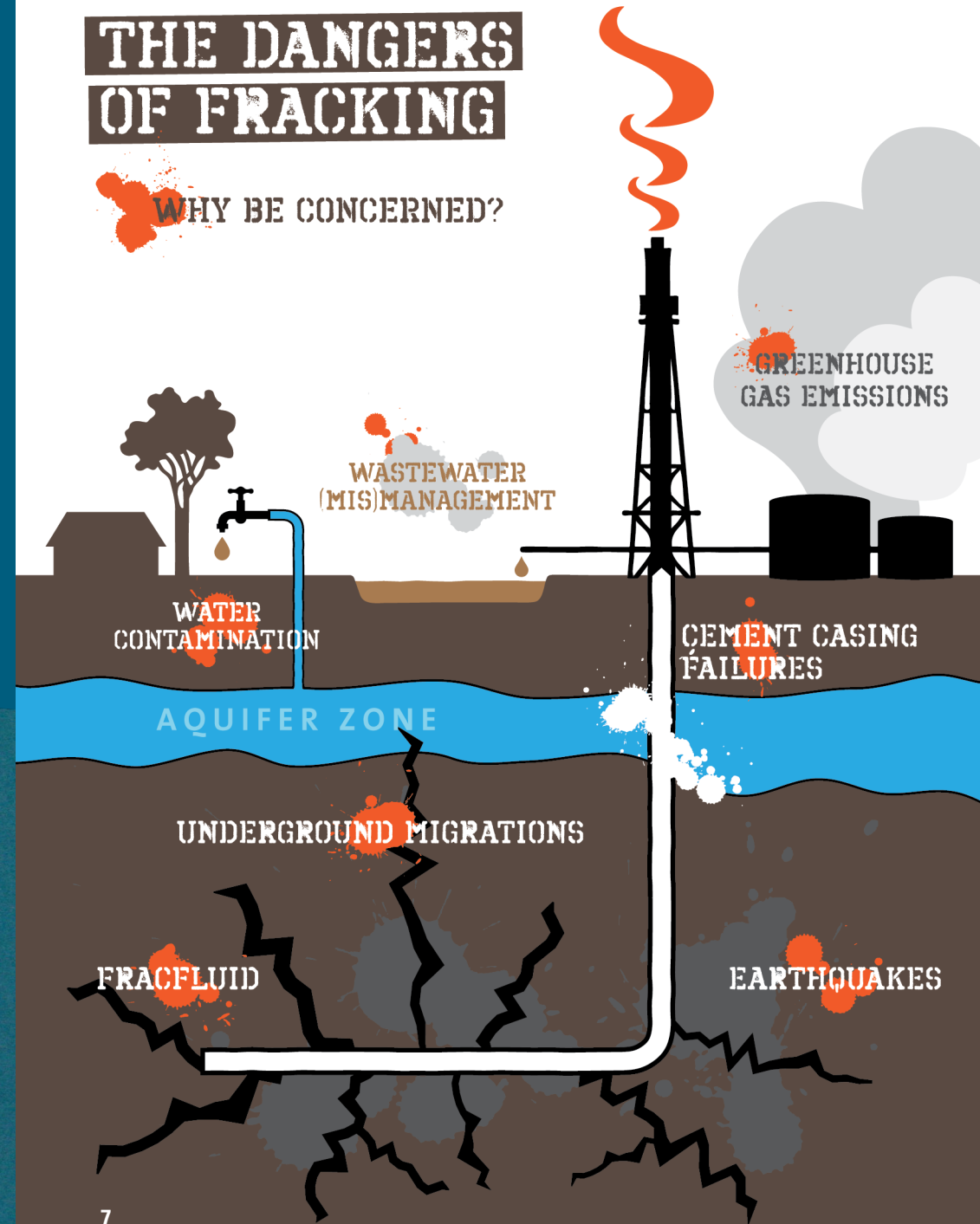
An analysis of the 2015 case study of Bilcon vs Canada reveals the threat posed by ISDS clauses in TPP-style trade agreements such as NAFTA. In 2007, the US-owned company had to obtain approval from Canadian authorities on both a provincial and a federal level for its proposal to **blast-extract basalt** from the Nova Scotia region. The environmental impact statement submitted by Bilcon was required to examine what sort of impacts the project would have on the natural and human environment. An expert panel **recommended that the project not proceed** for a variety of reasons, including the fact that it was in conflict with core community values and had the **potential to devastate rare marine species** such as the endangered North Atlantic Right Whale and Bay of Fundy Atlantic Salmon.¹³

The potential to affect the operations of commercial fisheries as well as indigenous hunting grounds did not fare well with the local community, and subsequently the project was denied after being reviewed by a panel of environmental experts. Bilcon then used an ISDS clause in the NAFTA agreement to circumvent the domestic processes, and took Canada to an international arbitration panel where they **successfully sued the Government for \$300 million**. The international arbitration panels have been categorically seen to be geared towards supporting the foreign corporations in these cases. Once such a case is taken to an arbitration panel there is no scope to appeal such a decision. Of the three judges on the arbitration panel, one dissenting voice, Donald McRae, pronounced the decision **'a remarkable step backwards in environmental protection'**.¹⁴



THE DANGERS OF FRACKING

WHY BE CONCERNED?



GROWING OPPOSITION TO FRACKING IN AUSTRALIA

There are currently 3508 coal seam gas wells operating in Australia¹⁵; the most heavily fracked states are Queensland and NSW but recent proposals mean that thousands more could spring up in Victoria and Western Australia. The Federal Government is taking measures to try and cut the amount of red and green tape surrounding resource extraction. A study conducted by the Australia Institute found that ninety-three percent of Australians wanted to either maintain the regulations that currently exist or to increase the regulatory framework surrounding unconventional gas.¹⁶ The general public's view of unconventional gas and its regulation is at loggerheads with that of the Federal Government¹⁷; people want federal regulation of foreign coal and gas companies, whilst the Government is taking measures to deregulate the industry. The power of these foreign companies to intrude on communities and disrupt people's lives and livelihoods is becoming increasingly evident. The recent ruling in favour of Metgasco against the community of Bentley makes this abundantly clear.



Photo: R. J. Hill



CASE STUDY: BENTLEY VS. NEW SOUTH WALES

Gas and energy giant Metgasco was undertaking drilling operations and exploration in the Northern Rivers region of New South Wales, situated on the traditional lands of the Bundjalung and Gumbaynggirr Aboriginal peoples.¹⁸ Stunning natural features and fertile soil has lent the area a reputation as a food bowl and place of outstanding beauty that 'supports one of the highest levels of biodiversity on the Australian continent'.¹⁹ The region's industries rely upon its clean soil, water and air for survival²⁰ but it has been targeted by the rapidly expanding industry for the gas deposits within the Clarence Moreton Basin.

After sustained and overwhelming local opposition in the Northern Rivers area, state authorities suspended Metgasco's exploration licence following concerns 'about the way in which Metgasco has characterised its activities'.²¹ The NSW Resource Minister Anthony Roberts claimed that the company had not 'undertaken genuine and effective consultation with the community'.²² The Supreme Court later overruled the suspension and is forcing the State Government to pay all of Metgasco's costs with the possibility of extending their licence.²³ The ruling means that people who live in unconventional gas project areas essentially have no say in what happens to their community. The suspension was described as 'unlawful',²⁴ but if state authorities cannot impose rulings upon companies to protect communities then Big Energy will always win. It highlights the need for legislative reform to protect the public, not further deregulation. The current lack of regulation surrounding these projects robs people of sovereignty over their own land, food and water.

Local community concerns are justified, with unconventional gas mining consistently found to be damaging to health and the environment. The toxic mix of chemicals used in fracking operations poses numerous dangers to residents of surrounding areas. Prolonged exposure to these compounds can negatively affect the functioning of the kidneys, liver and blood system. Long-term exposure to high levels of benzene in the air can lead to leukaemia and cancers of the blood.²⁵ Similarly, reports about the health of flora and fauna in these areas are exceedingly negative, showing that fracking and waste disposal have contaminated drinking water as well as polluting the air and soil. A longitudinal study of humans, farmed animals, and wildlife in areas of hydraulic fracturing showed consistent health impacts, which increased in heavily fracked areas.²⁶ It is irresponsible and dangerous to allow companies to go ahead with fracking operations without comprehensive health impact assessments²⁷; such assessments are not currently carried out in Australia.

The national resistance to unconventional gas mining exists as a strong network of farmers, activists and other residents who care about their community and who have the

'capacity to change the political landscape in rural Australia'.²⁸ The Lock the Gate Alliance is a resilient network of communities using different tactics to combat the rising tide of unconventional gas as well as to support each other in their resistance. The alliance has said that 'mining and unconventional gas companies are riding roughshod over our governments and local communities' and in doing so they place risk on 'our farmland, bushland and water resources'.²⁹

Large swathes of Victoria are under CSG, shale gas, or tight gas exploration licenses. Throughout 2012, communities arose and called for a state with a safe future driven by clean energy. Over 2000 individuals, fifty-nine organisations and six local councils called for the State Government to institute a moratorium on all 'new coal and unconventional gas explorations and developments until they can be scientifically proven to be safe'.³⁰ The State Government announced a moratorium on fracking in August of that year.

Community opposition to fracking has only intensified since the success of the campaign and its subsequent moratorium, with sixty-one communities declaring themselves no go zones for unconventional gas using the 'mining free communities' model of surveying residents and holding declaration days, and tens of thousands mobilized to defend their land. This democratically instituted moratorium would be at significant risk under the TPP.

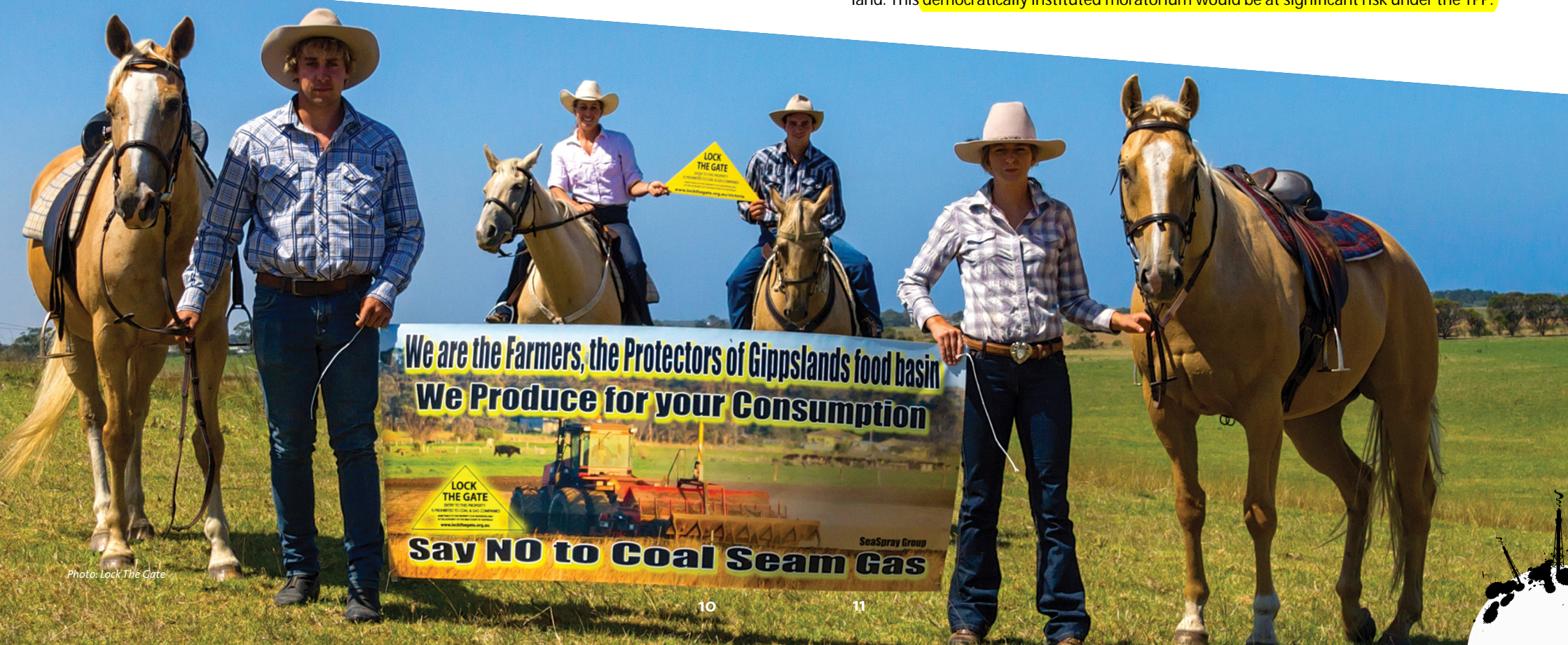


Photo: Lock The Gate

OPPOSITION TO FRACKING AROUND THE WORLD

In Europe and the United States opposition to fracking has quickly spreading as people become aware of the potential risks. In countries where fracking has gone ahead the public have grown distrustful of the operations, numerous studies showing that the vast majority of Europeans do not want shale gas or unconventional fossil fuel projects in their area.³¹ Some governments have listened to the public and introduced moratoria on fracking or strengthened environmental regulations. **Bans have occurred in France and Bulgaria, and a number of other countries have instituted moratoriums** until the risks can be fully assessed. In the United States, grassroots movements against the increase of unconventional gas projects have seen hundreds of cities and towns pass bans or moratoria on fracking. **Climate activists and farmers are uniting** around the globe to combat the threat of fracking; an international support network allows anti fracking groups to share information and support each other in their fight.

MAJOR UNCONVENTIONAL NATURAL GAS RESOURCES IN EUROPE



BANNED

France | Bulgaria

CITIZENS' CAMPAIGNS PREVENTING/ED FRACKING

Denmark | Sweden | Ireland
Czech Republic | Spain
Netherlands | Austria
Germany

CITIZENS' CAMPAIGNS TO ONGOING FRACKING

UK | Poland | Romania
Lithuania

NUMBER OF CONCESSIONS/LICENSE PERMITS



FRACKING AND ITS RESISTANCE IN THE US



WHERE FRACKING IS HAPPENING

California | North Dakota | Montana
Wyoming | Colorado | Utah | New Mexico
Texas | Oklahoma | Arkansas | Mississippi
Alabama | Indiana | Kentucky | Michigan
Ohio | West Virginia | Pennsylvania
New York | Tennessee | Kansas | Louisiana
North Carolina | Florida

RESISTANCE IN STATES

California | Colorado | Illinois
Indiana | Iowa | Maryland | Michigan
Minnesota | New Mexico | New York
Ohio | Pennsylvania | Texas | Virginia
West Virginia | Wisconsin | Wyoming
Kansas | Florida | Delaware | North Carolina

RESTRICTIONS IN PLACE

including bans, moratorium, and zoning restrictions at the state or local level
Vermont | New Jersey | New York
Municipalities in Colorado
Texas | Ohio | Pennsylvania
(Delaware River Basin, not the entire state of Pennsylvania)

Note: Maps reflect best available knowledge at the time of printing

New Internationalist examined the unlikely alliance between farmers and climate activists:

*'We're witnessing something very new here...amazing alliances that are moving beyond fracking and developing a genuine, alternative progressive politics outside the mainstream. It's inspiring an impressive wave of activism including pre-emptive action in communities that the fracking industry hasn't even got to yet.'*³²

Whilst fracking is certainly a global issue, the TPP will have the most negative effects for developing countries in the Pacific Rim. According to trade-law experts, trade deals such as the TPP have the ability to 'significantly inhibit the ability of developing countries' governments to protect their environment from mining and other companies'.³³ One of the unprecedented consequences of ISDS in agreements such as the TPP is the capacity for foreign corporations to restrict developing countries' abilities to regulate their own ecosystems, which may have global ramifications in an era of looming climate change catastrophe.

**NO COMPANIES SHOULD BE ALLOWED TO SUE
A STATE WHEN IT IMPLEMENTS SOVEREIGN
MEASURES TO PROTECT WATER AND THE COMMON
GOODS FOR THE SAKE OF OUR ECOSYSTEMS AND
THE HEALTH OF OUR PEOPLES**

ISDS AND ENVIRONMENT CHAPTERS

A comprehensive analysis of the Environment Chapter shows that obligations by countries to abide by any kind of environmental protocol are 'weak and compliance with them is unenforceable'.³⁴ The chapter applies at a federal level, however the majority of decisions surrounding the environment and its protection occur at the state level as was the case in Bentley vs. Metgasco. The ISDS Chapter is in its very essence in conflict with environmental protections. The majority of ISDS cases occur in relation to natural resources, most often mining, and as previously mentioned these cases can see governments sued for billions of dollars. Governments have been found to be particularly vulnerable to ISDS disputes when it comes to unconventional fossil fuel mining. The case of Lone Pine vs Canada exemplifies this; the fracking firm demanded \$250 million in compensation because of an imposed moratorium on fracking. The TPP fails to enforce a modern standard of protective measures, measures which are of the utmost importance in combating climate change and the further destruction of our already fragile ecosystems. The remaining chapters of the TPP will do nothing but 'subordinate the environment, natural resources and indigenous rights'.³⁵

CASE STUDY: LONE PINE VS CANADA

Canada's abundance of large shale gas basins has seen energy firms stake out claims in its numerous regions. One hundred and eighty one trillion cubic feet of natural gas lies within the Utica basin below the St. Lawrence River Valley in Quebec. A fracking moratorium was imposed in June 2011, prohibiting drilling under the St. Lawrence River to allow for a 'comprehensive and timely evaluation of the public health and environmental impacts of such an activity'.³⁶ It was strong community resistance in conjunction with evidence of pollution that led to this ban. The licenses of oil and gas companies were revoked, including that of Lone Pine Resources; after the moratorium was extended in 2012 to include all shale gas exploration and development in Quebec, Lone Pine Resources declared that it was going to challenge the moratorium. Due to the fact that Lone Pine, a wholly Canadian company, had registration in Delaware, USA, the company was able to sue the Canadian Government using ISDS provisions included in the North American Free Trade Agreement (NAFTA) asserting they were not offered 'fair and equitable treatment'.³⁷

Lone Pine is claiming that the moratorium is 'arbitrary, capricious, and an illegal revocation of [its] valuable right to mine for oil and gas' and is demanding Cdn\$250 million as well as interest from the Canadian Government because they acted with 'no cognizable public purpose'.³⁸ The rights of gas and energy firms such as Lone Pine may become of more importance than access to clean water when the TPP is finalized and ISDS provisions allow companies to take advantage of mechanisms that further their corporate agendas. Quebec water management maintained 'No companies should be allowed to sue a State when it implements sovereign measures to protect water and the common goods for the sake of our ecosystems and the health of our peoples'.³⁹

CASE STUDY: PHILLIP MORRIS TOBACCO VS. AUSTRALIA

In 2011 Australia introduced plain packaging for all tobacco products, part of a range of comprehensive tobacco control measures described as 'a legitimate public health measure based on a broad range of peer reviewed studies and reports'.⁴⁰ Tobacco giant Philip Morris launched a lawsuit against the Australian Government, challenging the plain packaging legislation. After unsuccessfully suing the Government and being forced to pay the legal costs, Philip Morris Asia acquired shares in Philip Morris Limited (Australia), allowing them to take advantage of an ISDS clause implemented in a bilateral trade agreement, the Australia-Hong Kong treaty of 1993. Philip Morris Asia did not acquire any of its Australian assets until 2011, after the Government made its position regarding plain packaging legislation very clear in 2010. There has subsequently been significant speculation that Philip Morris may have only acquired its Australian assets in order to take advantage of the 1993 agreement.⁴¹ Andrew Mitchell, international law expert at the University of Melbourne, contended that 'it will be very difficult to argue that at the time of investment they had a legitimate expectation that plain packaging wasn't going to be introduced when the Government had already announced it was going to do exactly that'.⁴²



RISKS GO BEYOND INVESTOR PRIVILEGES

The gas industry is keen to export fracked gas to Asia, where it can charge about three times Australia's market price. The TPP would facilitate liquefied natural gas (LNG) exports from Australia to other participating nations. In fact, if the TPP includes so-called 'national treatment for trade in natural gas', Australia would be legally bound to automatically approve exports of LNG to countries such as Japan without the opportunity to review or control the impacts.

Increasing exports of LNG would threaten our environment and climate in a number of ways, including:

Increasing fracking

Exporting natural gas encourages increased gas production - much of which will come from Unconventional Gas sources, almost all of which require fracking.

Exacerbating climate change

LNG is a carbon-intensive fuel, with life-cycle emissions significantly greater than that of natural gas. The energy needed to cool, liquefy, and store natural gas for overseas shipment makes LNG more energy- and greenhouse gas-intensive than ordinary natural gas. Opening natural gas reserves to unlimited exports will increase dependency on a fossil fuel with significant climate impacts.

Locking in fossil fuel infrastructure and increased methane emissions

LNG exports require industrial infrastructure including a new network of gas wells, terminals, liquefaction and regasification plants, pipelines, and compressors. This infrastructure has been found to leak methane, a greenhouse gas that is 23 times more potent than CO₂ over a 20-year period.⁴³ Increased exports, therefore, are likely to increase methane emissions and exacerbate climate change.

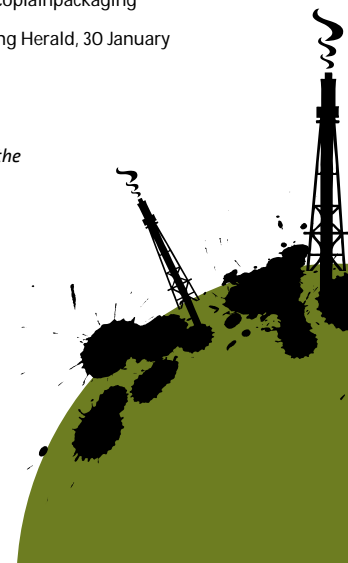
CONCLUSION

The TPP is a trade deal that will have innumerable consequences for the citizens and environment of Australia. The irreversible impacts of allowing foreign corporations legal provisions that outweigh those of domestic business and operations would alter the landscape of Australia in a multitude of ways. Analysis by way of the case studies presented in this brief makes it abundantly clear how ISDS provisions in trade deals circumvent domestic lawmaking processes. The TPP would see an exponential number of such cases launched against the Government, negatively impacting environmental and social protections put in place to protect our country.

The dangers of fracking have been categorically demonstrated, and the global movement against dangerous drilling techniques alludes to the fact that these practices affect more than just Australia. Rimmer notes 'It would be possible to conceive of a twenty-first century trade agreement that reflected this realization and embraced a socially progressive and democratic agenda where governments put their people centre stage in negotiations'.⁴⁴ There is little doubt that the ISDS clause in the TPP will be used again and again to challenge further fracking bans and regulation at the national and at local level. These developments must be resisted, to avoid catastrophic environmental and climate crises, and in the name of a socially progressive and democratic agenda. Opposing the inclusion of ISDS provisions in trade agreements like the Trans Pacific Partnership is the first step.

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