Australia's Rejection of Investor-State, from AUSFTA to the Gillard Government's Trade Policy and the implications for Canada.

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Introduction:

This paper places the Australian Labor government's 2011 policy of Investor -State rejection within the context of the escalating criticism of Investor-State Agreements [ISAs] and the extent to which they are being revisited and rejected by a growing number of countries. It offers insight into how and why the former Labor government of Australia came to its decision to reject Investor -State in its 2011 Trade Policy Statement while considering whether Australia's policy of Investor-State rejection should be an option for Canada.

During the writing of this paper an election in Australia resulted in a change of government with the Labor government of Prime Minister Julia Gillard, that had rejected Investor-State, being defeated by the Conservatives under Tony Abbot. As regards the impact on Investor-State, the new trade minister, Andrew Robb, was quoted after the election as saying "foreign corporations wanting to sue Australian governments will have to cool their heels." He also noted that Australia's negotiating position on the Trans Pacific Partnership Agreement [TPPA] would remain the same despite an election commitment to overturn the blanket prohibition on "investor-state dispute settlement" provisions. [1] At the same time a post-election article in Australia's GlobalMail, *Abbott: Open for Business and Investor State Lawsuits* revealed that the Conservative- led Coalition's recently released trade policy included a commitment to "remaining open to utilising Investor-State Dispute Settlement (ISDS) clauses as part of Australia's negotiating position" in future trade deals. [2]

Background on Investor-State Agreements:

International Investment Agreements (IIAs) are treaties between countries for the purpose of protection, promotion and liberalization of cross-border investments, in particular foreign direct investment (FDI). The main types of IIAs are Bilateral Investment Agreements (BITS) and Preferential Trade and Investment Agreements (PTIAs) which include Multilateral Investment Agreements and Free Trade Agreements (FTAs) like NAFTA. [3]

In some instances BITS are also referred to as Foreign Investment Promotion and Protection Agreements (FIPAs) e.g. the Canada-China FIPA. As the Canadian Government's Foreign Affairs, Trade and Development website states, FIPAs are part of the expanding global network of nearly 3000 bilateral investment treaties or BITS. [4] Originally Free Trade Agreements dealt primarily with a broad set of trade issues, until the North American Free Trade Agreement (NAFTA) set a precedent by including an Investor-State Dispute Settlement and investor rights and privileges, more commonly referred to as Chapter 11. The Chapter 11 approach has been modelled by many FTAs

since NAFTA and the provisions are similar to those found in Bilateral Investment Treaties.

As New Zealand Law Professor Jane Kelsey and US based international trade lawyer Lori Wallach note in their paper *Investor-State Dispute in Trade Pacts Threaten Fundamental Principles of National Justice*:

> *Free trade agreements (FTAs) and bilateral investment treaties (BITs) impose obligations on host governments to provide foreign investors with new privileges, but few if any social or environmental obligations are required of the investors*[5]

The controversial investor provisions in these agreements allow foreign investors to bring challenges against the host country under a number of rights and privileges which include i) Most favourite nation (MFN) status ii) National Treatment iii) Minimum Standard of Treatment including fair and equitable treatment iv) Performance Requirements and v) Expropriation and Compensation. [6] Also favouring the corporate investor is a broad definition of "investment" which includes – credit, contracts, intellectual property rights (IPRs) and expectations of future gains and profits. [7]

Disputes can be brought over alleged violations of these new rights, through the Investor-State Dispute Settlement [ISDS] mechanism, including the right to demand compensation for domestic policies that investors claim reduce the value of their investments. [8 In other words Investor-State gives multinational corporations the right to challenge the democratically instituted laws of sovereign states even e.g. fracking bans, attempts to phase out nuclear power plants, attempts to stem financial crises, food regulations, health regulations, environmental legislation etc.

One of the most controversial aspects of this system is that multinationals do not have to use the host countries' court system. They can chose to challenge host countries in offshore tribunals consisting of three undemocratically selected trade and investment lawyers, academics and former judges the majority of whom are private sector professionals. They often meet in hotel rooms, in a non-transparent process where conflict of interest has been documented in recent studies. As such these tribunals operate outside and above the judicial systems of nation states. [9]

The original intention of the Investor-State Dispute System was to protect investors from expropriation in developing countries back in the 1950s and 60s when they were gaining independence and nationalizing industries as their dependency on collapsing empires shifted. Because domestic courts of many developing countries were perceived at the time to be unable to adequately resolve the compensation claims presented by investors, the International Centre for Settlement of Investment Disputes [ICSID] was established in 1965 with the adoption of the Washington Convention, under the authority of the World Bank. ICSID established a specific arbitration mechanism to resolve disputes between a state and a foreign investor, a mechanism that was little used until BITS and FTA's with Investor –State chapters came into being in the 90's. [10]

Since then arbitration tribunals have increasingly stretched the concept of expropriation to mean both direct as well as indirect expropriation, including existing and planned legislation and regulations which impede profits. As well they have broadly interpreted other language in the agreements to the advantage of multinationals, and begun to award multinationals exorbitant sums amounting to millions and in some cases billions of dollars.

In fact from the time of the first dispute settlement under NAFTA which went in favour of the American Company *Ethyl* which was suing the Canadian Government over its law banning the export of a carcinogenic toxic fuel additive MMT, it became clear that the interpretation of 'expropriation' was so broad as to create very real concern for the future of public policy making. (11)

The following quote from a Spanish arbitrator is also a powerful reminder of the inadequacies and failures of investor-state.

> *"When I wake up at night and think about arbitration, it never ceases to amaze me that sovereign states have agreed to investment arbitration at all [...] Three private individuals are entrusted with the power to review, without any restriction or appeal procedure, all actions of the government, all decisions of the courts, and all laws and regulations emanating from parliament."*--- - Juan Fernandez-Armesto, arbitrator from Spain [12]

Background to Investor-State rejection by multiple countries:

A widespread and significant controversy has emerged on a global scale over investor rights and privileges and the Investor -State dispute mechanism found in the investment chapters of free trade agreements and bilateral investment treaties . As noted above there are many reasons for the concerns over Investor -State including what many critics see as its unethical, unfair, undemocratic, unsustainable and even unconstitutional nature giving undue power to transnational corporations over governments and public policy, thereby placing profit before people and the environment. The UN Conference on Trade and Development (UNCTAD), the United Nations body responsible for dealing with development issues, particularly international trade, acknowledges huge flaws in the Investor State arbitration system:

> *Concerns with the current ISDS system relate, among others things, to a perceived deficit of legitimacy and transparency; contradictions between arbitral awards; difficulties in correcting erroneous arbitral decisions; questions about the independence and impartiality of arbitrators, and concerns relating to the costs and time of arbitral procedures."* [13]

In general major flaws of Investor-State Agreements can be categorized as those relating to a) the unfair and unbalanced rules and rights of investors written into investment chapters and their open-ended interpretation, b) the undemocratic arbitrator selection process prone to conflict of interest and documented unethical behaviour, and c) the

undemocratic and in some cases unconstitutional decision-making process, outside of international law and the well-established judicial process of developed nations.

Questions are being raised, research conducted and actions taken in opposition to Investor-State, by a growing number of constituencies including international institutes, agencies and centres, national and international NGOs, international networks, academics, lawyers, jurists, economists, intergovernmental organization, former MPs, foreign policy experts and trade negotiators and even a significant number of countries.

Martin Kohr, Executive Director of South Centre, an intergovernmental organisation of developing countries based in Geneva, Switzerland, after outlining a litany of concerns with Investor-State, in *The World's Worst Judicial System*, summarized the situation as follows:

> *Awareness of the problems in the agreements and the unfairness of its arbitration system are growing, and calls for reform are being made by more countries***.** [14]

Some countries, like Canada, the US and the European Union, are taking a reformist approach tweaking the language around Investor-State rules in an attempt to address issues in piecemeal fashion. A recent Carleton University Policy Brief on *The Investment Provisions of the CETA* provides some insight into this approach. [15] However, because the entire process is fraught with systemic issues there appears to be little hope of tackling the associated problems through such a limited and fragmented approach. As the Transatlantic Statement on Investor- State in CETA , signed by more than 100 transatlantic civil society groups demanding the removal of the Investor-State chapter, states:

> *There is no way to tame this investor "rights" model. There is no comfort in claims by the [European] Commission or Canadian government that "frivolous" claims, or challenges to environmental policy, will be filtered out. Despite efforts in the North American Free Trade Agreement (NAFTA) to limit what kinds of government decisions might violate an investor's minimum standards of treatment or other investment chapter protections, Canada continues to face investor-state disputes attacking environmental measures that affect national and foreign investors in exactly the same way (e.g. a partial moratorium on shale gas extraction in Quebec). Likewise, we are not satisfied by efforts to limit the meaning of "indirect expropriation" so that legitimate public welfare objectives should be immune from investor challenges. The final determination is always made by the private investment tribunals themselves, and these unaccountable tribunals have a built-in bias toward the interests of multinational corporation.*[16]

At the same time other countries are rejecting Investor-State and its dispute settlement mechanism and seeking alternatives. As was reported in an earlier August 2012 blog, *Multiple States Rejecting Investor- State dispute Settlement,* Australia, under Julia Gillard's Labor government, was one of a growing number of nations rejecting the Investor -State regime in bilateral investment and free trade agreements. India, South America, Bolivia, Venezuela and Ecuador, were also cited as beginning the process of

rejecting Investor- State. [17] It should also be noted that Brazil did not sign the ICSID convention nor has it signed BITS or FTAs with Investor-State agreements with other countries. [18]

India now has drafted an alternative investment agreement stipulating that foreign investors will not be able to challenge the legality of an unfavourable verdict from their Supreme Court and that they would have to exhaust remedies under local laws before seeking international arbitration under bilateral investment protection agreements (BIPAs). According to experts a change in the model text was necessary because the overall investment environment had undergone so many changes since the existing BIPA text was prepared. India is in the process of reviewing BIPAs with 83 countries. [19]

In 2012, South Africa was re-examining its policy on Investor-State disputes and had refused to renew BITs with several EU countries. In September, 2013, the South African Trade and Industry Minister, Rob Davies, stated that South Africa will continue to protect foreign investment, but will do so through a legislative framework rather than through 'old-style, dated, antiquated bilateral investment treaties'. He reported that BITs entered into by South Africa and many other countries in the mid-1990s were poorly drafted and exhibited a range of serious flaws. He also noted that South Africa had notified the Embassy of the Kingdom of Belgium of its intention to terminate the trade agreement on September 7, 2013. On June 20, 2013 South Africa notified the Embassy of Spain of similar intention. [20] Finally on November 3rd Trade Minister Davies announced the new *Promotion and Protection Investment Law*. The bill recognises inherent weaknesses in international investment agreement arbitration by promoting a sound, open and transparent legal framework for the protection of investments in line with the constitution. [21] The bill diminishes the rights of investors in bilateral treaties in three important ways. a) In the event of expropriation, investors are no longer assured of compensation at full market value, but in line with the constitution, which says compensation must be "fair and equitable". It must consider both market value and a range of public interest concerns, such as redress for the past. b) The bill removes the obligation on the government to enter into international arbitration in the event of a dispute. Investors can ask the Department of Trade and Industry to facilitate mediation or can approach the courts for relief. c) The bill removes a provision contained in most bilateral investment treaties, that investors are entitled to "fair and equitable treatment". This is commonly used to provide investors with an avenue to contest new legislation or regulation that alters, in a prejudicial way, the conditions under which investments are made. [22]

In the South East Asian Pacific region, where 12 countries from both sides of the Pacific including Australia, New Zealand, Japan, Malaysia, Singapore, Brunei, and Vietnam are engaged in negotiating the Trans Pacific Partnership Agreement (TPPA), political opposition to Investor-State is building amongst parliamentarians, powerful professional associations, business sectors, unions, civil society organizations and the public.

In the early stages of negotiation Japan's Prime Minister Abe's Liberal Democratic Party parliamentary majority set a condition for Japan's TPPA participation that the deal not include Investor-State enforcement. [23] Kyla Tienhaara, a Research Fellow at the

Regulatory Institutions Network, Australian National University and Patricia Ranald, a Research Associate at the University of Sydney and Convenor of the Australian Fair Trade and Investment Network (AFTINET) think it's possible that Australia's stand against the ISDS might encourage countries like New Zealand and Vietnam, which have in the past claimed exemptions from ISDS provisions (e.g. in the ASEAN-New-Zealand Australia Free Trade Agreement), to take a similar position. [24] Meanwhile, Malaysia is undertaking a cost benefit analysis and Industry and Trade Minister Mustapa says if the cost benefit analysis indicates that it is not in their interest then definitely they will take serious note of the study. [25] Most recently, Malaysia declared it will not be a mere "yes man" in the ongoing Trans-Pacific Partnership Agreement (TPPA). Prime Minister Najib said Malaysia will take a firm stand and perform a "domestic process" -- to explain the agreement to the Cabinet; to the people of Malaysia; and to debate the agreement in Parliament before making a decision on the matter. The Prime Minister stated that the domestic process was adopted because the agreement touched on certain issues relating to the country's sovereignty including the rights to determine domestic policies, intellectual property rights, investor-state dispute settlements, government procurements, state-owned enterprises, environment and labour. [26] Malaysia already has a predisposition towards rejecting Investor- State in trade agreements having recently signed a Free Trade Agreement with Australia [MAFTA] , without an investor state mechanism. [27]

In Latin America, the adverse impact of excessive Investor-State arbitral awards has led the resource-rich countries of Bolivia, Ecuador and Venezuela to withdraw from the ICSID and from existing BITs. And Argentina is now considering doing the same. [28] According to the Third World Network:

> *These costly litigations, which to a greater extent have been settled favouring private interests from the North, not only affect the fiscal capabilities of the States and pose a serious challenge to their national jurisdiction -- and, ultimately, the exercise of their very sovereignty -- but also, they alienate citizens from their common and agreed-upon democratic set of rules.* [29]

The most significant development in Latin America in regard to Investor-State rejection is taking place at this time under the leadership of Ecuador. Twelve Caribbean and Latin American countries met this past May in Guayaquil, Ecuador to establish a major alternative to the Investor-State Dispute Settlement system. Seven of the twelve countries [Ecuador, Bolivia, Cuba, Nicaragua, Dominican Republic, St. Vincent and Grenadine and Venezuela] have adopted a declaration agreeing to establish a permanent "Conference of States" to deal with challenges posed by transnational companies, especially Investor-State challenges and the remainder [Argentina, Guatemala, El Salvador, Honduras and Mexico] are considering joining. This "Conference of States" will coordinate political and legal actions and disseminate information on legal disputes and other information to the public. They also established an Observatory which will analyse investment dispute cases, reform the present arbitration system, suggest alternative mechanisms for fair mediation, coordinate between the judicial systems of Latin American States, ensure the enforcement of domestic judicial decisions in investment disputes, and advise governments in their negotiations on contracts with transnational corporations. They also supported the setting up of a regional arbitration centre to settle investment disputes

between corporations and States as an alternative to ICSID, based at the World Bank in Washington DC, which was viewed by the conference participants as being biased in favour of investors. Finally they have said they will take their model to all the G77 countries and China for their consideration [30].

As the leading free trade critic in the US, Public Citizen's Lori Wallach, stated following the above conference in Ecuador where she had been a presenter:

> *Last week's conference adds another dash of momentum to this growing global push to ditch this rather radical regime.* [31]

These Latin American States, that are part of the push to reject Investor-State, are all developing countries that have suffered at the hands of multinationals from the North through the growing number of claims with enormously high settlements against their governments. They are also States that have rejected Neoliberalism and which have left of centre governments.

Amongst the nations rejecting Investor -State, Australia, under the Gillard government was unique in being the first developed nation and Neoliberal government to outwardly reject Investor-State. And as Dr Patricia Ranald was quoted as saying in a GlobeMail article: *Australia is the only country to have successfully resisted the US insistence on ISDS clauses in its trade deals.* [32]

The Gillard Government's Trade Policy's rejection of Investor-State is being widely discussed, critiqued and lauded in a number of papers, articles and blogs. Some of these writers have asked whether the Gillard government's rejection of Investor- State policy could be a model for the world and for Canada.

How and why Australia came to reject the Investor -State regime.

In April of 2011 Julia Gillard's Labor Government issued its *Government Trade Policy Statement* as part of a broader rethink of Australia's approach to international trade negotiations. In its statement the government vowed that it would no longer include provisions on Investor-State Dispute Settlement in bilateral and regional trade agreements. This Trade Policy Statement explicitly noted:

> *The Government does not support provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses.. Nor will the government support provisions that would constrain the ability of the government to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign business.*

It also offered a warning indicating that the government does not and will not accept provisions that limit its capacity to put health warnings or use plain packaging requirements on tobacco products or its ability to continue the pharmaceutical benefits scheme. [33]

Subsequently the negotiators of the Trans Pacific Partnership Agreement [TPPA] received explicit instructions that Australia would not accede to a TPPA Investor State Dispute Settlement provision. [34]

For many observers, both within and outside the country, this policy development came as a surprise. However, those familiar with the history of Australia's trade relations would have been aware that Australia had already rejected Investor-State in its 2004 Australia –United States Free Trade Agreement (AUSFTA).

Professor William S Dodge writing in the Vanderbilt Journal of Transnational Law in 2006 stated that AUSFTA was distinguished from NAFTA, by its lack of provision for direct investor claims and its enforcement mechanism which was limited to state-to-state dispute settlement procedures set forth in Chapter 21. Moreover, he stated that an investor would have to exhaust domestic remedies, i.e. go through the host countries courts before Chapter 21's procedures could be involved.

Professor Dodge also noted that neither the US nor Australia had rejected Investor State in other trade and investment agreements ratified between NAFTA (1994) and AUSFTA (2004) But as it turns out those agreements were all with developing nations which posed little risk of challenging a developed nation using Investor -State because investment tends to flow from developed into the underdeveloped countries and rarely the other way round. However, with the emergence of NAFTA- style FTA's with Investor -State chapters between developed nations there was obviously more to fear. Indeed, by the time the US and Australia signed AUSFTA, Australia was well aware of the increasing number of claims that had been brought forward under NAFTA's Investor -State regime by transnational corporations. And with the largest investing country in Australia being the US, the Australian government at the time was justifiably concerned that allowing Investor-State under AUSFTA would inevitably have led to a repetition of the North American experience under NAFTA. [35]

Australian researchers Tienharra and Ranald, in a 2010 paper examining contributing factors to Australia's rejection of Investor-State, noted, as did Dodge some years before, that little notice was taken by Australia when signing agreements containing ISDS provisions with developing countries. However, the threat to Australian public policy was obviously taken much more seriously when dealing with developed countries in particular the US which is Australia's single largest source of foreign direct investment. [36]

Hence it appears that the AUSFTA which, according to Tienhaara and Ranald, prompted the biggest critical debate amongst all political parties and civil society ever held in Australia about a trade agreement, provided a pre-existing critical perspective on Investor -State, that was reflected in the Trade Policy Statement .

Perhaps even more important in the rejection of Investor- State were the conclusions of the Australian Productivity Commission, an arms length advisory body, that conducts independent research on a range of economic social and environmental issues. [37]

Tienharra and Ranald suggested that one particular submission to the Productivity Commission appeared to have made a particularly strong impression on the Commissioners. That was the presentation by Jonathan Bonnitcha, a doctoral candidate in law at Oxford University and Dr. Emma Aisbett, then with the Australian National University, that dismantled the traditional arguments used to justify State participation in ISDS. [38]

Bonnitcha later reported that the Australian Productivity Commission could find no compelling economic rationale for the inclusion of Investor-State arbitration mechanisms in its trade and investment agreements and that it concluded that there were few clear benefits, and several worrying risks, associated with such provisions." [39]

Tienhaara and Ranald describe four potential contributing factors that led to Australia's rejection of Investor-State Dispute Settlement in the 2011 Trade Policy Statement, including the fact that insurance and Investor-State contracts were seen as more appropriate mechanisms for dealing with political risk than ISDS, the issues of regulatory chill, the cost of arbitration to governments and the experience in other countries demonstrating that there were considerable policy and financial risks arising from ISDS provisions".[40]

Another important finding of the Productivity Commission was the lack of evidence that having Investor-State in an agreement led to increased investment in one's country. Certainly with Australia this appeared to be the case with the US as its major investor without an investor-state agreement. Professor Nicolas Boeglin, in his July 2013 article on *Latin America, Criticisms Withdrawals and Regional Alternatives,* also pointed out that Brazil with the highest volume of foreign investors in all of Latin America is nevertheless free of ISDS mechanism and BITs. [41] Martin Kohr, Executive Director of the South Centre, speaking in Ecuador in May to the conference of 12 Latin American countries referred to above, explained that while attacks on public interest policies have grown under this investor-state system, foreign investment (the ostensible objective for such an extreme system) has not. Rather, he notes that study after study has shown no correlation between binding a country's policies to this anomalous regime and attracting foreign direct investment. [42]

The concluding statement of the Gillard Government Trade Policy provides further evidence that the findings of the Productivity Commission were a significant reason for the government decision to reject Investor-State:

> *The Productivity Commission's report into bilateral and regional trade agreements released in late 2010 has been closely considered in the preparation of this review, and its policy positions are highly consistent with the Productivity Commission's recommendations.* [43]

Another significant reason for Australia's rejection of ISDS was its fear of being challenged by Big Tobacco as it prepared legislation related to health warnings and plain packaging requirements for tobacco products. The government adamantly refused to accept provisions that would limit its capacity to do so.

Professor Thomas Faunce of the Australian National University of Canberra offers insight as to why this concern led to the governments discontinuing the practice of seeking inclusion of Investor-State in agreements. He explains how two multinationals unsuccessfully brought a constitutional challenge against the packaging legislation in the Australian High Court and how one of these contestants, Phillip Morris, then went outside the country bringing a case against Australia by using the Australian - Hong Kong BIT. [44]

Dr. Patricia Ranald stated that the contempt such an action showed for the Australian legal process and sovereignty is plain - it implies:

> *We're going to ignore the High Court, when it says we're not entitled to compensation; we're going to go off and find an obscure trade agreement to sue you under.* [45]

Professor Faunce indicated that none of this went down well with either the Australian people or their government for the following reasons:

> *A central part of the social contract ratified by the Australian constitution is that our nation will be governed democratically by a rule of law, with its implicit predictability, certainty and accountability. Australian taxpayers (through their governments) have invested an enormous amount of time and resources in creating a system of governance predicated on the capacity of a non-corrupt judiciary to decide on disputes by fairly interpreting laws promulgated in advance in public. Foreign corporations operating in Australia benefit from such an equitable governance structure. Indeed, it is one of the primary reasons they invest there. Australia regularly ranks very highly in rule of law rankings of nations around the world.* [46]

With the tobacco plain packaging dispute looming, the strong evidence and rationale of Productivity Commission, Australia's prior experience in rejecting NAFTA-like deals, and Australian's concern over financial and sovereignty issues and the integrity of their judicial system, it was perhaps not surprizing that Australia announced its rejection of Investor-State Dispute Settlement in trade agreements, including the TPPA.

Implications of the Gillard Government's Trade Policy statement and decision to reject Investor-State

Tienhaara and Ranald [2010] note that Australia's new policy on ISDS has been described by some as 'naïve', 'backwards', 'overkill', and by others as 'reasonable', 'progressive' and 'worth emulating'. Arguments against Australia's stance on rejecting Investor-State have been put forward critiquing the decision and lobbying for a reconsideration. [47] Professor Leon Trakman, University of New South Wales, Sydney critiqued Australia's decision to abandon the Investor-State arbitration process in a lengthy journal article recommending that the Government further examine the economic, political and practical implications of rejecting Investor -State. He suggested

that a failure to do so could jeopardise Australia's participation in multilateral investment treaties such as the Trans-Pacific Partnership Agreement in which it has a strong economic incentive to be a party. [48] Dr Jurgen Kurtz writing in an UNCTAD IPFSD Forum was also critical of Gillard's trade policy concluding that even though a powerful case can be made for deep contemporary reconsideration of investment disciplines, Australia's recent trade policy shift to reject Investor-State was inadequate for states which wish to rigorously and accurately reconsider their own future engagement with investment treaty disciplines. [49]

On the other hand, other researchers and academics, while expressing some concerns about the future of Australia's decision, seemed hopeful that this Australian policy might have the potential to become a model for the future of investor dispute.

Tienhaara and Ranald, while cautioning about political uncertainties such as pressure from the US regarding the TPPA and possible change of government reneging on the decision, also held out hope that the greater legacy of this episode in Australian politics would be that it inspired governments in other parts of the world to examine their own investment policies more critically. [50]

Professor Thomas Faunce, in a blog he was invited to write for the Canadian- based online Troy Media concluded that the Australian stance against Investor State Dispute Settlement may pave the way for important public policy initiatives towards environmental sustainability and in areas such as financial and energy security. [51]

Canadian McGill University law degree candidate, David Beckstead, asked in his March 2012 blog on McGill's Legal Frontiers International Law site *Is the Australian Model the Future for Investor-State?* He suggested that whether Australia's opposition to Investor-State arbitration could hurt its economy remained to be seen but he was hopeful that the stability and predictability of the Australian judiciary might be enough to satisfy foreign businesses that their investments would be safe. He suggested that the Canadian government should monitor the results of Australia's trade policy to determine if it is an appropriate model for future treaties. [52]

Also Stuart Trew, Trade campaigner and analyst with the Council of Canadians has urged Canadians to follow Australia's lead by eliminating Investor-State Dispute Settlement from Canada's trade deals. [53]

Should Canada consider Australia's rejection of Investor- State ?

As noted above, Australia, when signing its free trade deal, AUSFTA, with the US, remained steadfast in refusing to include Investor -State provisions and ISDS. On the other hand Canada, unlike Australia, signed a free trade deal with the US (NAFTA) which included Investor-State, and which was the first free trade deal between developed

nations with an Investor-State mechanism. In the intervening years Canada continued to pursue free trade deals insisting on the inclusion of Investor-State provisions.

In its latest comprehensive economic and free trade deal negotiated with the European Union, i.e. CETA, Canada placed ISDS on the table which was agreed to by the EU. Likewise with the Transpacific Partnership [TPPA] Canada champions Investor-State and has also negotiated a FIPA with China which contains an Investor-State mechanism, in spite of sovereignty ramifications. Critics fear the deal will allow Chinese corporations to seek arbitration and sue Canada for decisions that negatively affect their access to Canadian resources. They also warned that even provinces could lose their decision-making ability on resource development once the agreement is in place. Backlash against the FIPA deal has been substantive enough to slow down the its ratification and a First Nations band the Hupacasath from British Columbia launched a court action against the Federal Government for failing to consult on a deal that could affect their rights and title. Even though the case was later rejected by the court the small first nation's band intends to appeal the case. [54]

Resistance in Canada and the EU is also growing against Investor-State particularly in regard to its inclusion in the CETA agreement. Even though an agreement in principle has been signed between Canada and the EU, the Investor-State part of the agreement is still undergoing further negotiation and resistance is considerable on both sides of the Atlantic. There is strong opposition to the inclusion of ISDS in CETA from the European Trade Union Confederation which represents more than 60 million workers in Europe. [55] As well, both the European Parliament and an independent sustainability impact assessment of CETA carried out for the European Commission argued there was no good reason to include Investor-State in a Canada-EU deal since legal systems in both jurisdictions were more than adequate to arbitrate disputes between corporations and government [56] More recently the Dutch Parliament adopted a resolution critical of Investor - State Dispute Settlement which took the view that inclusion of ISDS in the trade agreement has a number of undesirable consequences, including providing companies operating internationally the possibility to bypass the national justice system. It requested the government to investigate, in the short term, the potential social and environmental risks and the consequences of ISDS for the Netherlands and the financial risks for the Dutch government, and to inform the House about the results of this research while requesting the Government to act in a European context, in order to deal with undesirable effects of the agreement. [57]

As negotiations on the ISDS chapter continue, over 100 civil society European and Canadian organizations, as noted above, have issued a "transatlantic statement" demanding that this chapter be removed entirely because of its affront to democracy, its attack on the independent judiciary, and its threat to climate change and our shared environment. [58]

Canadian Osgoode Hall Law School Professor Gus Van Harten says it remains a mystery why Canada, having fared far worse than the U.S. in Investor-State arbitration under

NAFTA, reportedly asked to include Investor-State arbitration in the Europe trade deal. [59]

Further evidence that Canada should be moving to rescind Investor-State in its free trade and investment agreements comes from the Canadian public. A recent Environics poll showed that more than half of Canadians 54% oppose NAFTA-like investment protection in the European free trade agreement, CETA. [60]

In addition as NAFTA reaches it 20th year resistance continues to flow from the same groups that opposed it from the beginning. One of the ongoing critiques of NAFTA has been that of the Investor-State mechanism. Research and studies of the cases brought forward by the corporate sector under the ISDS have documented an increasing number of challenges leading to a further loss of sovereignty as well as an egregious loss of taxpayers monies paid out in fees and settlements.

And now with the expansion of NAFTA Chapter 11 type Investor-State agreements into the CETA deal with Europe, the FIPA deal with China and the TPPA between 12 countries on both sides of the Pacific, financial security and sovereignty will be further compromised to an unconscionable degree.

As noted above, there is a well-informed backlash against Investor-State from many constituencies and civil society groups as they become better informed about the negative issues and impacts around Investor-State and are better able to articulate the irrefutable arguments to abandon its use. Much evidence has accrued over the past twenty years demonstrating how Investor-State has been unfairly and unjustly designed to give increased power to corporations over national and sub-national governments. The research has clearly shown how investor-state rights and the ISDS international offshore arbitration process compromise fiscal responsibility, democratic governance, judicial integrity, constitutions, public security, environmental and ecosystem balance, and climate stability to an unacceptable degree.

It would behoove Canada to consider the main reasons Australia presented in its decision to reject Investor-State: (a) the threat of increasing numbers of Investor-State agreements leading to burgeoning numbers of Investor -State cases with an accompanying burden on taxpayers of increasing costs of arbitration and settlements (b) the threat of the increased number of challenges to domestic legislation protecting citizens, public health , and the environment, thereby compromising sovereignty and democratic process and finally (c) the absolute unacceptability, as Australia has argued, of having unaccountable tribunal processes replace and compromise the integrity of the host countries' judicial system.

For all these reasons Canada should reject Investor-State agreements in FTAs and BITs. In particular, it is imperative that Canadian opposition parties examine the arguments being advanced against the Investor-State mechanism and take advantage of the considerable work being done by India, South Africa, Latin American countries and particularly that of the former Gillard government of Australia in order to create a fairer

investor- protection system that preserves Canada's democracy, sovereignty and the integrity of our judicial system.

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