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Abbott: Open For Business — And Multinational Lawsuits

By Mike Seccombe

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Labor rejected it outright. Even the Howard government issued America with a rare "no" over the legislation, declaring it contrary to national interests. But now the Abbott Coalition is flirting with a trade agreement that would allow companies, acting increasingly in secret, to sue Australia if they don't like its regulations.

Australia's government under Prime Minister John Howard was not notable for its willingness to say "no" to America. Consider, for example, its eager enrolment in the coalition of the willing-to-believe-anything, and in the war of false pretences in Iraq.

And then there was the matter of trade. Coincidentally, a major purpose of John Howard's visit to Washington in September 2001, where he was when the terrorists struck, was the pursuit of a free-trade deal.

Reversing a long history of resistance to the prospect of a bilateral free-trade agreement with America (Australia had rejected previous overtures as being not in our national interest, and was a leading proponent of multilateral trade reform, through its leadership of the so-called Cairns Group of nations), the Howard government was at first almost pathetically keen to do a deal with the United States.

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In the end, however, Australians' growing hostility to the trade agreement forced Howard, for once, to say "no" to George Bush.

It wasn't a blanket refusal of an Australia-United States Free Trade Agreement (AUSFTA); a deal was eventually stitched up

and began operating in 2005. The "no" was to one of America's key demands: a provision called Investor-State Dispute Settlement, or ISDS.

What this arcane phrase refers to is the right of foreign companies to sue national governments of the signatory countries, not in domestic courts, but in opaque international forums, if they think some element of that government's policy is harming their interests.

If a mining company, for example, is unhappy with environmental safeguards which inhibit its operations, if a pharmaceutical company is unhappy with the prices it gets for its drugs, if a chemical company is upset with the banning of an agricultural pesticide, if a tobacco company does not like laws restricting cigarette sales, ISDS provisions in trade agreements give them the means to challenge government policy and to seek compensation.

And they do this increasingly often, sometimes claiming enormous amounts of money. According to a report in May 2013 by the United Nations Conference on Trade and Development, which monitors these things, a record 58 ISDS cases were begun in 2012. In the same year, decisions were made on 42 cases by an assortment of more or less credible international arbiters. Only 31 of these were publicly disclosed (http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf), but of those, 70 per cent went in favour of the corporations, at least in part; and nine resulted in significant awards for damages, including one – to an oil company which sued Ecuador – for a record US$1.77 billion.

We'll get to more cases later, but the first important point to understand is that, back in 2001, the Howard government wasn't having a bar of an ISDS as part of the Australia-United States Free Trade Agreement. It heeded the warnings that such a provision would pose a great threat to good public policy, indeed to national sovereignty. It said "no".

The second, more important, point to understand is that in 2013 Australia's new conservative government, that of Tony Abbott, looks as if it is about to say "yes". And not just to one instance of an ISDS, but perhaps to a couple of dozen, across a variety of trade agreements.

On the eve of the election, the Coalition released its trade policy (http://lpaweb-static.s3.amazonaws.com/Coalition%202013%20Election%20Policy%20%E2%80%93%20Trade%20%E2%80%93%20final.pdf), which includes a commitment to "remaining open to utilising investor-state dispute settlement (ISDS) clauses as part of Australia's negotiating position" in future trade deals.

In saying it was "remaining open" to ISDS clauses, the Coalition was being cunningly understated, as was made clear elsewhere in the document.

In truth, it appears gung-ho to wrap up as many free-trade agreements as possible, as fast as possible, and to strongly favour inclusion of ISDS provisions. The document cites, for example, the need to quickly complete a deal with South Korea, and blames the current impasse in negotiations on "Labor's refusal to consider a proposal for an investor-state dispute settlement clause".

The policy also promises to "fast track the conclusion of free trade agreements with China, South Korea, Japan, India, the Gulf Cooperation Council and Indonesia", and to "explore the feasibility of free trade agreements with other trading partners including the European Union, Brazil, Hong Kong, Papua New Guinea, South Africa and Taiwan".

Now it may well be that ISDS clauses don't wind up in all of them, but they will at least, as the policy document says, form part of Australia's negotiating position.

And then there's the big one, the US-driven Trans-Pacific Partnership Agreement (TPP), now being negotiated between the US, Australia, Canada, New Zealand, Mexico, Peru, Chile, Singapore, Brunei, Malaysia, Japan and Vietnam; countries with a combined population of nearly 800 million people and a combined GDP of almost US$28 trillion.

The US hopes to wrap it up before the end of the year, and has flagged a milestone announcement, probably at a meeting coinciding with the APEC Economic Leaders' Week in Bali in early October.

And among the controversial demands the US is making for TPP are most of those that Australia rejected in AUSFTA, including ISDS provisions. America is intent on stitching up this agreement; it was among the subjects of conversation during President Obama's first, congratulatory phone call (http://www.smh.com.au/federal-politics/barack-obama-calls-to-congratulate-tony-abbott-and-discuss-syria-20130913-2to7o.html) after Tony Abbott's election victory.

The irony is that if Australia does sign up, it does not gain any trade benefits with America over and above those already included in the AUSFTA deal.

What it *does* get is greater access to the markets of those other signatories. But it also opens itself up to legal action from big corporates in those countries, and in the US.

Now, a little history.

As we said above, the Howard government resisted the inclusion of investor-state dispute resolution provisions in the free-trade agreement with the US. Dr Patricia Ranald, convenor of the Australian Fair Trade Investment Network (AFTINET), says Australia is the only country to have successfully resisted the US insistence on ISDS clauses in its trade deals.

The Howard government's position was not, however, one of blanket opposition to ISDS provisions in trade deals. It maintained the previous, bipartisan position that ISDS provisions should be considered on a case-by-case basis.

This attitude changed, though, under the next, Labor government, following a 2010 inquiry by the Productivity Commission, which found (http://www.pc.gov.au/__data/assets/pdf_file/0010/104203/trade-agreements-report.pdf) few benefits and "considerable policy and financial risks arising from ISDS provisions".

In 2011, the Australian government declared it would not agree to ISDS provisions under any circumstances. The wording of a statement from the Department of Foreign Affairs and Trade was unequivocal. It said, in part:

"… 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 Australian governments to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses."

It continued, making specific reference to two of the chief concerns over potential legal action that might be brought under an ISDS:

"The Government has not and will not accept provisions that limit its capacity to put health warnings or plain packaging requirements on tobacco products or its ability to continue the Pharmaceutical Benefits Scheme …"

> *Australia is the only country to have successfully resisted the US insistence on ISDS clauses in its trade deals.*

And the statement brushed off any suggestion that Australian businesses needed the protection of such arrangements.

"In the past," it said, "Australian Governments have sought the inclusion of investor-state dispute resolution procedures in trade agreements with developing countries at the behest of Australian businesses. The Gillard Government will discontinue this practice. If Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit to investing in those countries …"

Craig Emerson, who was Australia's trade minister at the time (and who retained the portfolio until Labor's recent election loss to the Tony Abbott Coalition), insists today that the policy shift was made with no significant opposition.

"No one in the business community thought that an odious position," he tells *The Global Mail*.

And the evidence coming out of countries that did sign on to trade deals including ISDS provisions shows the "folly" of it, he says.

Emerson cites an example from Canada where, in 2011, the province of Quebec called a moratorium on the controversial gas extraction method called fracking (hydraulic fracturing) while it undertook an evaluation of the possible resulting environmental damage.

Well, a United States company, Lone Pine Resources, which operates out of Calgary but is incorporated in the US tax-haven state (http://www.nytimes.com/2012/07/01/business/how-delaware-thrives-as-a-corporate-tax-haven.html?pagewanted=all&_r=0) of Delaware, decided to take action under the ISDS provisions of the North American Free Trade Agreement, (NAFTA), to which Canada, the US and Mexico, are signatories. It sued (http://canadians.org/media/water/2013/14-May-13.html) for C$250 million. (http://canadians.org/media/water/2013/14-May-13.html)

Emerson could equally have pointed to a large number of other actions taken by US corporations against countries with which it has trade pacts involving ISDS. Consider a couple of Canadian cases, for example. There was a C$500 million suit (http://www.theglobeandmail.com/report-on-business/international-business/us-business/lilly-ramps-up-nafta-fight-over-loss-of-patents/article13223813/) by the giant drug maker Eli Lily in response to a Canadian-court-ordered invalidation of the patents of two of its drugs, Strattera and Zyprexa.

(http://m.theglobeandmail.com/report-on-business/international-business/us-business/lilly-ramps-up-nafta-fight-over-loss-of-patents/article13223813/?service=mobile%23!/)

And another action by Dow AgroSciences LLC, for losses allegedly caused by a ban imposed by Quebec on the sale and certain uses of lawn pesticides containing the active ingredient 2,4-D.

Emerson points also to the problems caused by trade deals that Australia has already entered into, such as the action now being pursued by the tobacco company Philip Morris over Australia's plain-packaging laws for cigarettes, as good reason to eschew such provisions in future.

> *"The Government has not and will not accept provisions that limit its capacity to put health warnings or plain packaging requirements on tobacco products or its ability to continue the Pharmaceutical Benefits Scheme ..."*

You're probably familiar with the fact that a group of tobacco companies including Philip Morris brought a case to the Australian High Court (http://www.ag.gov.au/internationalrelations/internationallaw/pages/tobaccoplainpackaging.aspx), on the basis that the government had effectively stolen its intellectual property by enforcing plain packaging. It got lots of media coverage.

Less publicised is the fact that having failed in the High Court, the company now is pursuing the matter via a bilateral trade agreement signed between Australia and Hong Kong in the early 1990s, which includes ISDS provisions.

The contempt such an action shows for Australian legal process and sovereignty, says Patricia Ranald, is plain.

"They're saying: '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'."

But that's not the half of it. The tribunals which decide these cases, Ranald says, are not like courts as we usually understand them.

"The arbitrators can be advocates one week and arbitrators the next. Generally they favour the investor because they look at it in a business framework and not at the public purpose of the legislation."

Ranald is far from alone in making this criticism. The UN Conference on Trade and Development (UNCTAD), which oversees such disputes (to the extent that anyone does), itself acknowledges huge flaws in the system of dispute resolution.

In a 2013 report, UNCTAD conceded an urgent need for reform, noting:

"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."

Matters of transparency, or the lack thereof are of particular concern.

Even UNCTAD, in its comprehensive survey of ISDS cases brought in 2012 (http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf), said: "For five cases, the applicable arbitration rules/venues are unknown."

Some of the actions pursued are so confidential that often even the existence of a claim is kept secret from the people of the country being sued.

In short, just about every aspect of the system was declared deficient by UNCTAD. Its report (http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf) canvassing the problems and possible reform measures makes for troubling reading.

Among other things, it notes: "In many cases foreign investors have used ISDS claims to challenge measures adopted by States in the public interest (for example, policies to promote social equity, foster environmental protection or protect public health)."

Little wonder then that groups concerned for the future of measures safeguarding such policies in Australia are unhappy.

The progressive think tank, the Australia Institute, put out a statement within hours of the release of the Coalition Trade policy, attacking the Coalition's "hidden agenda" which would see "health and the environment sacrificed for free trade".

It highlights the threat that ISDS provisions pose to pharmaceutical, tobacco and environmental legislation in particular.

"A very topical example at the moment is coal seam gas," the Institute says. "As new information is collected and disseminated governments may want to act to control that activity. Governments would be loath to act if they were liable for massive payouts to foreign companies.

"The Howard Government successfully resisted pressure from the US Government but now the Coalition has signalled its intention to sell out Australian sovereignty."

The Institute notes, as the Productivity Commission and the previous government had noted before it, that ISDS clauses effectively give "foreign companies much stronger rights than Australian companies".

"Australia has a very high share of foreign ownership in mining and manufacturing so the issues involved with investor-state dispute settlement mechanisms are likely to severely impact Australia."

Ranald and AFTINET followed up a few days later with a release noting that closed meetings between representatives of the nations involved in the Trans-Pacific partnership agreement were continuing in Washington.

She expressed concern that the new Abbott government could "cave" almost before it had been sworn in.

"The US is exerting huge pressure on the Australian Government to agree to investors' right to sue governments as they push to finish the deal this year," Ranald said.

Ranald called on the new government to "support the right of Commonwealth and State governments to legislate for health and environmental purposes, and to reject proposals for foreign investors to be able to sue them for hundreds of millions of dollars.

> *"In many cases foreign investors have used ISDS claims to challenge measures adopted by States in the public interest (for example, policies to promote social equity, foster environmental protection or protect public health)."*
>
> ***– UNCTAD REPORT***

"We also call for the release of the full text of the TPPA for public and Parliamentary debate before it is signed by Cabinet," said Ranald.

We might add that provisions of the Trans-Pacific partnership are increasingly encountering resistance (http://www.nationmultimedia.com/aec/TPP-discussions-hit-snag-30213455.html) within other negotiating nations, which are concerned that the American agenda is more about protecting the interests, particularly the intellectual-property interests, of its big corporations than it is about free trade. (http://www.nationmultimedia.com/aec/TPP-discussions-hit-snag-30213455.html)

Even on the home front, the US administration is copping heat for its uncompromising determination to protect corporate interests, including those of tobacco companies.

Michael Bloomberg, billionaire mayor of New York City and anti-tobacco campaigner, weighed in with an impassioned piece on the opinion page of *The New York Times* on August 22, calling President Obama out for caving in (http://www.nytimes.com/2013/08/23/opinion/why-is-obama-caving-on-tobacco.html?_r=0) to tobacco interests, by removing so called "safe harbor" provisions from the TPP, which would have exempted tobacco from the right to bring ISDS actions.

Bloomberg noted that the industry was "increasingly using trade and investment agreements to challenge domestic tobacco control measures.

"If the Obama administration's policy reversal is allowed to stand, not only will cigarettes be cheaper for the 800 million people in the countries affected by the trade pact, but multinational tobacco corporations will be able to challenge those governments — including America's — for implementing lifesaving public health policies," he said.

If the TPP were to proceed as currently drafted, Bloomberg said, it would be "a devastating setback for the global effort to reduce tobacco use, particularly because the signatories to the trade pact include nations — like the United States, Australia and Vietnam — that have some of the world's strongest tobacco control measures".

We could go on, citing the list of well-intentioned and well-informed individuals and organisations warning of the dangers of investor-state dispute settlement processes. But the point is surely made by now.

The question is, why would an incoming Coalition government apparently be so keen on ISDS provisions in trade agreements, compared even to the previous conservative government?

Notwithstanding Craig Emerson's claim that business groups were relaxed about his government's decision to abandon ISDS clauses, some are clearly not.

In particular, this country's largest business organisation, the Australian Chamber of Commerce and Industry (ACCI), is an

enthusiastic booster of both the Trans-Pacific Partnership and the inclusion of ISDS provisions in trade agreements.

ACCI Director of Trade and International Affairs Bryan Clark says his organisation's view is that such provisions protect Australian companies in their dealings with foreign governments.

He says that, without recourse to international dispute settlement, "Australian firms … could have their assets or their capacity to repatriate profits curtailed or removed entirely. We want to make sure Australian firms are not impeded in their dealings internationally."

That does not mean ACCI wants ISDS provisions in all trade agreements. Apparently, there are some countries whose governmental and legal processes can be trusted, and others whose processes can not.

"We are quite comfortable with the arrangements we have with New Zealand and the United States, for example. But there are other countries where you wouldn't be so confident.

"Our view is that you need to give latitude to the trade negotiators … to work out what's the best deal. Not to have them hamstrung by this blanket opposition. What we've seen is that the [Labor] government wasn't able to complete very many negotiations during the last term, and there are cases like the Korean deal, where it [ISDS] was the main sticking point. And it has come up in the TPP and with Japan and other countries as well," he says.

Australia already has some 27 bilateral investment treaties and free-trade agreements, Clark says, and "until recently it hasn't caused any problems".

But what about the Philip Morris action? What about the Howard government's distrust of the US trade deal? What about the fears of civil-society groups concerned about health, social and environment policy?

Well, says Clark, it's a matter of different perspectives, and, "whether you take the defensive view of the Australian domestic economy, or an offensive view of Australia's international trade relationship.

"We're taking the offensive view, in support of Australian firms wanting to move out into the world."

And anyway, he says: "The Australian Government should be smart enough to figure out how it can manage our internal domestic affairs without triggering breaches of our international treaty obligations."

No worries then, so long as the Abbott government is smarter than the US trade negotiators, smarter than other governments, such as Canada's, which have been entangled in destructive legal actions, and smarter than the high-powered lawyers of the multinational corporations.

No worries at all. Right?

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by TechinBris

I am sorry, but this is right on the money for what I expect from the Licentious Nasty Party. No surprise at all considering who their financial backers are.

September 26, 2013 @ 1:40pm

by Phil Gorman

And where is Australia's Fourth Estate in all this? How many Australians are even aware of the Trans-Pacific Agreement, let alone it implications for our soveriegnty, values and way of life. We are walking into a nightmare of corporate World domination.

Be afraid; be very afraid.

September 26, 2013 @ 3:55pm

by stoic

Excellent article Mike, thanks.

All we need now is to know the Shadow Ministry so we can start exerting pressure on them to exert pressure on the new Government before it's too late to stop the Free Trade Juggernaut.

September 27, 2013 @ 10:29am