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Canada Demands Controversial Investor Rights Clause

By Allison Lowe

April 15, 2014

An ISDS clause gives foreign investors the right to sue a government if the company's business interests and investment returns are adversely affected by national policies.

Proponents of ISDS have argued that it allows investors to protect their investments in situations where the judicial system of the host country may be weak or lacks independence, and that states and their governments are bound by public international law, which includes bilateral investment treaties and international investment agreements.

International opponents, who first stood up against the clause when it was included in the North American Free Trade Agreement (NAFTA), say it allows big businesses to run roughshod over national interests in areas ranging from health to labor rights and environmental protection.

In a recent forum on The Bahamas' accession to the World Trade Organization (WTO), Pinder said the government has concerns about the implications of including such a clause in the Caribbean-Canada Trade Agreement (CARIBCAN), which is now being renegotiated by CARICOM (Caribbean Community) on behalf of the region with Canada.

The agreement covers trade in goods as well as services and investments. Presently, Canada already has a significant presence in The Bahamas as an investor in the financial services sector, with Scotiabank (Bahamas), RBC (Bahamas) and CIBC FirstCaribbean International Bank (Bahamas) all being Canadian owned.

"That's one area of negotiation ongoing now with Canada and CARICOM, because Canada wants an investor-state dispute clause where investors can potentially sue the government. Well, we take a little bit of a different position on that, where if we negotiate that we can maybe carve out for corruption and fraud and those types of things, but who knows if you leave it too open ended what the result is," said Pinder.

He compared the demand from Canada with the WTO's approach to similar situations. Under WTO rules, a company must persuade a sovereign nation that it has been wronged, leaving the decision to bring a trade case before the WTO in the hands of elected governments, avoiding the prerogative of corporations to unilaterally bring trade cases against sovereign countries – a potentially significant legal burden for a small country like The Bahamas.
While it withstood opposition during the negotiation of NAFTA, the ISDS clause has become increasingly controversial on an international scale.

A recent article in Forbes.com highlighted eight reasons why the U.S. government should "purge" demands for ISDS from the Trans-Pacific Partnership (TTP) and Transatlantic Trade and Investment Partnership (TTIP) negotiations that it is presently conducting.

The article is based on a paper recently published by the Cato Institute, a libertarian, pro-free trade think tank, which claims that demands for the ISDS have derailed U.S. advances towards further trade liberalization, and should therefore be "purged" as a compromise in achieving this ultimate objective.

Noting that the TPP and TTIP negotiations have run into the "usual objections from the usual suspects — labor unions blaming trade for manufacturing decline and job loss; environmental groups blaming trade for climate change; anti-globalization activists sparing the developing world from development," the Cato Institute concludes that beneath the "hyperbole" and "vacuous, anti-capitalist hyperventilation" about the agreement is a "kernel of truth".

"(This is that the) so-called investor-state dispute settlement (ISDS) mechanism, which enables foreign investors to sue host governments in third-party arbitration tribunals for treatment that allegedly fails to meet certain standards and that results in a loss of asset values, is an unnecessary, unreasonable, and unwise provision to include in trade agreements.

"Although detractors may not know it by name, ISDS is a significant reason why trade agreements engender so much antipathy. Yet, ISDS is not even essential to the task of freeing trade, so why burden the effort by carrying needless baggage?" said the institute.

In Australia, a bill introduced by Senator Peter Whish-Wilson, which would ban trade agreements between Australia and other countries that include ISDS clauses, has been garnering support.

Pensioner and religious groups have supported a bill to ban ISDS clauses in international trade and investment agreements, raising concerns such as higher medicine prices and the loss of Australian sovereignty, according to The Guardian of London.

The Combined Pensioners and Superannuants Association of New South Wales (CPSA) has joined the Catholic organization, the Conference of Leaders of Religious Institutes NSW (CLRI), which represents a membership of 3,500 nuns, priests and brothers, to condemn the use of ISDS clauses in its submissions to a Senate committee.

The CPSA submission said it was "troubled by the heavy influence of U.S. corporations" and the reduced capacity of the government to make laws for the Australian people.

In 2011, Australian Trade Minister Craig Emerson, said he would not support any deal that gave greater rights to foreign businesses than domestic firms.

Pinder's recent disclosure about the contention over Canada's efforts to include an ISDS in its trade deal with The Bahamas come as both he and Prime Minister Perry Christie have indicated that there have been challenges in finalizing a new trade deal with Canada, which would enable the country to avoid steep increases in duty rates being charged on goods exported to Canada, ranging from crawfish and fuel to pharmaceuticals and salt.

Prior to Pinder's comments regarding the ISDS, the major sticking points holding up the deal had not been entirely clear.

However, in a recent presentation to the National Conclave of Chambers of Commerce, Pinder called the trade agreement talks "very tenuous", and, in a recent address to the University of the West Indies on this nation's relations with CARICOM, Christie lamented that The Bahamas has not been able to conclude a trade agreement with Canada.

The prime minister pointed to that The Bahamas had supported Canada when it resisted the movement of the headquarters of the International Civil Aviation Organization (ICAO) from Montreal, and said the fact that the two countries' "traditional friendship" had not yet led to The Bahamas being able to bring closure to a new trade deal was evidence of what he termed a "fundamental disequilibrium".