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Chair

Mr. John Cannis

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● (1535)

[*English*]

The Chair (Mr. John Cannis (Scarborough Centre, Lib.)): I call this meeting to order.

Today, ladies and gentlemen, we're going to be dealing with Canada-U.S. trade issues vis-à-vis NAFTA chapter 11.

I'll introduce our witnesses, especially the witness we have from Mexico via teleconference, and I'll explain the procedure.

From the Executive Commission of the Mexican Action Network on Free Trade, we have Mr. Alejandro Villamar Calderon, a professor at several Mexican universities and an expert on investor-state cases in Mexico.

We also have with us, from Common Frontiers, Mr. Rickard Arnold, coordinator; from KAIROS, Canadian Ecumenical Justice Initiatives, Rusa Jeremic; from Réseau québécois sur l'intégration continental, Normand Pépin; from the Canadian Union of Postal Workers, Deborah Bourque, president and national president of the national executive committee; and from the Canadian Labour Congress, Pierre Laliberté, principal economist. Let me welcome you to our committee.

We're just trying to get our witness from Mexico, Mr. Villamar Calderon, online. Due to time constraints on his side, the procedure we'll follow is that he will make his presentation, and then we'll go right into questions with him so that you can have those answered by him, which will then permit him to go on with his other responsibilities. Following that, we'll go to the other presentations, if that's okay. We'll just ask your indulgence on that.

They're going to do their utmost with translation.

Mr. Calderon, welcome to our committee. Today we'll be discussing Canada-U.S. trade issues, specifically NAFTA chapter 11.

My name is John Cannis. I chair the Subcommittee on International Trade, Trade Disputes, and Investment of the Standing Committee on Foreign Affairs and International Trade.

We have with us representatives from the various parties of the Parliament of Canada. We're all in agreement here that you go ahead with your presentation, and immediately thereafter members of the committee will pose questions.

We'll do a ten-minute presentation, Mr. Calderon. Is that basically what you have time for?

Professor Alejandro Villamar Calderon (Professor at several Mexican Universities, Expert on Investor-State cases in Mexico, Executive Commission of the Mexican Action Network on Free Trade): My name is Alejandro Villamar Calderon. I'm a member of the Mexican Action Network on Free Trade.

Thank you all for these hearings. Permit me to share briefly some important facts related mainly to NAFTA chapter 11 impacts on Mexico. But first, permit me to ask you, what is the reason that a trade agreement would include one chapter on matters that are not directly trade-related?

For years, under NAFTA rules in the TNC's hands, the Mexican government has lost important battles on constitutional law powers and faculties to rule the country's development. These rules that adopt reforms into Mexican secondary law have been permitted, for instance, to cause us to lose control of our domestic financial system. To date, it's only one small Mexican bank, but 95% of the banking assets are under the control of foreign investors.

The Chair: Mr. Calderon, I must interrupt you for a moment. I've been told there's some difficulty with the interpretation.

I would beg your indulgence. I've been asked to suggest that you go a little bit slower and speak a little bit louder so that the interpreters can pick up your presentation and interpret it as accurately as possible.

Prof. Alejandro Villamar Calderon: I think that today only one small Mexican bank has 95% of the banking assets that are under the control of foreign investors in Mexico. But maybe this is some "minimal harm", given that the NAFTA investor chapter contained provisions—really new rights and privileges—that allow foreign investors to sue national governments for actions tantamount to expropriation of their investments. This language is so broad that it in effect establishes a right for private investors to seek compensation if any government action reduces in any way the investor's property value or expected profits.

Already this provision has been used to attack a host of legitimate environmental, social, or economic measures. Some researchers have calculated that in the first 10 years of NAFTA, with only 2,000 cases filed, an astonishing $13 billion U.S. has been claimed by corporations in their initial filings: $1.7 billion from U.S. taxpayers, $294 million from Mexican taxpayers, and a whopping $11 billion from Canadian taxpayers.

For example, in January 1997 the U.S. firm Metalclad challenged a Mexican municipality's refusal to grant construction permits for a toxic waste dump and a state declaration of an ecological zone. Metalclad company claimed $90 million against the Mexican government, and the NAFTA investor tribunal ordered Mexico to pay Metalclad $15.6 million at least. Another five cases filed against the Mexican government are pending.

The more recent cases against Mexico are related, on the one hand, to the sovereign right to defend farmers of sugar cane, workers in sugar mills, and the Mexican sugar industry. More than 300,000 Mexican direct employees and around 1.2 million indirect employees are in the race to lose more than $150 million U.S. by the illegitimate demand of U.S. sugar concerning high fructose corn syrup as national companies used chapter 11.

On the other hand, in the last shining example of how chapter 11 can be used by corporations to obtain compensation for illegal activities, there is the case of International Thunderbird Gaming Corporation, a Canadian company with a business office in San Diego, U.S., involved in gaming and entertainment operations in Latin America. In 1992, Thunderbird filed a NAFTA investor-state claim at UNCITRAL seeking damages in excess of $100 million for illegal violation of NAFTA chapter 11. I remind you that casinos have been illegal in Mexico since 1934, and in 1947 the Mexican congress banned all forms of gambling.

As you know, in 1998, one year after the Metalclad case, Canada was all set to settle a NAFTA complaint filed by the Virginia-based Ethyl Corporation over Canada's ban on MMT. One year later Canada also confronted the S.D. Myers case on importing hazardous PCBs from Canada for incineration in the United States. In 1999, Canada's Methanex sued the U.S. government for phasing out the cancer-causing gasoline additive MTBE.

NAFTA's investor protections are unprecedented in multilateral trade agreements. Corporate investors in all three NAFTA countries have used these new privileges to challenge a variety of national, state, and local environmental and public health policies and domestic judicial decisions as NAFTA violations. But these NAFTA investment rules and privileges for foreign investors go significantly beyond the rights available to Canadian, U.S., or Mexican citizens or businesses in domestic law of the three countries.

● (1540)

NAFTA also provides foreign investors with the ability to privately enforce the new investor rights, called “investor-to-state” dispute resolution. This extraordinary mechanism empowers private investors and corporations to sue NAFTA signatory governments in special private tribunals to obtain cash compensation for government policies or actions that investors believe violate their new rights under NAFTA.

The dispute resolution system of NAFTA chapter 11 is a Middle Ages inquisition. The scene is behind closed doors. Information about the case is difficult to obtain. Indeed, there is no requirement that the public or Congress be given notice on NAFTA chapter 11 cases that have been filed against Canada, the United States, or Mexico.

In other words, NAFTA's investment rules contain a private law and private tribunals to evade public interest and public dispute. Then, we the citizens—and the parliamentarians too—are in front of the erosion and attacks on the principle of sovereign immunity. But even more, corporations use chapter 11 not for a defence, but to offend the state and the citizens.

Then, if a foreign corporation can override the efforts of elected governments to protect the rights of its citizens and the integrity of its sovereignty, democracy itself is undermined, or it's clearly bankrupting democracy.

Thank you very much.

● (1545)

The Chair: Mr. Calderon, thank you very much for your presentation.

I would now ask members of the committee for any questions they might have for Mr. Calderon.

Mr. Menzies.

Mr. Ted Menzies (Macleod, CPC): Thank you very much, Mr. Calderon, for your comments. It's very interesting to hear. Isn't this technology wonderful? You didn't have to travel very far to get to Canada, so that's wonderful.

I think we have a concern very similar to what you do, living with this large trading partner across the border from us. We've had many issues. In fact, I believe your country got involved in the BSE issue. We had hopes of actually exporting beef through to Mexico, because you people had the foresight to believe that our Canadian beef was safe. The Americans, unfortunately, didn't want it travelling through their country to get to your country, so unfortunately, neither one of us was able to achieve our goals.

I have a question. Do you think chapter 11 has been successful and is our best tool, or do we need to come up with some better dispute settlement mechanisms?

Prof. Alejandro Villamar Calderon: I think it's very successful for corporations, but not for states and not for citizens. The fines, and the mechanism of dispute resolution, are totally against the citizens.

I don't know if it is possible to introduce changes because you intend to transform a tiger into a vegetarian. I think it's important to protect the national tribunals and national laws, and all these international mechanisms need to be maintained between private firms, but not the corporations against the state.

The Chair: Thank you.

Thank you, Mr. Menzies.

Mr. Julian.

Mr. Peter Julian (Burnaby—New Westminster, NDP): Thank you very much, Señor Calderon.

I'd like you to take us through the issue with Metalclad and San Luis Potosi in more detail as to what happened with that municipality, what the end results have been, and further to that, what has been the impact on other local municipalities in Mexico given the results of chapter 11 in this case. That will be my first question to you—what the Metalclad case has meant to that particular municipality and what it has meant to local governance and state governance in Mexico.

Prof. Alejandro Villamar Calderon: Related with the Metalclad case, the municipality and the state have the right to obtain or give permission for these toxic dumps, but the municipality doesn't give this permission to the company and the state. This is a complicated case because there was also some corruption action from the provincial government. So after some clarification and the resistance of the municipality, the people, the national government finally denied permission to the company in more clear terms. But this was used by the company to sue the Mexican government.

The impact is we continue with these toxic dumps and they contain more than 200,000 tonnes of toxic waste from different companies. They have not been attended to and not cleaned up, either by Metalclad, which did not live up to its compromises, or by the government. There continues to be impact on the municipality, on the environment, and on the health of the population.

● (1550)

Mr. Peter Julian: Have you had any indication or have you seen any studies on the health impact in that municipality and in the area? You mentioned 200,000 tonnes of toxic waste. The municipality was prevented from refusing to provide a permit, so in a sense it was forced upon the municipality as a result of chapter 11 provisions. What has been the impact on the health of people in that area?

Prof. Alejandro Villamar Calderon: Unfortunately, in Mexico we do not have toxic studies or health studies on the impact on the population. The testimonials from many people are that they are affected by several diseases. They also give testimony in public areas, in the local parliament, that they are affected. But unfortunately, I repeat, the Mexican government doesn't have and doesn't carry out epidemiological studies.

Mr. Peter Julian: You've heard some of the anecdotal evidence that people locally have expressed of the impact, right? You're aware of some of the stories that people have brought up?

Prof. Alejandro Villamar Calderon: I believe the professional opinion of medical experts in the region is that it's very important to handle this problem with concrete and serious medical studies. If the government doesn't make these medical studies, the people have the right to express their opinion, but it's very difficult to take decisions in the absence of scientific data. But what is worse is it's difficult to take decisions in the absence of the government's political will.

Mr. Peter Julian: As a result of this decision with Metalclad, have other Mexican municipalities changed what they would normally do—the kinds of decisions they would normally take?

Prof. Alejandro Villamar Calderon: I think the lesson of the Metalclad case is that the government is now starting to listen to protests from the population. We have a serious problem in Mexico with toxic waste, and this is not being addressed as a serious policy of the government. Even now, under the Commission for Environmental Cooperation of NAFTA, it is not being treated in a serious way.

Mr. Peter Julian: My next question is regarding NAFTA and Kyoto. Do you believe that companies could choose chapter 11 provisions to push back Kyoto measures that are being taken in Mexico or Canada, for example?

● (1555)

Prof. Alejandro Villamar Calderon: It's difficult to give a substantial opinion. I think my government is confronting a serious problem related to this, because very recently our parliament ratified the Kyoto agreement, but the U.S. didn't. I think it's very important to give attention to this problem. In the NAFTA area, how can corporations use the situation in which the main member of this region is not participating in the Kyoto Protocol? I think this is dangerous for the other two members of NAFTA. They can use it, but it's theoretical.

Mr. Peter Julian: Thank you.

My next question is on the figures you gave earlier. You gave amounts for taxpayers in Canada, in the United States, and in Mexico subject to chapter 11 claims. Could you repeat those figures, please?

Prof. Alejandro Villamar Calderon: Yes. It is an assumption made by different researchers, and we have a study on this. The accumulations in the first 10 years are $13 billion in the initial filing, with $1.8 billion from U.S. taxpayers, $294 million from Mexican taxpayers, and a whopping $11 billion from Canadian taxpayers. These figures did not include $245 million for the last two cases. But I am sure we need to update these figures, because in the last year there have been other cases.

Mr. Peter Julian: Thank you for that. So there have been over $13 billion in claims, which is a huge amount. Now a lot of these cases are still pending. What amount has been paid out thus far, or will be paid out as a result of court decisions thus far?

Prof. Alejandro Villamar Calderon: For Mexico?

Mr. Peter Julian: For all three countries—the amounts that have either been paid or been mandated to be paid.

Prof. Alejandro Villamar Calderon: I don't have the precise figure. I can speak only about the Mexican case, and that was exactly $17.8 million for the Metalclad case. Two more cases were denied by the tribunal, but the total amount for the new five cases against Mexico is around $600 million.

Mr. Peter Julian: So $600 million has actually been paid or is mandated to be paid.

Prof. Alejandro Villamar Calderon: No, they paid only $17.8 million. The demand for the new cases has an accumulated amount of $600 million.

● (1600)

Mr. Peter Julian: I see. Thank you.

The Chair: Madam Jennings.

Hon. Marlene Jennings (Notre-Dame-de-Grâce—Lachine, Lib.): Thank you very much, Professor Calderón.

To come back to the issue of the claims that had been filed under chapter 11, the amounts that are being claimed under the suits, and then the amounts that have actually been paid out where the suit has been successful and damages have actually been ordered to be paid, could you give us that specific information?

Prof. Alejandro Villamar Calderon: Unfortunately, no. At this moment, we have only the accumulated demand and in some cases the amount that was paid by the Mexican government, but we do not have all the details about the Canadian or U.S. cases.

Hon. Marlene Jennings: So you have the total amount that's being claimed against the Mexican government since NAFTA came into effect, which is some $600 million—

Prof. Alejandro Villamar Calderon: It is around $600 million.

Hon. Marlene Jennings: But the actual amount paid out by the Mexican government is $17.8 million since NAFTA began.

Prof. Alejandro Villamar Calderon: That's correct.

Hon. Marlene Jennings: Okay, thank you.

Prof. Alejandro Villamar Calderon: I would like to add that if we don't even have access to all cases, it's difficult for researchers, citizens, and parliamentarians to know the exact figures of these demands.

Hon. Marlene Jennings: And you're not aware of the number of cases that have been filed in the United States against the American government under chapter 11 and the total filed against the Canadian government under chapter 11. You don't have those figures.

Prof. Alejandro Villamar Calderon: I don't, but I don't think many other common parliamentarians or citizens have any access to these true figures either. You can turn to the web page of the tribunal, but it's clear for researchers involved in these cases that not all the cases that the tribunal attended to are on the web page, because that is not information open to the public.

Hon. Marlene Jennings: Okay, thank you.

I have another point. I didn't quite understand the piece that you were talking about, but there was a figure of $10 billion or so. I apologize, but I missed what exactly the point was. Could you repeat that for me?

Prof. Alejandro Villamar Calderon: What was it related to?

Hon. Marlene Jennings: It was related to wine and water. Was it a claim? Was it a suit that was brought against one of the three countries, with a claim of some $10 billion in damages? Is that what you were talking about?

Prof. Alejandro Villamar Calderon: The total claim was $13 billion. That includes $11 billion from Canada, $1.7 billion from the U.S., and $294 million from Mexican payers. This is the amount claimed in the first ten years of NAFTA.

Hon. Marlene Jennings: Claimed?

Prof. Alejandro Villamar Calderon: Yes, claimed.

Hon. Marlene Jennings: It's the amount claimed.

● (1605)

Prof. Alejandro Villamar Calderon: Yes.

Hon. Marlene Jennings: This may be *une déformation*. I don't know how to say that in English.

I am a lawyer by training, so I know there are damage suits that are filed before the court. I could file a claim tomorrow against the chair for $10 billion. That doesn't mean that it's founded, and even if it was founded, that I would be able to prove that amount of damages.

That's why I'm really curious. I asked about the actual amount that had been paid out where there has been a ruling by the tribunal under NAFTA, and the actual amount of damages that was ordered to be paid compared to what the plaintiff, the investor, was claiming in the suit for damages.

In Canada, if I look at personal damages, for instance, one can research the types of damage cases and get a sense of where the courts are going to rule, if all of the stars are aligned and the plaintiff wins the case. It's unlike the United States, where someone gets $100 million in punitive damages because of dropping a McDonald's coffee on his or her lap.

I'm not trying to belittle this. I'm trying to get a good sense of whether there have been enough cases in which there have been rulings to give us a sense on where the tribunals are going.

Prof. Alejandro Villamar Calderon: You are right. I agree with you. It's a different climate for the final amount to be paid, but I used this figure because you keep asking about the amount of challenges for our countries. Of course, it is only one signal of the threats to citizens in the states. The question here is not only on the amount of the claim; the question is on the nature of the claim. I think it's very important to return to the nature of the claim and how it affects the sovereignty of the states.

I don't know how it is in Canada, but in Mexico, through the constitution and national tribunals, it's impossible for corporations to make a demand of a state itself. It can make demands of the state-owned companies, but not the state itself. Even more, in the national constitution before NAFTA, it was impossible that foreign companies could demand a claim in the international tribunals because it referred to the national tribunals as the correct place to attend to these kinds of claims or demands.

Hon. Marlene Jennings: Thank you.

The Chair: Thank you very much, Mr. Calderon. It has certainly been very informative.

As frustrating as it is, if I may add my two cents to this, the dispute resolution mechanism sometimes makes it very frustrating. We are dealing with the softwood lumber situation here in Canada. I've heard from various individuals that we have to fine-tune it and take some of the bugs out of the system. It becomes very frustrating when there are rulings and endless appeals and we're dealing with different jurisdictions.

As one closing comment, indeed this dispute resolution mechanism that exists today tends to be a little cumbersome. Do you have any suggestions on how we could possibly enforce rulings in a more expeditious way?

Prof. Alejandro Villamar Calderon: Beyond the technical proposals, which are far from my thoughts at this moment, I think it is more important that parliamentarians need to be sensitive to the demands of the population in the three countries. The citizens from the three countries share the same concern related to chapter 11. We think that the best way is to analyse and review this chapter and to create a common position related to this.

At least in Mexico the parliamentarian is out of this issue by the same rules of NAFTA. I think it is a very complicated problem. I think it is important to put this in the public arena of discussion. It is particularly a matter for the parliamentarians. The parliamentarians are the representatives of the citizens.

● (1610)

The Chair: Thank you very much for that comment. I want to thank you for sharing your time and knowledge in this area with us.

I speak on behalf of my colleagues in this committee. We wish you all the best. Enjoy your warm weather down there, as we are enjoying a very lovely winter here. Thank you again for being with us today.

Prof. Alejandro Villamar Calderon: Thank you.

The Chair: Colleagues, I am not sure, but I believe I forgot to introduce Mr. Rémi Bachand.

Anyway, we'll go into the next phase of our work and we'll have a short presentation from Mr. Rickard Arnold.

Mr. Rickard Arnold (Coordinator, Common Frontiers): Thank you very much for inviting us here today as witnesses.

Just before I start, I do wish to point out that my colleague here, Rusa Jeremic, will address some of the questions you just raised in terms of total damages awarded and numbers of cases being disposed at this point; she will have some information on that.

My brief remarks are just introductory, and then Rusa will take over with a more substantial brief.

I did want to plug in here with the committee as to the last substantial document that was on the table from the standing committee, the one entitled “Partners in North America: Advancing Canada’s Relations withthe United States and Mexico”, which came out in December 2002. In that document, if you recall, recommendation 21 dealt with the question of NAFTA chapter 11, raising some concerns that were addressed to the government for a response. I just draw your attention to the fact that the government did of course respond in 2004 but used five small paragraphs to respond to recommendation 21. We think this is highly inadequate, given the seriousness of what NAFTA chapter 11 poses.

There are colleagues here at the table who will be intervening in a moment, and I just wanted to make the following observations. Another document that I think is important but for which the timing was very unfortunate is the Romanow commission report. Remember, in November 2002 that report came out with a blueprint for the future of Canada's health care system. A lot of that document, that commission's work, has been paid attention to by the government and by others in terms of reformulating our health care system.

But chapter 11—the aptly named chapter 11—of that very same document has been totally ignored, in our estimation. That chapter is actually an analysis of the impact chapter 11 of NAFTA may have on the current and future possibilities for Canada expanding its health care system. I want to bring that to the committee's attention, because nobody has responded to it. The government has not responded or, in our estimation, paid any attention to that particular chapter.

I do also want to say that since that document of the standing committee was issued in December 2002, Common Frontiers, along with the Réseau québécois sur l'intégration continentale and the Council of Canadians, held a petition ballot campaign in the year 2003, and we collected over 120,000 signatures of people specifically calling for an end to the NAFTA investor-state provisions.

The Kyoto Protocol has already been on the discussion table with Mr. Villamar, so I won't spend any more time on that, but I do bring to your attention an article that was in Monday's *Toronto Star* called “NAFTA shadow hangs over Kyoto”. The author, from the University of Guelph, is saying that in fact Kyoto and NAFTA are on an ideological and legal collision course.

In a moment you will hear from another of our colleagues here regarding one specific case, and I think she will be mentioning as well the constitutional challenge launched by the Council of Canadians and the Canadian Union of Postal Workers that was heard in the superior court of Ontario at the end of March. I believe she will be making some more comments on that particular case, which we feel to be very significant.

In my closing remarks I would just like to ask the committee, after they have heard the submissions from the witnesses today, to seriously consider whether this question of NAFTA chapter 11 could be put on the agenda of the Standing Committee on Foreign Affairs and International Trade for a full and comprehensive review.

● (1615)

We understand that, given the vote that went down in the House yesterday, SCFAIT will probably have a longer period of time together. I presume it will not be separated in the foreseeable future.

The other thing we would like to suggest for your consideration is on this question of democratic deficit. Mr. Villamar made some allusions to how Parliament weighs in on these questions of international trade policies, directions, and decisions.

I do want to bring this to your attention, because in our estimation the Parliament in Canada has relatively little if anything to say on international trade negotiations, particularly as many of these have a track record of boomeranging back on domestic public policy decision-making. So it's not only something that's happening outside of the borders of Canada; it's actually affecting policy-making inside this country.

I would like now to turn this over to Rusa Jeremic. She will be looking in more depth at a number of specific NAFTA chapter 11 examples and will be touching on the troubling question of Canada's intention to now export that chapter to bilateral negotiations happening with other countries.

Thank you.

The Chair: We'll now go to Ms. Jeremic.

Ms. Rusa Jeremic (Program Coordinator, KAIROS (Canadian Ecumenical Justice Initiatives)): As Rick mentioned, we're concerned that the government really hasn't paid enough attention to the problems inherent to chapter 11. In reality, after 10 years' of concerns about chapter 11, the only response has been an interpretive note that superficially addresses concerns regarding the tribunal process, the dispute settlement process, without actually engaging in any sorts of structural changes. That interpretive note claims to bring greater transparency to the arbitration process, but it doesn't actually amend the treaty, so it really leaves it open to international arbitration rules.

Let me just respond a little bit to the question surrounding the cases filed under this NAFTA chapter 11 tribunal. The latest statistics we have are that 11 cases have been filed against Canada, with total damages awarded of $27 million Canadian. Fifteen cases have been filed against Mexico, with total damage awards of $18.2 million. And 13 cases have been filed against the U.S., with total damages awarded of zero. That is a significant number to keep in mind, the fact that although there have been cases filed against the U. S., the U.S. has actually paid out zero in damages.

Of the Canadian amounts, $13 million was paid out for what I think is the most famous case concerning chapter 11, the Ethyl case, which was settled out of court. When we see the government being sued for $200 million but settling out of court for $13 million with the Ethyl Corporation, that really leads us to is thinking about the possible impacts and consequences of that in terms of a regulatory chill.

There is an expert paper that the government commissioned in 2002, called “Untangling the Expropriation and Regulation Relationship: Is There a Way Forward?”, with authors who had distinct viewpoints coming together to discuss a number of issues about chapter 11. Both authors agreed in this paper that

> If Article 1110 can be used to require governments to pay compensation to investors for adopting bona fide measures, this could have a chilling impact on the ability of governments to regulate, thereby compromising the protection of the environment, human health, etc.,

and a whole range of social, environmental, and other protections and rights.

That's the concern we have. A recent example of this regulatory chilling effect comes from New Brunswick, where a legislative committee was created, which held public consultations for months, provided expert testimony and deliberations, and submitted a final report with a clear recommendation that there should and could be a made-in-New Brunswick model of public automobile insurance. Despite all of this popular support and a strong rationale for public automobile insurance, Premier Lord bowed to the threats of the insurance industry, which was threatening trade treaty litigation under NAFTA and GATS if the proposal actually went ahead. In the end, the premier announced that the government would not be adopting this public insurance scheme.

That put to the side all of the work that the expert committee did, including a detailed analysis of how the provincial government could safely go ahead with a public insurance scheme while ensuring consistency with Canada's international trade obligations. Moreover, there was no legal or constitutional impediment to implementing this scheme; even the right to establish new crown corporations is safeguarded under NAFTA. Despite these assurances, there was a fear of litigation that, frankly, the federal government would have had to assume, not the provincial government, and that prevented the implementation of a public insurance scheme.

Other examples where we're concerned that the government hasn't acted, or isn't going to act, in response to what Canadians need and are asking for, are health care and a national child care program. As Rick mentioned, in 2003 the Romanow commission handed down some clear and explicit recommendations on the need to expand our health care program to include home care and pharmacare, yet the government has only injected cash infusions since that time. There is no doubt that those cash infusions are necessary, but it has basically only handed down cash infusions and been silent on this demand and the clear recommendation on the need for home care and pharmacare to be part of the public health care system.

● (1620)

In a similar vein, right now Minister Dryden is engaging in talks on the long-awaited and much-needed national child care program. According to legal opinions, if the new program allows for commercial for-profit child care, then NAFTA's chapter 11 can be used to pry open the Canadian child care market to big-box foreign private institutions. Again, if the government can clearly stipulate public not-for-profit delivery, then there should be no risk of provoking a NAFTA investment claim. Unfortunately, right now we don't have enough details to know the scope of the program, but the fear is that this potential threat of litigation will shape this national child care program in a very lax manner that will allow for foreign service providers. Luckily, there's still time to avert that danger.

The second point I'd like to briefly cover, if I may, is around exporting chapter 11. The 2002 report did not address Canada's interest in exporting chapter 11 at all. What we found is that there is a real disconnect between Canada's stated foreign policy goals, our global role where we see ourselves as a human rights champion, and the image Canada is presenting when it engages in trade negotiations.

Currently, Canada is negotiating a free trade agreement with four Central American countries, and it has been confirmed to us by the negotiators that the chapter 11 model will be used in that agreement. We're extremely concerned that exporting chapter 11 is the wrong path for a government that says it's committed to upholding human rights and eradicating poverty. Given the problematic nature of chapter 11 here in Canada, which we've talked about today and will talk more about, what sort of possibility for real development is there in Central American countries that are post-conflict and have weaker and smaller economies than ours?

I'd like to briefly present the Glamis Gold case, if I may. In Guatemala, Glamis Gold, which is a Canadian-U.S. mining company, was granted a mining concession by the Guatemalan government without an adequate consultative process, clearly violating ILO 169. When the community protested and attempted to deter the operation, the Canadian ambassador, James Lambert, supported the mining company, disregarding the community's wishes and rights. Sadly, violence erupted, and Guatemalan security forces killed an indigenous campesino, Raul Castro Bocel. This was an unnecessary and tragic loss of life, which illustrates the problematic nature of this militarized commerce that Canadian companies, with support from the Canadian government, are engaging in.

We strongly feel that if chapter 11 rules are replicated in the Canada-CA4 agreement, the result will be the right of companies like Glamis to operate with no accountability and leave communities with no recompense. Chapter 11 rules in this instance would have trumped community rights.

What Canada should be doing is promoting trade and investment rules that permit rather than restrict governments' ability to uphold the economic, social, and cultural rights of their citizens and to do so without fear of reprisal.

● (1625)

The Chair: Please summarize.

Ms. Rusa Jeremic: I will do so in two seconds.

How do we know that Glamis Gold would have used chapter 11 if the Central American agreement were in place? The Glamis Gold case really brings to light how these big transnational corporations are using chapter 11 to their advantage in more ways than anyone could have originally believed. Basically, a chess game ensues in which subsidiaries can place challenges in essence to bypass stricter domestic laws.

As I said, Glamis Gold is a joint U.S.-Canadian company, but it's generally understood to be a U.S.-based corporation that has a very small subsidiary in Canada. Glamis Gold has used its Canadian subsidiary to file a chapter 11 suit under NAFTA for $50 million due to California's intent to protect its indigenous communities and the environment from the notoriously harmful open-pit mining. So it's a U.S. company that wants to continue mining in California. It has a subsidiary, which has no operations in Canada, and it is using that subsidiary to file this chapter 11 claim against indigenous rights and environmental laws in California.

This illustrates another way in which chapter 11 is working to advance corporate gains with little or no accountability. As the power of non-state actors increases, there clearly need to be some binding mechanisms and general recognition of the obligation of corporations to secure and respect international human rights.

The Chair: I do not know how much further you have to go, but I want to be fair to the rest of the people. You asked for two seconds, and we gave you more than that.

I am sure you will have an opportunity during the questioning to come back to that.

Mr. Pépin.

[*Translation*]

Mr. Normand Pépin (Réseau québécois sur l'intégration continentale): I will begin our presentation, and turn the floor over to Rémi, and then I will make the closing remarks.

The Réseau québécois sur l'intégration continentale is composed of about 20 organizations representing the following sectors: unions, students, rights protection, environmental issues, women and international cooperation. So we will be speaking for over one million Quebeckers, and we do represent quite a broad spectrum of the population.

I would also like to say that the amounts of money involved in the lawsuits may be quite high, but there is also a sort of case law that becomes established. Most of the cases are heard by the same international body, which deals with all sorts of chapters on protecting investment. Of course, that is not chapter 11 of NAFTA, but these cases do tend to create some case law. For example, we're in the process of defining expropriation as a very broad concept. It is not just direct expropriation: increasingly, we are hearing about rampant expropriation. That is one of the problems. Investment is defined very broadly. That is what is becoming a threat, beyond the amounts of money claimed.

I will turn the floor over to Rémi, who will give you more details on these matters.

Mr. Rémi Bachand (Réseau québécois sur l'intégration continentale): Thank you.

As you know, chapter 11 is broken down into two parts: the first defines the obligations of foreign companies or investors; and the second establishes a dispute settlement mechanism. I will be speaking about some of the problems that result from the interaction between these two parts.

Reference has been made to the large number of bilateral treaties on investment that have come into effect in recent years and that contain the same provisions as chapter 11. Today we will be talking about some disputes that do not originate in NAFTA, but rather in these other treaties, and that nevertheless are important in order to understand the ins and outs of chapter 11, which is the subject of today's meeting.

It has already been mentioned that one of the problems of chapter 11 has to do with the reduced capacity of states to pass legislation and take steps to protect the public interest. We have spoken mainly about article 1110, which discusses expropriation, but also other measures that are equivalent to expropriation.

There is a question you are entitled to ask yourself when you introduce legislation to protect the public interest: could a tribunal consider the measure you are introducing as an expropriation, which would eventually result in an obligation to pay compensation to foreign investors? We have to reply that we do not know, because the wording of article 1110 leaves us completely in the dark on this matter.

For example, could a social regulation measure be considered an expropriation? Some tribunals have answered this question in varying ways, depending on the case. We could mention the comments made in S.D. Myers Inc. v. Government of Canada and in Marvin Roy Feldman Karpa (CEMSA) v. the United States of Mexico. In these two decisions, the arbitration tribunals spoke about a distinction between a regulation measure and an expropriation, and about the fact that generally speaking, regulation measures could not be considered expropriations. They said that distinction was important in order to reduce the risk that the government be subject to lawsuits regarding the management of public affairs. That line of thought is quite reassuring to us.

However, in Pope & Talbot Inc. v. the Government of Canada, it was held, conversely, that any action by a public authority—and explicit reference was made to tax measures—could be considered an expropriation.

In The United States of Mexico v. Metalclad Corp., which has been referred to often in the past hour, it was found that any interference with ownership and the expectation of profits could be considered an expropriation, even if the measure in question did not benefit the state directly. As a result, we have to say that only the tribunals can answer the question as to whether a law that seeks to protect the public interest may be considered an expropriation. In other words, when you pass legislation to introduce measures to protect the public interest, you are at the mercy of the tribunals, which will be established in keeping with the second part of chapter 11.

The great protection provided in chapter 11 as well as the ambiguity of the terms used in some articles, including article 1110, mean, as has been mentioned, that companies can now threaten the state when it seeks to protect the public interest. We have two somewhat similar but nevertheless interesting examples of this.

Here is the first one. A few years ago, Health Canada decided to introduce plain packaging for cigarettes. It was thought that this measure could be an effective part of an anti-smoking campaign aimed at teenagers.

● (1630)

Reynolds, one of the largest tobacco companies, warned the Department of Health that such an initiative would probably be considered an expropriation under article 1110 of NAFTA.

A little later, an attempt was made to ban the use of the word “light” on cigarette packages, because the word “light” suggested that the cigarettes were less harmful to health than normal cigarettes. In this case, Philip Morris used chapter 11 and the ambiguous definition of expropriation to convince the Department of Health once again to withdraw its measure and not pass the legislation.

In other words, even if the dispute settlement mechanism is not used, the protection provided could greatly limit the ability of states to pass legislation to protect the public's interest. In this case, the issue was health.

We might also mention article 1105, which has not been discussed so far, which talks about minimal standards of treatment. What is a minimal standard of treatment? The article refers to treatment in keeping with international law and fair and equitable treatment.

I've been working on this issue for some years, and I still cannot tell you what a minimal standard of treatment is. In July 2000, the NAFTA Commission tried to clarify the issue somewhat, but despite that, people have continued to say...

● (1635)

[*English*]

The Chair: Could you summarize for us in one minute? We have two more witnesses to go. That is so you can have questions posed as well.

[*Translation*]

Mr. Rémi Bachand: What I am trying to explain is that when states pass legislation, they are at the mercy of the arbitral tribunals. We should talk about the unique feature of these tribunals. In public law, a tribunal generally tries to make a decision in keeping with the law generally, in keeping with certain principles. Dworkin, for example, would talk about the principles underlying the legal system. Arbitral tribunals, for their part, because of the statutes, such as the Washington Convention, which created the ICSID, would rather base their decisions solely on the rights and obligations of the two parties, and the two parties are considered to be of the same type. The tribunals disregard the fact that one of these parties, the state, has social duties. In other words, the arbitral tribunals make decisions that completely divorce the legal problem from its social context.

In the document you will receive as soon as it is translated, I refer to the approximately 20 lawsuits filed in Argentina following the December 2002 financial crisis. They asked some essential questions. I could talk about them during the question period.

[*English*]

The Chair: You'll have time to get into that, if you wish, during the questioning from the members.

I'm just looking at the clock, guests, and I know colleagues on the committee do have questions for you. I always try to be very generous with our time to everybody, and I've been very fair in looking at the clock.

We'll go to Deborah Bourque.

Deborah, the floor is yours.

Mrs. Deborah Bourque (President, National President of the National Executive Committee, Canadian Union of Postal Workers): Thank you.

The Chair: I just ask you to be conscious of the fact that the members have questions, and then we have to share the time that's available for questions and answers all in one.

Mrs. Deborah Bourque: I think I'll be pretty close to the ten minutes I was promised without driving the interpreters crazy, I hope. Thank you.

First of all, on behalf of the 54,000 members of the Canadian Union of Postal Workers, I want to thank you for the opportunity to talk about our views on and our experience with chapter 11 of NAFTA. And as you know, CUPW has a direct interest in chapter 11 as a result of a complaint about Canada Post that UPS has made against Canada.

To begin, I want to provide this committee with a bit of background to UPS's chapter 11 complaint. I think this is a very good concrete example of a real threat to public services here at home. It's less abstract, I think, to talk about some real examples.

I guess anyone who's been around Parliament for a while knows that United Parcel Service has been complaining about Canada Post for decades. Over the years, UPS and other courier companies have repeatedly attempted to get Canada Post to exit courier services and to restrict its legal mandate to provide a broad range of postal services. They've done this by taking challenges to the Competition Bureau and by lobbying for and participating in government reviews of the post office. They've managed to get regular reviews in one form or another in 1985, 1988, 1989, and then again in 1995-96, when the government conducted an inquiry into Canada's public postal system called the Canada Post mandate review.

We were fully expecting another review in 2000 or 2001, and we did get another review but not a public one. In January 2000 UPS submitted a notice of intent to submit a claim to arbitration under NAFTA. This claim is essentially a mini-review of Canada Post's courier and express services, but without any public or parliamentary input.

This is not just the union's spin on UPS's complaint. We know from media reports and access to information requests that UPS was not happy with the government's response to the Canada Post mandate review. That is, it wasn't pleased that its proposals to reform the postal system had once again been rejected by the public and our democratically elected government, and we know that UPS decided at that point to pursue postal reforms not through the democratic process, but through the backdoor of NAFTA.

UPS is using the investor state rules of NAFTA to sue Canada for $160 million U.S. It says that its investments are being limited by Canada's publicly funded network of post offices and mail boxes. It claims that this network gives public postal service an unfair advantage when delivering courier services that are in competition with the private sector.

If UPS wins its case, the federal government will likely ask Canada Post to stop providing courier service. This move would prevent UPS from claiming ongoing damages—and I stress ongoing because I'm talking about millions of dollars in addition to the millions it wants for damages to date, and this is all for parcels that it never delivered, which is the appalling part of it.

The federal government and UPS could also negotiate a settlement before a legal decision comes down. A settlement would probably give UPS access to Canada Post's network at cut rates, which would allow the courier company to increase its share of lucrative markets at Canada Post's expense.

So in short, a settlement or a win would leave Canada Post with less money to provide public postal service and jobs. An international tribunal, not a national body, is hearing the UPS complaint. No one else gets to hear much of anything until there's a decision, because the tribunal proceedings are, for the most part, in secret.

I want to talk a bit about the secrecy. Initially, UPS wouldn't even provide us with a copy of its complaint against Canada. Imagine how difficult it is to defend your members and the public postal service if you don't even know what the allegations are. So in July 2002, UPS finally released its complaint in a bid to silence some of the critics. UPS also tried to claim the moral high ground in 2002 by announcing that it had reached an agreement to open NAFTA hearings to the public, at least for that moment. We took the position that it's no consolation to be allowed to sit back and watch while our interests are debated by a tribunal of unelected trade experts.

We also have some problems with the location of the tribunal hearings. The tribunal picked Washington as its place of arbitration. This means that Canadian courts would be powerless to review the decision of the tribunal, no matter how off base it would be, and only a U.S. court would have that authority.

● (1640)

As if this weren't bad enough, the tribunal has denied our application for full party standing at hearings. Instead, it has ruled that it will receive written submissions or amicus briefs on matters that it believes are relevant. But it's also ruled that it would make a decision on what those matters might be at a later date.

So they've not received any amicus briefs from us to date. We had hoped to make submissions on jurisdictional issues but the tribunal wouldn't allow it. And I want to talk briefly about the amicus briefs, because the problem with them is you can't see any of the evidence. You can't introduce any of your own evidence. You can't make any oral arguments. You're restricted to submitting 20 pages of written argument in a process where thousands of pages of evidence and argument will be presented.

The Chair: I've been asked if you could slow down for the interpreters. I know you have a lot to say, and we're going to keep you to your ten minutes.

Mrs. Deborah Bourque: All right.

So that's the problem with the whole issue of amicus briefs. It's small consolation. So the tribunal issued its decision on jurisdiction issues without our input in November 2002. It ruled that it has jurisdiction to deal with some, but not all, parts of the complaint. Some allegations of anti-competitive behaviour are off the table while similar allegations still remain.

Allegations that UPS made about our pensions will be examined by the tribunal. It will also look at UPS's claim that Canada has failed to give UPS national treatment by providing the magazine industry with a mailing subsidy through Canada Post and that subsidy is not provided to companies such as UPS.

The so-called subsidy that UPS is referring to is the publications assistance program, which is administered by the Department of Canadian Heritage in collaboration with Canada Post. So as you can see, UPS is taking issue not just with Canada's public postal system, but also with the lifeblood of the country's cultural communities and publishing industry. At the moment, the tribunal is moving toward hearings on the merits of the UPS case and has set a tentative date of December 2005 for the first hearing.

We're extremely concerned about the UPS case. We believe it's fundamentally wrong that NAFTA can be used to undermine public postal services and jobs without recourse to our courts and without input from the public, postal workers, or Parliament. That's why in March 2001 CUPW and the Council of Canadians launched a lawsuit challenging the constitutionality of the NAFTA rules that allow foreign corporations like UPS to sue Canada. And our lawyer, Steven Shrybman, will be appearing before you on April 5 to explain our court challenge and our fear that by UPS's logic we could end up with similar lawsuits, costing taxpayers billions of dollars, decided not in public or by Canadian courts but in secret and by a tribunal of international trade lawyers.

We expect a decision from the Ontario Superior Court some time in May or June. Of course, we'd like to win the case, but even more we'd like to see the federal government eliminate chapter 11 of NAFTA. We've already raised some of our concerns about NAFTA and chapter 11 with the former international trade minister, Pierre Pettigrew. The former minister responded to our concerns by saying that

> ...theoperation of NAFTA Chapter 11 has raised some issues that need to be clarified. Suchissues include transparency and third party participation...it is Canada's view thatNAFTA governments should address these issues by elaborating rules that will governthe dispute settlement process and ensure uniformity and predictability.

In other words, he thinks that chapter 11 can be fixed. We don't. We think improving transparency and participation in chapter 11 proceedings might improve matters, but these improvements don't amount to a democratic process and they don't fix the fact that chapter 11 establishes one rule for foreign corporations and another for everyone else in civil society.

We hope this committee is as concerned as we are by what I've told you today. We also hope that this committee and the new international trade minister will look at this issue and conclude, as we have, that the government needs to take whatever measures necessary to eliminate chapter 11 of NAFTA. And we would support the proposal as well that there be full hearings at the standing committee on this very important matter.

Thank you all for listening, and I'd be happy to answer questions.

● (1645)

The Chair: You were just a couple of seconds over, which is being very fair to us. Thank you.

Guests, I'm saying that because there's a vote later on, at about 5:30 or 5:45. We would just like to be on time.

We'll go to Mr. Laliberté, of the Canada Labour Congress. You have until five o'clock—or sooner, if you wish.

Mr. Pierre Laliberté (Principal Economist, Canadian Labour Congress): I will, because I just realized I left half of my notes on the printer at the office. Seeing that many of the points have actually been covered pretty well, I will try to restrict my comments to a few points.

I thank the committee for holding this meeting. It's good for us to see this has not disappeared from the radar screen, especially since Prime Minister Martin will be meeting with the presidents of the United States and Mexico—probably in March or April, we're told—to revisit NAFTA. It's probably a very good moment for us to reflect on what we've gotten so far.

In this area, as in other areas, such as the dispute settlement process under chapter 19, there have been many problems. In fact chapter 19, in a way, was supposed to be the jewel of the crown, the holy grail to secure access to the U.S. market. We obviously have not gotten that, but in return we have made many concessions with regard to access to our natural resources, and some would claim with respect to such things as chapter 11.

If there is an intention to revisit, we would strongly urge that chapter 11 be looked upon again and that the whole exercise be rebalanced. One of the problems the labour movement has, here and worldwide, with free trade exercises is that they are fundamentally unbalanced. When you look at the rights and some would say privileges that are given to investors or to private property in general, whether it's through intellectual property agreements or investment agreements, as opposed to parallel labour side agreements that often don't even exist, the imbalance is pretty clear. Within the confines of NAFTA, the labour side agreement, just to make a brief comparison between both types of agreements, would really show the big gaps there. I don't want to get into that particular issue.

Going into the matter of chapter 11, it's clear that chapter 11 is innovative in a number of ways. There are four issues with it. One is the broad definition of what constitutes an investment. If you look at the definition, it pretty much includes everything and the kitchen sink. If you look at government measures that are within the purview of litigation, it's anything. It's even judgments that are rendered by the court system or jury decisions. Essentially, this is quite wide in spectrum.

Then you add to this an incredibly wide definition of what constitutes an expropriation. We used to think of investment agreements as something that would protect the old-fashioned foreign investor who sets up a factory or some installations, which are then usurped for nothing. That's no longer the case. It covers everything. The definition of expropriation, by being so wide and, as was mentioned before, open to so many interpretations, creates a real problem of volatility and uncertainty for you, as legislators, but also for people who operate within the government system. Certainly it's a threat to our capacity to engage in democratic debate.

To add to this, obviously what matters in any of these issues is not so much what the intent of the measure is, it's always the effect. So you don't need to show intent. In other words, the scope of the agreement is quite wide.

● (1650)

The greatest innovation, really, is the investor-state process. This basically brings private parties for the first time into the sphere of international public law. This is quite problematic. State-to-state agreements we know about, but private party to state is also administered by what could be construed as kangaroo courts. This case, for instance, is a case that's being heard in the United States that may or may not lead to compensation, but upon which we have absolutely no recourse, right?

I'm not an expert in the matter, but the commercial arbitration process was created in a certain way for certain needs. Those were typically the needs of corporations wanting to hash out some problems they had between themselves. As a result, one could say they were ad hoc in character and were totally secretive. That was one of their main qualities.

When these tribunals suddenly have to deal with matters that concern a public interest, all of this is absolutely out of order. I would agree with my colleague that it goes way beyond the issue of transparency. It goes into the issue of process and the standing that different parties have in these litigation processes.

The fourth area that I think is problematic is the area of performance requirements. Those are...what is the term?

● (1655)

[*Translation*]

These are obligations that cannot be... These are absolute obligations.

[*English*]

Essentially, the—

[*Translation*]

In these cases, for example, we have the so-called performance criteria which are and have always been an economic development tool for the developed countries of the planet, including our own. We talked about the consequences for developing countries, but there are consequences even for us. The effect of these treaties is to cancel or prevent the adoption of measures that would allow us to impose a certain Canadian content as a condition for the establishment of an investor.

[*English*]

The Chair: Are we into questions and answers now?

Mr. Pierre Laliberté: No, no. They were asking me to switch to French. That's what created the distraction.

The Chair: We're at five o'clock. If you wish to summarize, please do.

Mr. Pierre Laliberté: Yes, if you would give me maybe a minute just to finish on that thought, with apologies again to the translators.

Performance requirements are actually a very important tool. There is a liberalizing philosophy that obviously is embodied in chapter 11, like investment agreements, that reflects a certain dominant view of what is good and bad economic policy.

As an economist, I can tell you that fashions come and go when it comes to things like that. To have Canada impress on economic partners those sorts of constraints seemed to us unwarranted. And certainly we should not be imposing them on ourselves.

With this, I will thank you.

The Chair: Thank you very much for being so prompt.

Members, in your briefing note there is some data that is in both official languages. Mr. Laliberté was kind enough to provide us with his presentation. It's not in French. Due to time constraints he was not able to have it fully translated.

It's your pleasure. If you wish to have a copy of it, you are more than welcome to it. If you wish to request a French version, by all means do. You have the data, in essence, here. I just felt obligated to tell you that it's available. If you wish to have it, I'd be more than happy to have the clerk pass it around. Most of the data is in the briefing note, by the way.

Would you like to get a copy of it? I'm putting the request to you primarily because it's only in English. As you know, we insist that everything be in both official languages. With your permission, I'd be glad to pass it around. If not, we'll leave it here. I'm at your pleasure.

Do you want a copy of it now, as is?

● (1700)

[*Translation*]

Ms. Johanne Deschamps (Laurentides—Labelle, BQ): I do not want to prevent anyone here from having access to these documents. However, I find myself somewhat handicapped by the fact that they are only in English.

[*English*]

The Chair: I respect that, and I feel obligated, given the rules and as an experienced parliamentarian. We always try to respect the rules in relation to procedure here.

Mr. Julian.

[*Translation*]

Mr. Peter Julian: I believe it would be best to wait for the translation.

[*English*]

The Chair: Excellent.

We'll go to questions—ten minutes, both ways, questions and answers.

Madame Jennings is first on the list.

[*Translation*]

Hon. Marlene Jennings: Thank you for your presentations.

These presentations dealt with the legal aspects of the issue. In your opinion, these definitions are much too broad, much too vast, and would allow any investor to bring actions against a government. I feel more comfortable in this domain. I would like to digress for a moment. I once was a member of your union, the Canadian Union of Postal Workers. At the time, it was the Canadian Postal Employees Association. This was in the Montreal region. I was a shop steward and I was involved in two strikes. I therefore very much enjoyed your presentation.

I would like to come back to the issue of minimum standards of treatment, which Mr. Bachand feels are not well-defined, as well as to the issue of the definitions of investment and of expropriation, which Mr. Laliberté mentioned. There have already been a few judgments from these administrative tribunals. You mentioned different definitions. The administrative tribunals studied the same facts, the same allegations, but in different ways. Could you give the members of the committee a little more information? For example, tell us that in this or that case, the facts were similar, but that one of the tribunals handed down a certain decision, whereas another made a different ruling. Could you do the same thing with respect to the definitions of investment and expropriation?

Mr. Rémi Bachand: As you probably know better than I do, in law, one of the fundamental problems, one of the most important problems, is how to reconcile the general and the particular, that is to say, how to imagine and draft legislation that will apply to each and every case one has in mind. Often, when the law is being drafted, we cannot even imagine the kind of cases that might crop up. If I stated that we had given different definitions to the same terms, it is because the concrete or particular situations were different from each other.

This is normally alluded to in the writing of a decision, but it is very easy to make a distinction between the particular case one is dealing with and the different cases that have been judged in the past. In this way, the arbitrators have free rein in terms of subjectivity, and they can choose to frame their decision as they wish. We must therefore explain what the legislator had in mind, in this case the participating states at the time of the drafting of the legislation.

I cannot answer your question as you worded it. Some internationalists have said that the nature of language is such that it is impossible to draft legislation that would show all of the intentions one had at the moment of writing.

This is the context which results in such a broad definition of expropriation, and a definition of minimum standards of treatment that is even broader.

● (1705)

Hon. Marlene Jennings: Thank you.

Mr. Pierre Laliberté: I cannot tell you how these things were defined in each case in particular, but they certainly were defined in different ways. For example, in the S.D. Myers case, if I remember correctly, market share is literally referred to as an asset. This is a company that did not even have any market share. The reference was to potential market share, which was considered by the panel to be a legitimate asset. We are talking about intangibles. I do not want to go into the particular details of the case, but what causes a difficulty in all of this, is the nature of...

Hon. Marlene Jennings: These are such sweeping definitions that you can read anything into them.

Mr. Pierre Laliberté: Precisely. For example, you mentioned minimum standards of treatment. In the case of Pope & Talbot, where this was evoked, it was stated that Canada was in breach of its obligations because department officials who were managing export quota shares had been rude to company employees. It is a rather frivolous interpretation that went too far. Earlier we were alluding to case law. In fact, the problem is that there is no case law. Case law from the country in question is not referred to and none is created, because from one case to another, generally speaking, litigators make decisions on issues that are often of public interest.

Mr. Rémi Bachand: May I make a final comment?

Hon. Marlene Jennings: I would like to ask a final question. If you do not have enough time to answer, you may always do so in writing.

If I understand correctly, you would like to eliminate chapter 11. If ever the elimination of chapter 11 was out of the question because the three governments wish to keep it, what would be the best way to amend it in order to correct the weaknesses you have identified in your testimony today and in the briefs you have tabled?

[*English*]

The Chair: There are two more people, and they deserve to have their ten minutes. Should there be time after that, by all means respond. If not, I will ask that you make a submission in writing, as requested, so we can distribute it.

Madame Deschamps, the floor is yours.

[*Translation*]

Ms. Johanne Deschamps: Thank you very much.

Like Ms. Jennings, I will ask each of you what the reforms should consist of, should this chapter not be eliminated. In a very short period of time, we have heard all kinds of things on the social and environmental impact of this issue, as well as on its legal complexity.

Mr. Normand Pépin: I feel that the principle underlying chapter 11 was fundamentally wrong at the outset. However, should we have to improve it, we will have to ask ourselves seriously what it is we absolutely want to preserve as a society. There are things that should be included in the treaty in much stricter terms. The treaty must have standards and mechanisms that are specifically intended to guarantee and protect the rights of workers, as well as health and education services, even if it means including absolute exclusions. In these treaties, the very nature of exclusions is that they are temporary. They are part of the treaty until a new one is negotiated. Therefore, we must have standards and mechanisms that will protect health, education, environment, and cultural services.

If possible, we must reaffirm within the body of the treaty itself the primacy of public interest over commercial and private interests. We are talking about a free trade treaty, but in the end, it is, rather, a charter for the protection of the rights of investors, whereas this should not be the main goal of the treaty. Chapter 11 should specifically take into account the priority of the public interest by supporting the ability of governments to act in the public interest. In the case brought before the Ontario courts by the Canadian Union of Postal Workers, it was said that in Canada, you had to respect the union, which has the right to function as it chooses.

We should also repeal the remedy that investors can use against governments. We should go back to remedies between governments, that is to say to more traditional diplomacy. If an investor feels he has been adversely affected, he should convince his own government to intervene on his behalf and the dispute should be settled through that process rather than through an arbitral tribunal made up of unelected representatives.

● (1710)

Ms. Johanne Deschamps: Go ahead, madam.

[*English*]

Mrs. Deborah Bourque: I would like to add something. We don't think chapter 11 can be fixed. We think it is just fundamentally wrong that foreign companies, corporations that have no obligations under a treaty and aren't signatories to a treaty, should have rights under that treaty that put their profits ahead of the public interest, and the ability to undermine decisions that are made by democratically elected governments in the public interest.

You could probably say have it go to the courts instead of a tribunal, but that's just tinkering and trying to fix something that's fundamentally wrong. We don't think it can be fixed.

Mr. Rickard Arnold: Perhaps I could just add that we also feel that NAFTA chapter 11 should be taken out.

Pierre has mentioned that there are several innovations in chapter 11, and that's true. In fact, when NAFTA and chapter 11 were created, this took things way beyond anything else that was out there at that point, in terms of trade treaties—beyond many of the WTO strictures at that time. Countries like Brazil, I would like to emphasize, are resisting this chapter 11. Their argument is that when you're talking about trade you should stick to trade. So they're happy to discuss market access questions, but they're not at all keen to have a chapter 11 type of procedure placed upon them.

The only other thing I would like to mention is I agree that we can't really tinker with court systems, whether they're international or national, but I'd like to leave you with this question: why, in the free trade negotiations between Australia and the United States, did the Australians win the right to have some of their cases heard in national courts, when Canada didn't?

[*Translation*]

Mr. Pierre Laliberté: What is the objective of a treaty on investment? Theoretically, it is to protect investors from expropriation and discrimination. In fact, however, it makes up for a possible lack of equity in the national justice system. Here we have a system that works well, that includes appeals, and so on. We assume that all countries are responsible for updating their laws and cleaning house so as to establish an appropriate climate that attracts investors.

What are we trying to do here? As one of my colleagues said, do we really need a treaty on this? I have spoken to people who write these agreements, and I know that they tend to establish a linkage between trade and investment. They see these two types of economic transactions as being more or less equivalent, but that is not the fact of the matter. In the case of trade, a company exports its goods and services. In the case of an investment, a company sets up activities in another country and does business there. Once a person is an investor and he is doing business in a specific location, there is the whole issue regarding interaction with local laws and local stakeholders, how the goods and services are produced, what type of relationship is developed with the workers, and so on. These are not questions that someone exporting from another country to Canada need ask. We have national laws that are supposed to cover these matters.

In the extreme case, we could have non-discriminatory treatment of foreign investors, and that should perhaps be protected. However, it is frankly excessive to give them, as chapter 11 does, privileges that are not given to Canadian investors.

● (1715)

Ms. Johanne Deschamps: Thank you very much.

[*English*]

The Chair: Monsieur Laliberté, if I may, you made a point that when an investor goes throughout a country, he has to respect the rules, the regulations, the laws, etc. In the most recent debate on Bill C-31, for example, some concerns were expressed. Why should we go to certain countries when there are environmental violations or labour violations?

You're saying go to invest and respect the rules, but isn't that a double standard? If I go there with that intent, I want to make sure that labour laws are not violated. I want to make sure there are no abuses of child labour. I want to make sure that the environment is protected.

Mr. Pierre Laliberté: I agree with you. Of course, I would imagine and hope that when Canadian investors go to China, they don't go beyond the rule of law because the law and it's enforcement are absolutely despicable. We are in total agreement. One would hope that the Chinese government doesn't change its mind and decide that an investor's assets are—

The Chair: I intervene only because Madame Deschamps was very generous and she left me a minute.

Monsieur Julian has exactly ten minutes, as you can see on the clock, all to himself.

[*Translation*]

Mr. Peter Julian: Your presentations were excellent. Ms. Jennings has asked some of the questions I wanted to ask.

[*English*]

We're going to need some time to discuss the recommendation you brought forward to this subcommittee, so I'll pass on my time.

The Chair: Okay. If I may, to pick up what I was saying earlier, it's very intriguing. You talked about China and various other countries. If that was the case, as I described earlier, and there's no mechanism....

I ask the question only because there were two views. Correct me if I'm wrong, but one view was to take out chapter 11 altogether. I think that was discussed. The other view was mentioned by Mr. Pépin. We have to look at it, change it, and fine-tune it.

I believe that's along the pattern of your thought, if I'm not mistaken, Mr. Pépin.

Hon. Marlene Jennings: They all want it out.

The Chair: Generally speaking, but there was a suggestion.

Mr. Normand Pépin: I started by saying that the principle of chapter 11 is wrong on its basis, but if there's no other way, then.... I don't think it could be fixed. It could be....

[*Translation*]

Perhaps its harmful effect could be controlled somewhere. However it is clear for my organization that chapter 11 is based on a false premise.

[*English*]

The Chair: Please....

Ms. Rusa Jeremic: Just to be clear, if we took all the problems out of chapter 11, it wouldn't be chapter 11. So let's be honest about what we're talking about. We're saying yes, eliminate chapter 11, and we can use other language—fix this, fix this, fix this, as we've been talking about today—but then it won't be chapter 11. Really, we are talking about eliminating chapter 11, fundamentally.

The Chair: Unless there are any other questions, we've really managed to consolidate our time. Now we've got eight or nine minutes before 5:30.

Are there any other questions?

Mr. Julian, please. It's your time, after all.

Mr. Peter Julian: In that case, Mr. Chair, I'd like to come back to the recommendation that all of these presenters have brought forward, which is to recommend to the Standing Committee on Foreign Affairs and International Trade that a full and comprehensive review of NAFTA, chapter 11, be undertaken. I think it was in the context of the Prime Minister's comments about renegotiating NAFTA, so I'm assuming the witnesses mean this spring, prior to that NAFTA summit.

● (1720)

The Chair: Madam Jennings.

Hon. Marlene Jennings: If you would allow me 30 seconds of your time, I would be in favour of that, and I would add on chapter 19 as well.

Mr. Peter Julian: So with that amendment....

Hon. Marlene Jennings: We can do a joint motion.

The Chair: That's for another time. But certainly it's your privilege; it's your right, as a member, to—

Mr. Peter Julian: I believe it's an order, Mr. Chair, so I'd like to move that.

The Chair: We don't have a quorum here, to be able to do it right.

Hon. Marlene Jennings: Mr. Chair, if no one questions quorum, quorum is presumed. So I didn't hear you talk about quorum, did I?

The Chair: When we first opened the meeting, yes, but I found it was not necessary to come back to it throughout the discussion.

I'll consult with the clerk, if you'll permit me, but that's my understanding. I think we also need notification, Mr. Julian...?

Mr. Peter Julian: I believe we have unanimous consent.

The Chair: I can only suggest and saythat there have been strong recommendations that are going on record and will be part of the report we're going to be putting together. You're suggesting to me—correct me if I'm wrong—that a motion be put on the floor right now for....

Mr. Peter Julian: With the amendments that Madame Jennings suggested.

The Chair: I'm at a difficult position only because I know the other party is not here. Mr. Menzies had to leave.

Unanimous consent to waive the notice period, is that what I'm understanding? Do we have unanimous consent? Do we need to have it in writing, and in both official languages? Am I correct there? Please pursue your suggestion.

Mr. Peter Julian: Do I have to say it in English and in French?

The Chair: No, we'll have the clerk....

[*Translation*]

Hon. Marlene Jennings: Moved that the Sub-Committee on International Trade recommend that the Standing Committee on Foreign Affairs and International Trade review Chapter 11 and Chapter 19 o... Our clerk could fill in the missing part.

[*English*]

The Chair: Does that meet your satisfaction, Mr. Julian?

[*Translation*]

Mr. Peter Julian: Yes, this must be done before the NAFTA Summit.

Hon. Marlene Jennings: In the context of a “NAFTA plus”. The three leaders are talking about a “NAFTA plus”, which means that there would be further negotiations to discuss the withdrawal or improvement of these articles.

[*English*]

The Chair: Can we suspend for one minute, so we can get the language clear? Do I have your consent for this?

Okay. We suspend for one minute so the language can be clear.

● (1724)

(Pause)

● (1726)

The Chair: We're back in session. We'll have the clerk read in French.

I think we have a final draft. Please, Mr. Clerk....

[*Translation*]

Mr. James M. Latimer (Procedural Clerk): M. Julian moves that the Sub-Committee recommend to the Standing Committee on Foreign Affairs and International Trade that the Standing Committee undertake a complete review of Chapters 11 and 19 of NAFTA before the NAFTA summit in the spring of 2005.

Hon. Marlene Jennings: I think it will take two or three months to do a proper review. The committee will not necessarily have the time to do that before the summit. If the summit is held at the end of March, they will not be able to do a high-quality study in four weeks.

There will be a summit, and the three heads of state may say that they will give their officials the go-ahead and suggest that they begin the review of NAFTA.

[*English*]

The Chair: Could you move that amendment to remove that part of the...?

[*Translation*]

Mr. Peter Julian: This will be in the context of the negotiations for the summit in the spring of 2005.

[*English*]

The Chair: I think we have a final draft.

Please, Clerk.

[*Translation*]

Mr. James M. Latimer: Ms. Jennings moves that the motion be amended by removing the words " before the NAFTA Summit in the Spring of 2005"

Mr. Peter Julian: It would be completed...

Mr. James M. Latimer: The motion would read as follows: That the Sub-Committee recommend to the Standing Committee on Foreign Affairs and International Trade that the Standing Committee undertake a full review of Chapters 11 and 19 of NAFTA.

[*English*]

The Chair: That was your initial proposal.

Mr. Peter Julian: Yes, okay.

The Chair: We don't need a recorded vote.

(Motion agreed to)

The Chair: It's unanimous. Great.

Let me, in closing, thank you all very much for coming here and providing us with your ideas and suggestions, your input.

You seem a little bit upset with me because I didn't give you enough time. I will tell you, we kept track. I followed very closely, and everybody had a fair share of everything. So thank you very much.

The meeting is now adjourned.

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