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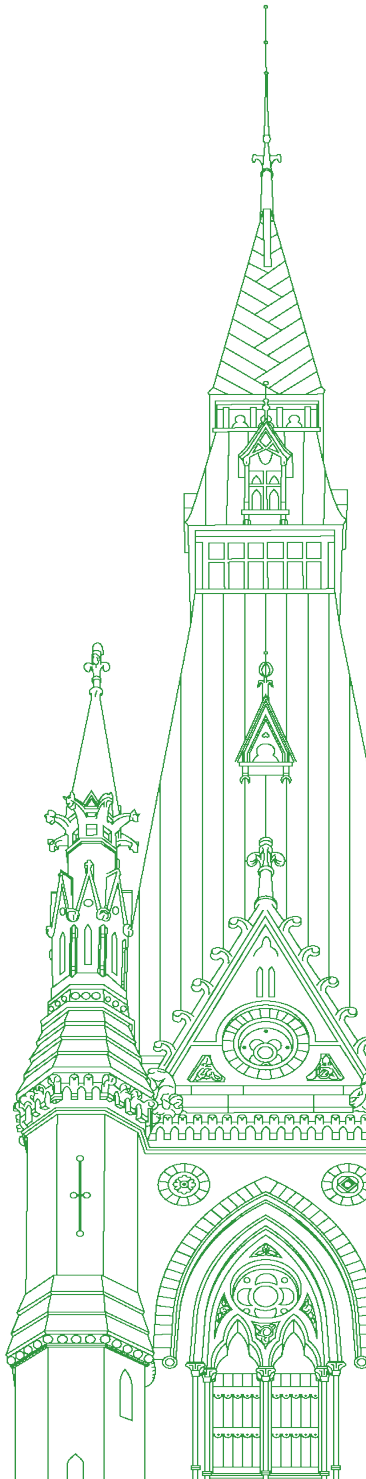

Chair: The Honourable Judy A. Sgro

Standing Committee on International Trade

Monday, March 22, 2021

● (1105)

[*English*]

The Chair (Hon. Judy A. Sgro (Humber River—Black Creek, Lib.)): I call this meeting to order.

This is meeting number 20 of the House of Commons Standing Committee on International Trade. Today's meeting is being webcast and is taking place in a hybrid format, pursuant to the House order of January 25, 2021.

Before I go into the issue we're dealing with, I had said we would deal with the two motions Mr. Savard-Tremblay wanted to speak to.

Can I make a suggestion, Mr. Savard-Tremblay? Would you be okay with dealing with these two motions at the end of the meeting?

[*Translation*]

Mr. Simon-Pierre Savard-Tremblay (Saint-Hyacinthe—Bagot, BQ): I don't see any issues with it, as long as we deal with them today.

The Chair: Okay. Thank you.

[*English*]

Pursuant to Standing Order 108 and the motion adopted by the committee on October 23, 2020, the committee will proceed with its study of investor-state dispute settlement mechanisms.

I welcome our witnesses on this panel. As individuals, we have Gus Van Harten, professor of law at Osgoode Hall Law School, York University; Lawrence Herman, counsel at Herman & Associates; and Mark Warner, principal counsel at MAAW Law. We also have, from the Trade Justice Network, Angella MacEwen, co-chair.

Mr. Van Harten, you have the floor to start, please.

Dr. Gus Van Harten (Professor of Law, Osgoode Hall Law School, York University, As an Individual): Thank you, Madam Chair, and good morning, everyone.

I have been studying ISDS for many years, maybe 20 years, and I have some simple advice for you today: Canada should adopt the perspective of quiet determination to withdraw from its ISDS risks and costs where possible and whenever possible.

Let me elaborate a little. The context, obviously, is that we're in the midst of a crisis, a global pandemic. That crisis has revealed the vulnerabilities and possibly the limits of our era of globalization. We have a lack of vaccine manufacturing capacity. We have a lack of other manufacturing capacity in Canada and in North America. To give you one anecdotal example, an electrician told me I was lucky to be able to get a breaker for my electrical panel a couple of months ago. There's only one factory producing them in North America, and it was shut down by an outbreak in the summer.

Besides the pandemic and what it's revealed in terms of vulnerabilities, we have all kinds of complex risks coming at us—environmental challenges, climate disruption, rising debt burdens, economic inequality, loss of jobs and businesses, and the rise of political extremism. In this context, I would suggest, while not wishing to be sensationalist at all, that we need to prepare for the prospect of some winding down, or further winding down, of the globalization era of the last 30 years or so. It certainly has dominated my adult life, this era. I'm not sure if the winding down will be gradual or sporadic or jolting, but I think it would be wise for us to think about planning for some sort of winding down.

That means a shift in strategy more to a national capacity, likely with more of a North American regional orientation as opposed to a global orientation. Global markets will still always be vitally important, but we need to have some kind of robust plan B to deal with changing circumstances and the crises yet to come, whether they are public health-related, environmental, financial or economic. To do that, we need to strengthen the regulatory manoeuvring space and governmental capacity in Canada, nationally and subnationally. To do that, we have to free ourselves from ISDS risks and costs. This is a different order of risk and cost compared with all other forms of adjudication, whether international or otherwise. There are potentially billions at risk, with a huge deterrent impact on governmental decision-making. I've been documenting that for years in various countries.

ISDS creates this really difficult-to-justify shift in bargaining power within governmental decision-making. I would say it's even leading to a kind of reconfiguration of the state, the governing apparatus of the state, in favour of foreign investors and against anyone in Canada who has a different interest on any issue. There are also long-standing issues in ISDS about this underlying taint of the process because of the extraordinary power of lawyers sitting as arbitrators to interpret vague language in the treaties in order to order retrospective damages amounts running into potentially billions of dollars against states. The process is not independent. It's not fair. It's not balanced. It's also not respectful to domestic institutions. Those criticisms have been out there for a long time.

Basically, in summary, with ISDS treaties we've been writing cheques that have an unknown amount on them. Where it says the amount, this cheque is blank. It's to be determined by very wealthy foreign investors and by the lawyers and arbitrators who interpret the treaties in the event of a claim by one of those foreign investors, usually big multinational entities or billionaires.

● (1110)

ISDS treaties haven't cost us catastrophically yet. There have been very serious impacts in the context of some other countries, but I think it's just a matter of time. As we respond to challenges and crises in the future, eventually ISDS treaties are going to cost us. They're going to hamper us more and complicate and deter our efforts to protect Canadian interests. ISDS treaties will do the same to other countries, too. I think, broadly speaking, we want those other countries to have national capacity to respond to crises as well.

How should we respond? Very briefly, we need to retain and strengthen governmental capacity and flexibility and strengthen our domestic institutions based on Canadian law that protects all investors and based on the customary approach to international law and relations between states and foreign nationals, a customary approach that frankly has been departed from dramatically and, at times, simply mangled by ISDS arbitrators over the last 20 years or so.

ISDS is the clearest and riskiest obstacle from a legal point of view to building this governmental capacity going forward. That's why my advice is fairly simple: withdraw from ISDS.

There are various ISDS reform efforts, but in summary, they're sort of scattered, painfully slow, generally flagging or not that promising. That's why I say develop a strategy of withdrawal from ISDS however possible. We have a window to let the clock tick down on existing ISDS treaty commitments, and we should start taking advantage of it now. I'm not trying to be provocative or inflexible about how we withdraw; I would just say to prioritize it. The tactics will depend on the particular treaty in which we already have ISDS commitments, but we really need to take ourselves on this path, in my view.

Very briefly, in summary, I've heard a lot of arguments for ISDS treaties. I understand what is at stake for Canadian companies operating abroad. I understand that alternatives to treaty-based ISDS are viable, but they're certainly not perfect. In my judgment, however, ISDS treaties are just not worth the national loss and future constraints in any context where we've agreed to ISDS, and so we need this attitude of quiet determination to get out and, in the meantime, otherwise limit ISDS risks as best we can.

Thank you.

The Chair: Thank you very much, Mr. Van Harten.

We will go on to Mr. Herman, please.

Mr. Lawrence Herman (Counsel, Herman and Associates, As an Individual): Thank you very much. I'm very pleased to be able to present my views.

Let me just say that I have followed Gus Van Harten's writings for years now. He is one of Canada's leading experts on this matter, and I have a great respect for his points of view.

I'm going to approach this a little bit differently, from the point of view of a former diplomat many years ago when I used to serve in Geneva at the Canadian mission to what was then called the General Agreement on Tariffs and Trade. I've been involved in these matters for years since. It's been a long time since I've been in government service.

ISDS is a fact of life in international relations, and it is not going to disappear. In my view, as meritorious as Professor Van Harten's points are, and they do have a lot of merit, it's going to be impossible to change the ISDS system. It's ingrained and it's built in to not only trade agreements but separate foreign investment protection agreements. There are between 2,500 and 3,000 of these agreements globally, and of course Canada has a number of them.

As the committee knows, ISDS is built into our regional trade agreements like the NAFTA, now the CUSMA. ISDS is built into the Trans-Pacific Partnership agreement, the CPTPP. ISDS is built into the Canada-European agreement, and it is part of bilateral trade agreements we have with Latin American and Caribbean countries, including a bilateral trade agreement we have with South Korea.

Withdrawing from ISDS, frankly, is politically, diplomatically and legally very difficult, and I would say it's probably not going to happen. The question is, what do we do about this?

There are a couple of things I want to point out to the committee, and they're relevant.

● (1115)

Professor Van Harten is correct. ISDS was initially conceived of as a means of stabilizing the investment situation for wealthy countries—northern countries, if you like—the industrialized countries that would help to stimulate investment flows to the developing world. That was the basic rationale. It has morphed into a system where private enterprises can challenge national measures for a variety of reasons. We can go into the details during the question and answer period.

By the way, I should say that if the committee wants a good review of the issues and the facts respecting ISDS, there was an excellent study done by the Canadian Centre for Policy Alternatives a couple of years ago. I reread it over the weekend and it still is very pertinent. I'm not saying I agree with the Canadian Centre for Policy Alternatives in many respects, but as a review of ISDS, there isn't, I don't think, a more useful document. I recommend you have a look at that.

There are a couple of things about ISDS that do indicate where Canada and the Canadian provinces are exposed. One of the things I would mention, which is not widely appreciated, is that Canada has a bilateral investment treaty with China. It was concluded in 2012 and entered into force in 2014. It lasts for 16 years after entry into force. It runs until 2030, with a carry-over period for investors, providing them with rights for 15 years after that.

One question before the committee is, does that give Canadian investors practical legal rights vis-à-vis China when they invest in China? On the other hand, is Canada exposed to private investment arbitration brought by Chinese companies that have invested in Canada? That's an issue, and it's not going to go away.

I want to mention the Canada-European Union trade agreement. There have been improvements in the ISDS process in the Canada-European Union agreement, CETA. I don't believe those will enter into force. CETA is being applied provisionally. The parts of CETA on ISDS with the reforms in the system require ratification by all of the member states. I am very skeptical that will come about, so CETA will continue for some time without those ISDS provisions.

The factor that I think has to be weighed in all of this is whether ISDS gives Canadian investors advantages, rights and certainty in their investments abroad. That's an issue that has to be examined.

The Centre for Policy Alternatives study rightly points out that most of the treaty provisions, the protective rights for investors, have been used by the Canadian mining sector, the extractive sector. However, there is arbitration going on beyond the extractive sector where Canadian investors have sought recourse to these provisions in ISDS. There is a benefit to Canadian outbound capital that has to be considered in all of this.

The final point I would make about withdrawing from ISDS is, as I indicated before, that where ISDS is embedded in our international bilateral or regional trade agreements, we can't simply withdraw from ISDS. That's because it's embedded in our trade agreements, including in the CPTPP and the NAFTA-CUSMA. CUSMA carried over some of the NAFTA provisions for three years, so you can't just withdraw from ISDS when it's embedded in trade agreements. It is possible for Canada to abrogate its bilateral investment treaties, but one thing that has to be mentioned—and it's very important—is that investment protection treaties, our foreign investment protection agreements, contain two things.

● (1120)

They contain rights of private investors, ISDS rights of private Canadian investors, to bring binding arbitration, but they also contain important obligations of governments to respect the rights of investors. This means that Canada can bring arbitration proceedings against a foreign government that doesn't give adequate protection to Canadian investors.

The state-to-state obligation in these treaties is of great value. Withdrawing from these treaties would mean that no longer would there be any binding treaty obligations between the host government abroad and Canada. In my view, that would limit, as a policy option, withdrawing from these foreign investment protection agreements.

What can be done? Picking up on points that have been made by others, in Canada's future negotiations of foreign investment protection agreements I think strong consideration should be given to not having ISDS provisions in those bilateral treaties.

My final point is that the options, realistically speaking, are regrettably quite limited in this area.

Those are my comments. I'd be happy to answer any questions.

The Chair: Thank you very much, Mr. Herman.

We will go to Mr. Warner, please.

Mr. Mark Warner (Principal counsel, MAAW Law, As an Individual): Thank you. This is the first time I'm doing this, so thank you for the invitation.

I am a Canadian lawyer, an Ontario lawyer, but I'm also a New York lawyer. Before I was a lawyer, I was an economist. I worked for Professor Alan Rugman who was one of the big advisers during the Canada-U.S. Free Trade Agreement negotiations, and one of the leading experts on investment.

That's how I started out thinking about investor–state dispute settlements. I thought what I would do, to be useful to your committee today, is to take you through my experiences with ISDS as a way of illustrating the advantages and disadvantages, and some of the things that sometimes get lost.

When I was working with Alan Rugman in the late 80s in the lead-up to the Canada-U.S. Free Trade Agreement, Canada was coming out of a very difficult environment. We had the National Energy Program, which had led to one of the greatest outflows of capital from any country at that point in recorded history. It's probably still true. We had the Foreign Investment Review Agency, FIRA, which was the subject of a dispute settlement proceeding in the old GATT, General Agreement on Tariffs and Trade, where Canada lost.

One of the first things Brian Mulroney did when he got elected was to change FIRA to make it more of a welcoming system toward investment, and then gradually to repeal the National Energy Program.

Wearing my two hats as a Canadian lawyer and an American lawyer, I have always been struck by the Canadian version of the history of the Canada-U.S. Free Trade Agreement. It tends to forget something, which is that the Americans wanted ISDS to be in the original Canada-U.S. Free Trade Agreement. It didn't get in the final draft, in large part because the Americans were happy with other things. One of the main motivations for the Americans in wanting to negotiate a free trade agreement was what we had done in investment and energy in the 70s and 80s. In other words, when you look back to that period, Canada was a net capital importer. Fast forward to today, Canada is a net capital exporter.

As a net capital importer, we had put in place all of these restrictions on foreign investment, and had acted in a way that our major trading partner regarded as very arbitrary. The way we disciplined that was with all these provisions in the investment chapter of the Canada-U.S. Free Trade Agreement that later got repeated in what became the NAFTA minus this investor-state dispute settlement mechanism.

When it came time to negotiate NAFTA, it was very clear the Americans wanted that agreement with Mexico. One of their chief objectives, again, was energy. At that point, I was a practising lawyer in Washington for a law firm that represented Pemex, the Mexican version of what I will call Petro-Canada.

In a sense, that was the prime objective. Since the Americans were going to go forward with that, and they weren't going to go forward with an agreement with NAFTA without having an investor-state dispute settlement, they were able to get through the back door in NAFTA something they didn't achieve, but wanted in the Canada-U.S. Free Trade Agreement, and that's the investor-state dispute settlement.

It's important to note that, because as we saw the world that Professor Van Harten talked about seeming to recede from globalization, and people going back to those 70s policies of nationalism that we ran away from in the 80s, we realized they were hurting our economy, and we stepped back from that. We learned a lesson from that experience. I don't think we should go back to it. We should continue to learn from those lessons.

Apart from that, we're now a capital exporter, as Mr. Herman said. We have mining companies operating the extractive sector. We are in the position that the Americans were vis-à-vis Canada in the 70s and 80s. We are in a position of having to protect our outward investment. How do you do that?

The origins of investor-state dispute settlement go right back to the beginning of the 1800s. Before that, Americans would go to various Latin American countries with what they called gunboat diplomacy. The idea was, how we can tone these disputes down? How can we avoid having to send in the marines to Venezuela and the Dominican Republic? Well, we can have arbitrations over disputed investments. That's part of the long history of this.

When people talk about getting rid of this investor-state dispute settlement channel, they are really talking about ramping up disputes between countries, bringing them back up to the national level.

● (1125)

In other words, if a mining company has a dispute in an African country, rather than having that dispute take place between the company and the country in a nice setting in Paris, it then becomes people lobbying you, knocking on your door as parliamentarians and as a government, asking you to put pressure on that government. It basically brings back up to the national level disputes that we brought down to the private level precisely to depoliticize them. I think that's a lot of what's lost in the current discussion of investor-state dispute settlement.

The last point I'd make is perhaps just from my world tour of investor-state dispute settlement. I was at the OECD, working in the trade directorate, when they were negotiating the multilateral agreement on investment. I happened to be there right around the time when the ISDS provisions of NAFTA chapter 11 began being used in a dispute involving the Ethyl Corporation, so I understand why all these sensitivities began to emerge. I think it's worth noting how politically sensitive ISDS has become. That might speak to how broad it is. It's no longer just covering the subjects of the old-fashioned expropriations, such as Fidel Castro coming to power in Cuba and taking over the telecom company. Now we're talking about things that are tantamount to expropriation, regulatory changes. Maybe that's something we would need to pare back, and I'm willing to accept that this might well be a frontier that we should work on.

The last part that I really want to come back to is my experience in working in the Ontario government as the legal director of the Ministry of Economic Development, Job Creation and Trade. There I had the opportunity to advise governments a lot on these NAFTA chapter 11 disputes. My observation is that when you listen to critics of investor-state dispute settlement in Canada talk about it, they tend to exaggerate the extent to which the Canadian government has lost. The truth is that Canada has a winning record. Most of these cases get dismissed, by a margin of about three to one, and we don't even lose.

The sexy part of this discussion is always expropriation, but most of the cases really turn on something to do with fair and equitable treatment. They talk about minimum standard of treatment.

Then the question that is interesting for us as Canadians to think about, based on my observations, is that oftentimes although the critics of ISDS like to focus on the subject matter of the arbitration, a lot of where we lose, when we lose, is because of the process. We lose because municipal governments or provincial governments acted arbitrarily. In reality, because we don't have a right to property, essentially, in our Constitution, a lot of people don't have a remedy for those kinds of arbitrary actions under Canadian law. That's why companies go and seek recourse to ISDS.

Just as support for that, I'll say that as a blanket statement, but I'll invite you to look at some of the writings of Professor Armand de Mestral at McGill University for the CIGI where he actually documented, looked at all the cases and looked at those where there might be a remedy in Canadian law, and concluded that there really wouldn't be in most cases.

For me, that's why it's there. For those of us who believed it and hoped for it, it was because we would like to see a situation where our governments don't act arbitrarily. If a government has a concern for the environment, great, legislate, but don't legislate it in the dark of night with nobody looking.

If you have a concern with environmental causes, don't apply it only to one company, to a foreign company; apply it equally.

Those are my thoughts about investor-state dispute settlement. I'd be happy to answer your questions.

● (1130)

The Chair: Thank you very much, Mr. Warner.

Ms. MacEwen.

Ms. Angella MacEwen (Co-Chair, Trade Justice Network): Thank you for inviting me to appear on behalf of the Trade Justice Network. We're a coalition of environmental, civil society, student, indigenous, cultural, farming, labour and social justice organizations that came together in 2010 to call for a new global trade regime founded on social justice, human rights and environmental sustainability.

Our members include the Canadian Labour Congress, Unifor, CUPE, the United Steelworkers, Climate Action Network Canada, The Council of Canadians, the Communications Workers of America, the National Farmers Union and many other groups that represent people in Canada from all walks of life.

The new standard that has been set in the Canada-U.S.-Mexico trade agreement is that ISDS or other investor-state dispute settlement courts are unnecessary and in fact harmful. Outside this deal, as you've heard from the other panellists, Canada is still part of dozens of agreements that include an ISDS mechanism. We want to reiterate the reasons we think Canada should permanently shift from including these mechanisms in our trade and investment deals.

An ISDS mechanism is the clearest embodiment of the ways in which trade deals prioritize corporate rights and not just corporate rights, but foreign corporate rights, because if we legislate something, an ISDS claim would only apply to foreign corporations, not Canadian corporations. If there is no remedy in Canadian law, that's because Canadian legislators have determined it would be inappropriate to have a remedy, that it's okay. Why would we put a remedy in an international trade agreement that is not available under our Canadian law? Why would we allow foreign corporations to have different rights from domestic corporations? I think that is the crux of where we disagree with ISDS mechanisms.

It also constrains citizens and governments in their ability to voice and protect the public interest. As you've heard, ISDS reinforces and protects corporate rights by allowing foreign corporations to sue government for alleged appropriation, discriminatory treatment or loss of potential profit. It often goes beyond protecting investors, so the obligation to compensate investors for their losses of expected profits has been applied even where the rules are non-discriminatory, and where the company's profits are made from causing public harm.

In a 2016 report from Gus Van Harten, “Foreign Investor Protections in the Trans-Pacific Partnership”, he outlined how these types of protections have historically only benefited very large companies and very wealthy individuals. The suits often target and suppress government action towards the public good, both in Canada and internationally. Under NAFTA chapter 11, Canada has been brought to investor-state arbitration more times than the U.S. or Mexico.

This is a problem, whether we win or lose the suit, because it takes significant energy on behalf of provincial and municipal governments to determine whether or not they will be in violation of an ISDS suit, and they don't have the expertise that the New York lawyers have, who often deal with these suits. It can be very difficult for local legislators to determine if their action will be acceptable. Often they determine it is too risky to even try, so that problem of "chill" is a problem, having to deal with a suit once it comes up is a problem, and then losing is the third problem, obviously.

Some of the laws or regulations that have been challenged in Canada include a proposed ban on fracking, domestic court decisions around drug patents, a ban on the gasoline additive MMT, and provincial water and timber protection policies.

The problem is that the letter of the law matters in an ISDS success; Van Harten said who makes decisions is fairly arbitrary. They don't generally have precedent, so you can't predict the outcome of a decision. They themselves don't have a clear process that's easy for people to be able to tell, so there is a great deal of difficulty on the government side to establish a process that will protect them from an ISDS claim—and again, they don't have the capacity.

● (1135)

As we've said, Canada is now the most sued developed country under ISDS. These cases clearly illustrate the danger of this mechanism in preventing the Canadian government from implementing policy, law or regulations in the public interest. As two of the panellists have also mentioned, Canadian investors are bad actors on the international stage on this front. They have used ISDS to disproportionately target environmental policy in developing nations when they file investor-state lawsuits outside North America.

A 2019 report by Hadrian Mertins-Kirkwood and Ben Smith, "Digging for Dividends", finds that Canadian investors have initiated 43 ISDS claims against countries outside North America since 1999, and that these are often mining companies and they are against environmental protections in these countries.

In the report, Mertins-Kirkwood also raises concerns about third party profiteering from the ISDS system, whereby financial speculators engage in for-profit financing of cases. This speculative funding is used to encourage and sustain ISDS cases that would not otherwise be able to go forward. This acts as a huge barrier to climate action for developing nations, which are most affected by the severe climate impacts of global warming and climate change.

As Gus Van Harten mentioned in his opening statement, ISDS threats have also hindered effective public action during the pandemic and could possibly cost nations millions of dollars in ISDS claims in the years to come and prevent governments from taking action that would protect the public health of their people.

Several of the actions that governments have taken in the past year that could make them a target for ISDS include restricting and closing business activities; securing resources for their health system; preventing foreign takeovers of strategic businesses that have been affected by the crisis; ensuring access to clean water for handwashing and sanitation when they freeze utility bills and suspend disconnections; and ensuring that medicines, tests and vaccines are affordable.

For example, in Italy, after a private manufacturer failed to deliver critical parts for ventilators and refused to share the design specifications, government researchers reverse-engineered the part and 3-D printed the parts for a fraction of the cost that the private supplier had been charging. The manufacturer threatened to sue, and the government had to back down from producing this life-saving piece.

The Columbia Center on Sustainable Investment has made a call for a complete moratorium on ISDS cases during the pandemic. In June, the National Union of Public and General Employees, a member of the Trade Justice Network, wrote an open letter to Prime Minister Trudeau criticizing the threat of ISDS cases and highlighting six calls to action, including restricting ISDS cases and prohibiting ISDS in any future agreements. These calls are very important, as is the need to continue to educate the public and politicians about the risks of ISDS.

Finally, as the committee knows, Canada failed to support a motion at the World Trade Organization that would waive restrictions on making sure that vaccines and other medical supplies for the pandemic would be affordable for developing nations. Should these nations go ahead with generic vaccine production anyway in order to protect their people from COVID-19, they would be subject to expensive ISDS lawsuits from pharmaceutical manufacturers, whose vaccine development and trials were largely funded by the public sector in the first place.

We argue that trade and investment should be viewed as a means to enhance material and social well-being, not as an end in their own right, and that if investors—even if they're Canadian investors investing abroad—are violating our environmental or human rights codes, we should not be allowing them to be protected by ISDS suits. Any protection of investor rights, whether within Canada or globally, should be accompanied by an enforcement of their responsibilities to the public good.

Thank you very much.

● (1140)

The Chair: Thank you very much, Ms. MacEwen.

We'll go on to Ms. Gray for six minutes, please.

Mrs. Tracy Gray (Kelowna—Lake Country, CPC): Thank you, Madam Chair, and thank you to all the witnesses for being here today.

Mr. Warner, would you say that Canadian businesses would be less inclined to invest in countries if ISDS measures were removed or did not exist?

Mr. Mark Warner: That's a complicated subject. The economic evidence, the statistical evidence, is not conclusive one way or the other. Going back to my origins, as I told you, working for Alan Rugman, who was one of the guys who worked long on these origins of foreign direct investment, I can tell you that when economists look at it, they say the greatest determinant of foreign direct investment is the size and growth of markets. That pretty much swamps any other effects that you try to look at, whether it's taxation or anything else.

At the margins, I do think it would hurt Canadian investments in other countries. It depends on their stage of development—more emerging markets. It tends to be something that companies need. As a practical matter what it means is this. If companies want to invest in a country, if they can't get a remedy through something like ISDS, they're going to look for some kind of insurance. Where are they going to look for that insurance? You can say, “Well, let them pay for it.” Well, we live in Canada. Let's be frank about it. They're coming to you, or some bank you will set up, and they're going to ask that bank that you set up, “Can we fund this...Canadian taxpayers to pay for it?” It's not some great, independent insurance market where they're going to get it.

ISDS allows you not to have to fund it through some really highly subsidized insurance scheme. Without the insurance and without ISDS they won't invest, it seems to me. You can have it either on the front side or the back side, but one way or another if we want our Canadian companies to go into those jurisdictions, we're going to end up having to have something like that to deal with it.

● (1145)

Mrs. Tracy Gray: Some worry that ISDS provisions would prevent Canada from enacting legislation, such as on the environment or maybe other factors, without facing challenges from corporations. Would you say this concern is valid?

Mr. Mark Warner: It is fair to say that where we have tended to lose cases or where we see cases brought is under this idea of the fair and equitable treatment of the investor. It's not really under the expropriation heading. It's not that we're losing because panels have come in and said, “Canada, what you did is really bad by implementing this new substantive, legal obligation.” Where Canada loses is when people say, “Wait a second, you told the investor one thing one day and the next day, somebody else gave you some more money and you changed your mind,” or they say, “We had a deal with you. We gave you some money. You told us there were these regulations. We incurred costs and then you just changed your mind because some municipal government said it didn't have to pay because the federal government's going to pay for it in effect.” Those are the cases we actually lose.

I don't think it changes our ability to enact environmental law or pharmaceutical policy that we choose. What it says is that we have to be more careful when we legislate so that we don't discriminate against particular investors when we do it, and that we do it in a way that conforms to some sort of notion of due process, for lack of a better word. I don't think it really does hurt our ability to substantially legislate in those fields.

Mrs. Tracy Gray: It sounds like you're saying a lot of it has to do with certainty if someone's going to be investing.

What risks do you foresee for Canadian businesses abroad if Canada were to remove foreign investment protection agreements it has signed with countries across the world?

Mr. Mark Warner: I think if we didn't have investor-state dispute settlements, then Canadian companies would have to figure out where to go to get a remedy.

As I said before, they're going to either not invest—so we will lose out on the returns that come to us through taxation—or pay for it in the form of insurance. Thirdly, they're going to ask you as a government to make the decision for them, and every time you sit down with representatives of their government.... There may be cases, particularly in Africa, where our foreign policy demands that we have a good relationship with a country that has a huge mining industry. But if every time that we sit down with that country, the top of the agenda is that investment dispute, we won't be able to pursue some of the foreign policy objectives we have on a bilateral basis with that country, and, let's be frank, on a multilateral basis in larger international institutions. I think it hurts us.

Mrs. Tracy Gray: We've heard that the government is in consultations for a trade agreement with Indonesia, and, according to the World Justice Project, has a rule of law index score of 0.58, compared to Canada, which is 0.75. Would you recommend that Canada seek to negotiate some form of ISDS provisions in a potential Canada-Indonesia free trade agreement?

Mr. Mark Warner: The short answer is yes, I would. I think there's no reason to depart from our practice so far. We are a capital exporter.

I think the norm so far is to have ISDS in those provisions, even regionally, because, of course, it is in our existing CPTPP agreement regionally. I would see no reason to depart from that.

The Chair: Thank you very much, Ms. Gray.

We will go on to Mr. Dhaliwal for six minutes.

Mr. Sukh Dhaliwal (Surrey—Newton, Lib.): Thank you, Madam Chair, and thank you to all the presenters. That was excellent information.

Madam Chair, most of the questions I had were touched on by Ms. MacEwen, on the pandemic, and the environment and social justice.

I'm going to start with pandemic. To what extent could pandemic-related measures implemented by our government expose it to legal repercussions under ISDS provisions in Canada's international trade agreements, as we have many trade agreements that have this provision?

● (1150)

Ms. Angella MacEwen: There is the Columbia Institute that I mentioned, and other legal organizations in Europe have definitely made lists of potential cases. I can share that with the committee.

There was a lot of concern at the beginning of the pandemic that these would be coming. What we saw were letters of threats from some, and then backtracking from government. Unfortunately, we don't know that, because often those communications are in private.

I can send you the list of the extent.... I think it's significant.

Mr. Sukh Dhaliwal: Do any of the other witnesses want to chip in? No?

Because our government is big on environment and social justice policies, and we are signing those agreements, some have expressed concern, and you have expressed concerns as well, that ISDS provisions hamper environment and social justice policy by imposing some penalties on any country that attempts to regulate in the public interest.

Could you please give your thoughts on whether this may be the case when it comes to these issues and how the government can improve on it if we sign the agreement and we have a chapter on environment and social justice policies?

Ms. Angella MacEwen: These trade agreements that we find...for example, with the one with Europe where we have an investor court system in place, the investor protections are guaranteed at this tribunal or at this court, but the environmental protections don't have the same weight. We mentioned environmental protections, labour protections—we have wonderful language—but there's no enforcement of them and there's no relationship between the investor protection and the commitment we have referenced in the environmental or social justice chapters, or the other treaties we've signed on to, for example, at the International Labour Organization on labour rights or the Paris Agreement.

Therefore, if you take action as a government to meet your climate targets under the Paris Agreement, that does not protect you from an investor dispute if you are appropriating rights. You can't use that to justify action that you've taken. We would call for binding restrictions in the agreement, binding references to other international treaties that we've negotiated either for climate or for labour.

Mr. Sukh Dhaliwal: ISDS provisions are implemented in many of the trade agreements, as mentioned by Mr. Herman.

When I look from the other angle, if we do not have these ISDS provisions incorporated in those agreements, by not having that dispute settlement system with some of the trade agreements that we sign, the companies, particularly the Canadian companies, would face challenges if we do not have those provisions.

Ms. Angella MacEwen: They would absolutely, but I question why we would want to insure Canadian companies that are behaving contrary to our international obligations under labour or environmental rights. I don't think we have the responsibility as a government or as the people of Canada to insure them through this supposedly costless to us investor-state dispute settlement mechanism.

We should make them buy insurance, if they want to invest, because if they want to invest, it's because they expect there to be profits; isn't that the case? It's not our responsibility to insure them against their own bad action in generating profit.

I know that you hear from us politically on a regular basis about the bad behaviour of these corporations in the global south anywhere. Having ISDS does not diminish the political pressure that we're applying to you about the bad behaviour of some of these Canadian—

Really, Canada is a flag of convenience for mining companies. It's awful, it is horrible, and I don't think that most Canadian citizens would support our public dollars or our foreign policy backing these organizations.

● (1155)

Mr. Sukh Dhaliwal: Thank you.

The Chair: We move on to Monsieur Savard-Tremblay for six minutes.

[*Translation*]

Mr. Simon-Pierre Savard-Tremblay: Thank you, Madam Chair.

I want to say hello to my colleagues and thank all the witnesses.

My first question is for Mr. Van Harten.

You explained why you think the investor-state dispute settlement mechanism was politically damaging. I completely agree with you. The UN published a report on prosecutions not only in Canada, but around the world. The data may not be quite up to date. Be that as it may, according to the report, about 60% of those prosecutions resulted in the state losing the case or in an out-of-court settlement. In 60% of cases, the political will backed down to for-profit companies.

What's more, according to a report by the European Union, the mechanism has non-quantifiable impacts. Take for example the permanent pressure the provisions of that mechanism apply on states and the atmosphere of self-censorship they create. In other words, leaders avoid adopting policy to avoid being prosecuted.

To your knowledge, have any studies in a Canadian context been carried out to determine whether states have indeed suffered setbacks or been subject to pressure?

[*English*]

Dr. Gus Van Harten: I entirely agree. A report that counts the number of wins and losses isn't telling us that much about the impact of ISDS because the real impact is behind the scenes. To get at that impact is very difficult for an outsider—I have tried by interviewing officials.

I think there are many examples of governments' changing their decisions as a result of ISDS risk. Now whether or not the change was good or bad could be argued, but I can tell you that there are many examples in many countries where behind-the-scenes decisions have been changed, and sometimes in ways that are pretty alarming.

The Ethyl case is one of the most famous settlements in the history of NAFTA. It's one of the early cases where Canada had a very concessionary settlement, including the withdrawal of proposed legislation. It's a long story. I don't want to draw us into that rabbit hole.

I would say that what happens with ISDS is that the question of the merits of a decision is no longer left to the institutions of the country ultimately—to the government, to the legislature, to the Supreme Court. The ultimate decision-maker becomes a panel of arbitrators whose role is triggered by a multinational. That extraordinary change in the decision-making infrastructure of your sovereign country leads to all kinds of pressure behind the scenes. I would say that, above all in a crisis—any kind of crisis—this behind-the-scenes pressure is going to be bad for any Canadian perspective that differs from that of someone who can claim to be a foreign investor and has enough money to bring a credible threat of a claim.

That means it could be an economic crisis, a financial crisis, an environmental crisis or a public health crisis. It's not good, and I fear we're going to face more of those crises in the future. There are plenty of examples of this.

Quickly, I'll just highlight that many trade agreements do not allow for ISDS. The new NAFTA has removed ISDS between Canada and the United States. That's one of the most positive things I've encountered in my couple of decades following ISDS, and it came from the Americans. The Americans decided that ISDS was too much of a constraint on their own sovereignty, and among other things, it created incentives for American companies to move manufacturing abroad. That was a concern.

I'm saying that U.S.-Canada relations will always be fundamental for us. By the way, I completely respect and defer to the wisdom, expertise and experience of others on the panel. I'm just saying that it's case-by-case, treaty-by-treaty-specific how you withdraw in a non-provocative manner that doesn't offend relations with the United States, that doesn't offend multinationals, that doesn't say that Canada's going back to the bad old days of the 1970s where Pierre Trudeau was friends with Fidel Castro or I don't know what.

It's looking forward. We need to free ourselves from ISDS because of the crises that are coming in the future and just because, at this point, we cannot have our governments being deterred behind the scenes from essential steps they need to take to protect Canadians.

● (1200)

The Chair: Thank you very much.

We will move on to Mr. Johns for six minutes, please.

Mr. Gord Johns (Courtenay—Alberni, NDP): Thank you.

Thank you to all the witnesses for their testimony.

Ms. MacEwen, in your opening statements you mentioned the investor-state dispute settlement provisions in relation to vaccine production. Can you explain to the committee more fully what the TRIPS waiver is and how it demonstrates exactly how dangerous the ISDS provisions are?

Ms. Angella MacEwen: TRIPS is a treaty on intellectual property rights at the World Trade Organization and there's a TRIPS council that meets regularly. They have, in the past, allowed waivers of intellectual property in certain circumstances. And so, in the middle of the pandemic, India and South Africa—which have both been badly hit by COVID-19—proposed to this committee at the World Trade Organization that they suspend the intellectual property rules to allow them to produce generic versions of vaccines because they have generic manufacturers there where they could do that. That would allow their population to be vaccinated more quickly, which would protect global health. They also wanted to be able to manufacture parts for ventilators, PPE and other things that might have intellectual property restrictions on them. Now, what Canada and other rich countries have said in this council is, “Well, prove to us that this is delaying your response. We think that you can resolve this on a case-by-case basis. We think that these huge global profitable corporations that have never seen more money come into their bank accounts—we think that right now, they're probably going to be in a good mood and they'll let you do this. We don't have to go to this extreme of lifting this whole provision.”

The countries came back and said, “Here's an example of where we've been trying to do this and it's been stalled. It's taking us a really long time and it's hurting us. There are people dying in our country because we're not able to provide the stuff that you need to do—the testing—and we're not able to provide these things on an affordable basis because of this intellectual property restriction that you're refusing to lift on our behalf.”

Canada has still said, “Well, no. We think that you're probably fine, that we don't need to do this.” We think, in the interest of global public health, human rights and basic decency, that in an emergency like this pandemic, it makes sense to lift that intellectual property rule that says these companies get to negotiate how much they can be paid. It's a little bit like Uber drivers with the surge pricing. In the absence of this waiver, the global north is protected; we're vaccinated. But you're going to keep seeing more variants produced in South Africa, in India. You're going to see more people in the global south dying from COVID-19 because we did not act swiftly and allow these things to be produced in a generic way that would be affordable for these countries.

Mr. Gord Johns: I want to drill down a little more on this. Maybe you could talk to the committee about how many countries have signed the waiver, how many groups have been pushing the Canadian government to sign onto the waiver. When is the next opportunity for the Canadian government to sign onto that waiver at the WTO? Has the Canadian government responded to any of your concerns around signing onto the waiver? Maybe you could also speak to how there's a lot of public money going in right now to the crisis and how responsible this is right now.

● (1205)

Ms. Angella MacEwen: Yes. You raise a good point. The major vaccines were actually funded mostly through public money. The innovation behind the Moderna vaccine was created by publicly funded scientists in the United States, and they have the patent for it. But still, somehow, Moderna and the other companies have a right to license the end vaccine. The trials were funded by public money, and Moderna, which is completely publicly funded—everything about Moderna's vaccine actually was funded by public dollars—had the highest price for its vaccine, which is completely unacceptable. They're looking at making a huge profit from this vaccine.

But yes, the majority of countries have signed onto the waiver. Canada, the U.S., the U.K.—we're dragging our feet. We haven't said no, but we've said, look, we need more evidence that this is causing a problem. We've written letters. Many of our members have written letters, including, the Canadian Union of Public Employees, the Canadian Labour Congress, Doctors Without Borders, Amnesty International, Public Services International. There are global campaigns pushing governments to make this decision that would save lives, and we've heard no response. So what the Trade Justice Network did—what I did—was to start a petition with the House of Commons, an official e-petition. We have over 500 signatures already. That petition will close at the end of March and the government will have to respond to our petition. So we are expecting that we will get a response from the Government of Canada at that time, but we've had no response to date from them.

The Chair: Thank you very much, Mr. Johns.

We'll go to Mr. Lobb for five minutes, please.

Mr. Ben Lobb (Huron—Bruce, CPC): Thank you, Madam Chair.

It's been a great conversation so far this morning.

I just want to ask Mr. Warner a question in regard to the WTO dispute mechanism and the ISDS mechanism. When is it in the country's best interest to go forward through WTO, or when would a company decide it's in their best interest to go through ISDS, or is it concerted effort to go to a dual approach? I just want some thoughts on that.

Mr. Mark Warner: They are obviously two very different processes. I think, from the point of view of a company, that the decision to go to the ISDS gives it more direct say, because, of course, the WTO proceedings are state-to-state proceedings, so the best a company can do is go to you, the Government in Canada, and say, “Will you take our case and will you argue it in the Geneva proceedings and go through the consultations with the governments, etc.?” Governments defend in ISDS cases, but they aren't the proponents, and so the investor, I guess, has more sovereignty to make the arguments it wants to make.

If you're well funded and you can afford to do that, it might give you a better resolution than trying to rely on the state-to-state dispute settlement process. I think it's really the kind of calculus that a company goes into in deciding whether to ask its government to pursue the matter through any number of trade agreements, including the WTO, or to take matters into its own hands.

Mr. Ben Lobb: Maybe you don't want to comment on a particular case or a potential case, but do you believe that Huawei will have a great case if Canada makes a decision one way or the other?

Mr. Mark Warner: I think I should, if you don't mind, refer your question to Mr. Herman, because he's written, I think, a very good article on this subject. Why don't I put him on the hot spot?

Mr. Ben Lobb: Mr. Herman.

Mr. Lawrence Herman: As I indicated, we have an investment treaty with China. Most people don't think about it or talk about it. It gives Chinese investors rights to bring binding arbitration against the Canadian government for breaches of the treaty, and that means breaches of the obligation to provide fair and equitable treatment to investors, but that Canada-China investment treaty has an exception for national security interests. My sense is that the exception would cover Canada in the event that Huawei were to bring arbitration proceedings against Canada.

● (1210)

Mr. Ben Lobb: Okay, that's good.

Ms. MacEwen, the one I was interested in is Keystone XL. Maybe you don't want to comment, maybe you do. It is an old file that predates USMCA. Do you think that a company like TC Energy, TransCanada PipeLine, should be able to sue the U.S. government or state government because of the cancelling of Keystone XL? Do you have any thoughts on that one?

Ms. Angella MacEwen: Sure. I can just tell you factually that, because it is an old case.... ISDS is not completely out of CUSMA. It's being slowly weaned out, so investments like that one would still be covered by ISDS. Whether I think that's a good idea or not is a different matter.

Mr. Ben Lobb: But in that one—and I'm not trying to make you say one way or the other; you're free to answer any way you like—it would seem to me that is a good provision to have to protect the TransCanada PipeLine from a decision that's covered three presidents and billions of dollars of investment.

Ms. Angella MacEwen: Absolutely. My argument there would not be with the specific investors. It would be with the government for not providing clear direction and guidance ahead of time when it was clear that the investment would likely not go forward.

To be fair to the government, they were trying to follow a process, as Mr. Warner states, that would allow them to say no, so whether they intended to say no from the beginning or not, they had to go through the environmental protection process to allow them to deny that investment, and in doing so, they dragged the investors along potentially longer than they should have.

The Chair: Thank you, Ms. MacEwen.

We'll go on to Mr. Arya for five minutes.

Mr. Chandra Arya (Nepean, Lib.): Thank you, Madam Chair.

Mr. Mark Warner, thanks a lot for bringing up the history of these mechanisms and emphasizing the importance of these mechanisms in depoliticization. That's an excellent point that many of us forget. Also, you mentioned twice that we are becoming a capital exporter. The capital export is still growing.

Mr. Lawrence Herman, I did read the note that you circulated. Let me just quote the last part of your note. You mentioned the need for modernization to make the ad hoc arbitration process more efficient, effective and consistent. That is very important. You also touched on state-to-state obligations. Once again, many of us forget about that. The foreign investment protection and promotion agreements are a fact of life today. Canadian companies earlier, in the previous generation...a few mining companies were investing abroad. These days, a lot of Canadian investment is going from the Canada pension plan, the OMERS or the teachers' pension and we have been investing elsewhere.

To take a specific example, Canadian investments in India are about $52 billion. We don't have a FIPA yet. We don't have any foreign investment protection agreements with India. What is the mechanism available for Canadian capital exporters to protect our investments?

Just because a few Canadian mining companies acted in a wrong way, to paint all Canadian companies as bad actors is something I don't agree with. I think we need to have a mechanism where the funds of an average Canadian that are invested through our pension plans, whether the CPP, OMERS or the teachers'....

What is the mechanism available when they invest in Asia and South America, or for example, in India, where we don't have any protection agreements?

● (1215)

Mr. Lawrence Herman: When it comes to India, we don't have a FIPA, so there aren't any state-to-state obligations that Canada could rely on. In that case, it would be up to the investors to assess their risks and make decisions accordingly. That's just the way the market works. Some people say that investment protection agreements unfairly—I guess that is one way of expressing it—underwrite investor risks and that it's up to the investors to make the decision of whether they want to invest in a particular jurisdiction.

To answer your question, there would be no way in which an investor in, let's say, India, could be protected other than recourse to Indian law in the event of some behaviour that was illegal or improper. That's the short answer to your question regarding India in particular.

Mr. Chandra Arya: We have a practical case here. When I say Canadian investment, I'm talking about mining company investment. An average Canadian investment—for an average Canadian like you and me—gets invested through our pension plans in various countries because we need to invest in other countries to generate returns for our pensions. When we make investments in countries in South America or Asia, does that emphasize the need for having these investment protection agreements?

The Chair: Give a short answer, Mr. Herman.

Mr. Lawrence Herman: In my view, it does. Those agreements can be drafted accordingly to provide the necessary guarantees and protections for the host country vis-à-vis the investor that we talked about, but would also give the investor a framework for bringing action if that investment was unfairly treated.

The Chair: Thank you, Mr. Herman.

We move on to Mr. Savard-Tremblay for two and a half minutes, please.

[*Translation*]

Mr. Simon-Pierre Savard-Tremblay: Thank you, Madam Chair.

I will put a question to Ms. MacEwen.

As we know, investor-state dispute settlement mechanisms provide protection for foreign investors. In the agreements that have been signed, the definition of investment is often limited to the financial aspect. Job creation or wealth creation is not really covered. Often, a transaction through a corporation is enough. I digress.

The protection provided to foreign investors enables multinationals to sue states. In contrast, those agreements contain no measures to protect citizens from abuse by those same foreign investors.

Would you say there is a flagrant imbalance in those agreements?

[*English*]

Ms. Angella MacEwen: Absolutely. That is the central problem with investor-state dispute mechanisms: the imbalance that it gives large foreign investors against states. The only reason you would need an investor-state dispute settlement mechanism for investment in India would be your not trusting the Government of India to behave consistently and not trusting their court system to treat foreign investors equivalently to domestic investors.

If we're afraid that our investments will be counter to what the Government of India wants for its people, I think the Government of India has the right to say what it wants for its people. That's democracy.

The fundamental thing about an investor-state dispute settlement mechanism, and what advocates say about it, is that it ties the hands of democratic governments to privilege the rights of investors over the public good. It doesn't always work out that way, but that is its entire purpose and goal.

I would argue, then, that if we want democracy globally, we have to trust democracy globally, and we do not need to handcuff other governments and prevent them from acting in the best interests of their citizens.

● (1220)

[*Translation*]

Mr. Simon-Pierre Savard-Tremblay: Thank you for clarifying.

How much time do I have left, Madam Chair.

[*English*]

The Chair: You have 14 seconds, Monsieur Savard-Tremblay.

[*Translation*]

Mr. Simon-Pierre Savard-Tremblay: Okay. In that case, I thank Ms. MacEwen.

[*English*]

The Chair: We'll go on to Mr. Johns for two and a half minutes, please.

Mr. Gord Johns: Thank you.

Ms. MacEwen, Brenda Sayers, from the Hupacasath First Nation in my riding, went to court regarding the Canada-China FIPA, concerned about indigenous rights and the sovereignty of the people there; concerned that foreign companies could come in and buy part of the watershed for a tree farm licence and impact wild salmon and clean drinking water. We've heard many times that the Canadian government is committed to reconciliation, to the United Nations Declaration on the Rights of Indigenous Peoples. In fact, we have legislation before the House right now.

My NDP colleague tried to include a non-derogation clause in the ratifying legislation of the Canada-UK Trade Continuity Agreement to ensure that Canada's trading partners are fully aware of Canada's obligations to first nations and indigenous peoples. It's disappointing that the amendment was voted down.

Given that the trade continuity agreement includes ISDS provisions as well, as is the case with CETA, can you clarify how the ISDS could impact the government's abilities to fulfill its obligations to Canada's indigenous peoples?

Ms. Angella MacEwen: That question highlights a gap in my presentation when I spoke about our international obligations through the climate accord or through the ILO. The United Nations Declaration on the Rights of Indigenous Peoples is something we have signed on to internationally; that we have committed to, at least rhetorically, at the federal level. We have, however, signed treaties that will not allow us to fully enact the rhetorical responsibility we have agreed to.

I have worked with Pam Palmater on trade agreements, and what she says is that we need to have indigenous representation at the bargaining table to fully realize UNDRIP and trading rights. We are so far from that in trade deals that what we have right now absolutely contravenes UNDRIP.

The Chair: You have 20 seconds, Mr. Johns.

Mr. Gord Johns: We hear at this committee regularly that the climate crisis is one of the defining things about our generation. I'm wondering if you could explain how ISDS has negatively impacted...or cost Canadian taxpayers money when making changes to our regulatory framework. Maybe you have a couple of quick examples.

Ms. Angella MacEwen: I think the first example that everybody knows about is that Ontario tried to do a climate response where they bought locally. That was struck down internationally. They didn't do it the right way. I maintain that they could have done it in a way that would have been consistent, but they were unwilling to actually make the effort to break through and do it in a way that would have been consistent with international law. They tried it one way; it didn't work and they gave up.

When I worked for the Department of Agriculture in Nova Scotia, I proposed a whole bunch of ways that we could compensate farmers for actions they had taken to be sustainable. It was killed actually, probably at the deputy minister level, because he thought we would get sued under ISDS for that.

They had given examples of European countries that had similar policies in place. I think those are the examples of where silencing really matters. You never hear about it.

The Chair: Mr. Aboultaif.

Mr. Ziad Aboultaif (Edmonton Manning, CPC): Thank you, Madam Chair, and thank you to our witnesses this morning.

These questions are for Mr. Van Harten, who has called for cancelling or withdrawing from ISDS.

The first question is whether that can hurt our investment trade balances, especially with the major agreements we have in place. Second, how does the industry react or can the industry react to such things?

Dr. Gus Van Harten: Just as a prelude, let me say, withdrawal is not going to happen quickly. Withdrawal will take a generation.

To withdraw fully from the obligations we have assumed under existing treaties, my view is that our general stance should be to prioritize withdrawal, where possible, depending on the treaty and depending on the context, and certainly not to agree to ISDS anymore.

How will this affect our investment relations, and how will it affect Canadian investors abroad? I think it's so hard to predict how investment relations and the economic benefits of investment, which are clearly tremendous, are affected by current ISDS treaties, let alone future ISDS treaties and the prospect of withdrawal.

I would say the risk of negative impact simply from withdrawing from ISDS treaties would be low, and we can keep it even lower if we do it in a quiet, unprovocative way, which was essentially South Africa's approach when it withdrew from its bilateral investment treaties that allowed for ISDS in the last 10 years or so. They did it in a way that reassured foreign investors there were other protections available, and new legislation was passed to make those protections more robust in South Africa.

For Canadian investors abroad, yes, you're not going to have access to the treaty ISDS anymore, but for many investors the most important Canadian investors' assets we're concerned about are the really big ones, the multi-billion dollar assets that we do not want to leave completely open to abuse by some government abroad. Here, there is always a very complex set of contracts between the foreign investor and the state entities in the host country. A large multinational is sophisticated in its ability to negotiate contracts that protect its interests, including by providing for ISDS. You could have ISDS under a contract; it leads to essentially the same process. I think that is preferable for a host country because you can be more selective in when you're making these extraordinary concessions of your sovereignty and your regulatory flexibility.

That has to be one component of a gradual plan to withdraw, which is to make sure the contract-based ISDS is well-known to major Canadian investors abroad, and that they have capacity to pursue that means of protection.

Secondly, political risk insurance is available. Mr. Warner has referred to it. It could be state-backed, it could be in the marketplace. It's far from perfect. I would stress that the insurers are much smarter than the drafters of the treaties because they limit the obligations. You don't get an obligation to insure for breach of fair and equitable treatment in a political risk insurance contract. You get safeguards against the more obvious and more controllable risks, like nationalization and expropriation, which we absolutely should be protecting investors against.

I think Canadian investors will have some setback. They will not be as well off, but if you look at it in terms of the benefit to Canada, overall, what we pay monetarily, what we pay in our loss of capacity to respond in a future crisis.... I am telling you, when the future crisis comes, government officials will be thanking the heavens if they don't have to worry about ISDS risks in the billions of dollars. That will be well worth it to ensure Canadians can be protected even when one multinational, for whatever reason, fights really hard behind the scenes to stop our doing what's right for Canadians. We just need to get that obstacle out of the way.

I think a Canadian investor who sits down and looks at the quid pro quo will say, we can manage to protect ourselves with governmental support, and we're Canadian too and we can see the value of protecting our country against these broader risks.

All that sounds a little provocative, I'm sure. I don't mean it to be provocative. I've been banging on about reform of ISDS for a long time. I have just come to the view: keep it simple, withdraw and then reform ISDS. Don't stay stuck in it.

● (1225)

The Chair: Thank you very much, sir.

We will go on to Ms. Bendayan for five minutes.

Ms. Rachel Bendayan (Outremont, Lib.): Thank you, Madam Chair.

Thank you to all of our witnesses for this very thoughtful discussion this morning.

As a point of disclosure, I should mention that previous to my political career, I was a lawyer in international commercial arbitration and did represent several companies, including some that we are very proud of here in Quebec, such as Bombardier, against foreign states under arbitration provisions, similar to what Mr. Van Harten was just describing as ISDS provided through contracts. I also did some ISDS through our trade agreements. Nevertheless, without putting any of my personal opinions on the table, I think it is important to discuss how Canada should move forward, particularly as we negotiate new trade agreements.

Before I ask a question, as a point of clarification or correction, Mr. Van Harten did say on the record that it was the United States that asked that ISDS be removed from the new NAFTA. I don't think that any of us who were not in the room should presume how those negotiations went down or what Canada's position had been at the outset.

Also, with respect to the previous conversation regarding the United Kingdom-Canada transitional agreement, I note that the ISDS provision is suspended in that agreement and would only come into force much later if the ISDS provision in CETA were ratified, which, as we heard earlier today and as we all know, is possibly not going to ever happen.

Let me get to a substantive question, perhaps for Mr. Warner and Mr. Herman.

I wonder if you could comment generally on your feeling about taking a case-by-case approach. Perhaps in some situations dealing with certain trading partners, ISDS could be used, whereas in other circumstances, for example, when dealing with partners whose judicial system we have great confidence in, it could be unnecessary in those cases.

Perhaps we could start with Mr. Herman.

● (1230)

Mr. Lawrence Herman: First of all, Ms. Bendayan, your reputation before you took the political turn is well known, and your involvement in these cases by those of us in the field is well appreciated.

I would make just one comment about withdrawal from current ISDS provisions. Our first investor-state treaty was with Russia. I would ask, at some point, Mr. Van Harten to answer this question: Is it in Canadian interests to withdraw from that treaty with Russia?

Your point, Ms. Bendayan, is whether we should approach it on a case-by-case basis. I think that is a viable approach. We are eliminating investor-state disputes with the U.S. They are eliminated, for all practical purposes, with the Europeans. Where are the Canadian interests affected? If we're not going to be subject to investor-state arbitration from American investors, and the same for European investors, where are the Canadian interests that are somehow in jeopardy?

My point is that the withdrawal from existing foreign investment protection treaties is fraught with difficulties. It is possible in future cases, to come to your point, to be selective and to decide where we need some ISDS provisions, with the guarantees that have been built into the CETA provisions where you have an appellate process and a standing arbitration court. That, to me, improves the system remarkably, and that could be part of a policy going forward for any new treaties that Canada is seeking to negotiate.

Ms. Rachel Bendayan: Thank you very much, Mr. Herman.

The Chair: I'm sorry, but your time is up, Ms. Bendayan. You have 18 seconds left.

Ms. Rachel Bendayan: Could Mr. Warner please comment?

The Chair: Briefly.

Mr. Mark Warner: Very briefly, I agree with much of what Mr. Herman has said on that subject.

I would say that I think, in reality, the way it will play out for Canada is now that we have taken it out of our agreement with the United States, going forward other countries will ask for equivalent treatment. I think that's how it will play out for Canada.

The Chair: Thank you, Mr. Warner.

We'll go on to Mr. Hoback for five minutes, please.

● (1235)

Mr. Randy Hoback (Prince Albert, CPC): Actually, Mr. Warner, you bring up a good point. When you go to countries where you feel you really do need appropriate ISDS protections because of their court systems or because of their political systems, how do you negotiate that in that scenario?

Mr. Mark Warner: It's tough. Those are exactly the countries that are going to stand across from us in a negotiation and say, “Well, if you didn't need it with the United States, why would we put it in an agreement with you?”

I don't know how we're going to answer that. It could just be that the interest in having an agreement is so substantial that they will accede to it. I think that's going to be one of those unintended consequences of the last go-around with the CUSMA that has yet to play out, but it will be very tough to get this. Certainly, with bigger players.... I think Indonesia, for instance, could very well look at us and say, “You have to be kidding,” because it is very nationalistic as well.

Mr. Randy Hoback: One of the problems I have is that we hear from other parties that this is a huge issue for Canada. When I go back and look at the record, we've lost eight and won nine cases against Canada. We paid out $219 million in damages and about $95 million in legal fees, yet we received some $410 billion worth of foreign direct investment.

How big of an issue is it in Canada? How restrictive is it? Are we concerned about investment in Canada, as we're seeing now with this government that they've put in policies that make sure nobody wants to invest in Canada? Is it now more the concern that we protect Canadians who invest outside of Canada? How do we take that small company that has maybe $10 million worth of sales and wants to break into a new market—let's say Europe or the U.S.—but wants to make sure that it has protection? It can't buy that protection; it's not a big multinational that's actually going to go to the courts and sue a state or the federal government in the U.S. What other than ISDS do we put in place to protect those small businesses?

Mr. Mark Warner: I suppose that once ISDS is out of the U.S. agreement, we're going to be asking, basically, to politicize every trade and investment dispute all over again. There's no shortage of things on the list of disputes with the United States, from softwood lumber to Keystone or whatever else.

There's only so much time and attention you can have with the United States when you're Canada. I don't know if you really want to convert all of these. We're going to be asked to spend a lot more money in supporting individual Canadian companies in bringing these disputes forward in the United States in the absence of ISDS, it seems to me.

Mr. Randy Hoback: Then, Mr. Warner, can you just talk about buying insurance?

You can buy insurance for political risk from EDC. Let's say that you actually go to collect on that political risk. Who ends up paying the bill if it's EDC paying out that insurance premium or that policy? Is it actually not the Canadian taxpayer? Are there other companies that are buying risk insurance from EDC? If we were to see a massive payout, who, in the end, is on the hook? Is it the Canadian government, or is it the foreign government that actually went and nationalized the Canadian company or made decisions arbitrarily against the Canadian company?

Mr. Mark Warner: It seems to me that if it's EDC paying for it, then we are the ones that ultimately will be underwriting that risk as Canadian taxpayers. That's just part of, again, the unintended consequences of some of these proposals.

Mr. Randy Hoback: Mr. Van Harten, I asked Mr. Warner a question before about these small businesses. They only do $10 million worth of sales, and they decide to get into the export market because we've been promoting them to be SMEs that are exporters. Let's say that they do invest in, say, a warehouse distribution or something in another country. How do we protect their investments? What do we do for them?

Dr. Gus Van Harten: Mr. Hoback, that's a totally fair question, an important question.

I want to support entrepreneurial Canadians doing business abroad. I take my hat off to them. I'm an academic. In the private sector, “they expect results,” as they say in *Ghostbusters*. I have the utmost respect for them.

I just want to tell you that, honestly, ISDS isn't going to help because they can't afford the litigation. You're dealing with a country like, let's say, Russia or China. Even if you win an ISDS millions or tens of millions in litigation fees later, do you think the country is going to pay?

Russians, you know, they might not pay. Then what do you do? Then you have to chase Russian assets in countries all over the world, waving around an arbitration award and an investment treaty. It's great for the lawyers. It's great for the arbitrators. I'm just telling you straight up that unless you're talking about hundreds of millions in assets, the benefits to Canadian investors' being protected abroad.... You're just going to have to look elsewhere for your protection.

Mr. Randy Hoback: In other words, then, in our trade agreements for these small and medium-sized enterprises, we actually have to look for a different mechanism to protect them. Is that fair to say?

● (1240)

The Chair: Please respond briefly.

Dr. Gus Van Harten: Yes, we need a state-to-state mechanism. That would help more. They have to look at their contracts, but at a certain point, it's an ugly marketplace out there, so make your decisions accordingly.

The Chair: Thank you very much.

Mr. Sarai, you have five minutes.

Mr. Randeep Sarai (Surrey Centre, Lib.): Thank you, Madam Chair.

My question is for Mr. Van Harten.

Similar to what others have said, I still have mixed thoughts about ISDS. We've heard, as Mr. Hoback has just stated as well, that we've won a bit more than we've lost.

What are the potential risks of not having an ISDS, particularly for SMEs that go out and venture, and especially for new technologies that might be disruptive or might be state-of-the-art, which other states might not like or use protective measures to shut down?

Dr. Gus Van Harten: In most contexts, treaty-based ISDS is not going to do anything for companies that have assets below hundreds of millions of dollars at stake in the country abroad. There should be a sequenced approach to managing the Canadian interest in withdrawal and the Canadian investor interest in still having sufficient protections that are tailored to that investor's needs.

For example, the highest priority was always NAFTA. We're out of ISDS under NAFTA, box ticked, great, thank you very much, Minister Freeland. I emailed her at the time to thank her for basically asking for Canada what the Americans were demanding for themselves. The Americans wanted to keep ISDS for Canada and Mexico but not have the obligations themselves. Well, that was a non-starter for our government, and I thank you for that.

Beyond that, I say keep CETA provisionally applied and keep ISDS out. Do it quietly, but make sure ISDS is not coming in. Also, don't leave it just to European member states to not ratify. Make it clear that ISDS is never going to be applied under CETA. I will be so happy for Canada on that day.

Next, on the CPTPP, oh, dear, that was a turn in the wrong direction. At the time, we were changing ISDS on CETA and actually getting ready to get out of it in NAFTA. Look at the example of New Zealand and Australia: They have side deals under the CPTPP that remove ISDS as between them. I don't see how we can't conclude similar side deals with those same countries in the CPTPP.

As for the bilateral investment treaties, it's a bit of a different story, but if you want to protect Canadian SMEs, there are far more important measures that can be pursued at a lower level than the grand claims of treaty-based ISDS.

Mr. Randeep Sarai: Thank you.

I'm going to pose the same question to Mr. Herman.

How do you think we can perhaps modify ISDS for future provisions, or in current or side agreements, as Mr. Van Harten has said, to still protect our interests where they're unfairly hindered by different states, while at the same time also allowing us to protect our sovereignty and our own environmental labour laws?

Mr. Lawrence Herman: As I've said, we don't have ISDS with the Americans anymore, so that removes a huge swath of risk. I don't think we need to get overly exercised about ISDS going forward with the Europeans. It's probably not going to happen.

Where do Canadian interests lie? I don't quite understand the notion that we should abrogate existing treaties, get out of existing foreign investment protection agreements. I don't understand how Canadian interests are advanced by doing that. I might be missing something. It might be desirable from an academic perspective, but why would we withdraw from those treaties where there is benefit arguably and no disadvantage to Canadians in terms of Canadian interests?

We could negotiate under the CPTPP bilaterals to eliminate ISDS. I don't think there's a huge risk of foreign investors from the Asia-Pacific region attacking Canada. It might happen, but I think there are a lot of atmospherics about ISDS. Frankly, I think we have to sit back and determine where Canadian interests lie. I'm not talking about broad academic interests. I'm talking about hard Canadian interests.

● (1245)

Mr. Randeep Sarai: Thank you, Mr. Herman.

The Chair: We move to Mr. Savard-Tremblay for two and a half minutes.

[*Translation*]

Mr. Simon-Pierre Savard-Tremblay: Thank you.

A number of stakeholders have talked about the need to keep this mechanism. Some have said it must be maintained at all costs, and that all agreements use it. But that is not quite true. The new NAFTA—CUSMA—does not use that mechanism.

I would like to put the following question to Mr. Warner, who said he is in favour of the mechanism.

Since CUSMA came into force, eight months ago, has the fact that the mechanism was not being used had a significant impact?

[*English*]

Mr. Mark Warner: Well, I think the answer to your question is that we have not really exited NAFTA yet from the point of view of investor-state dispute settlement. That will happen next year, because now there's this transitional period. We haven't really seen that effect.

Someone mentioned Keystone. What's interesting so far is that when NAFTA was in effect, the TransCanada, as it was then, did launch an investor-state dispute settlement case that they withdrew when Donald Trump passed an executive order to let the project go through. What's interesting is that in this transitional period, TC Energy has not reinitiated a similar measure, which it's entirely entitled to do. I don't have a complete answer to that, and I keep asking.

[*Translation*]

Mr. Simon-Pierre Savard-Tremblay: That's okay. Thank you for your effort.

The United States and Canada have developed justice systems. They are two countries governed by the rule of law, capable of making decisions on disputes themselves.

Why is that insufficient?

[*English*]

Mr. Mark Warner: I think the reality is that it doesn't work. One famous case in NAFTA was a case involving Loewen, a funeral home. It's one of the golden oldies you can read about. Many people published it. It's a case in which the Canadian investor—well, we thought—was treated very poorly in an American courts system. What's the remedy for that? In the end, he didn't get what he wanted from ISDS, but I wonder where else that person could have gone.

On the reverse side, in Canada when you have some of these decisions in which municipalities or provinces act arbitrarily, I have to say, as I cited before the work of Professor Armand de Mestral, it's not clear to me that under Canadian law any such investor has a remedy in those kinds of cases. That's, to me, why. Those are the paradigmatic cases in which ISDS can be useful.

The Chair: Thank you very much, Mr. Warner.

Thank you to our witnesses. We will allow you to leave. Thank you for the excellent information that you've given us. We have some committee business.

We go now to Mr. Savard-Tremblay.

You have two motions. Do you want to speak to the first one?

[*Translation*]

Mr. Simon-Pierre Savard-Tremblay: These are routine motions. The first reads as follows:

> That all documents submitted for committee business that do not come from a federal department or that have not been translated by the Translation Bureau be sent for prior linguistic review by the Translation Bureau before being distributed to members.

I believe the French version was also sent to you.

● (1250)

[*English*]

The Chair: Is there any discussion on the motion? I have allocated 10 minutes for these two motions.

Ms. Bendayan.

Ms. Rachel Bendayan: Thank you, Madam Chair. I'll be very quick.

[*Translation*]

Thank you, Mr. Savard-Tremblay.

I completely agree. It seems to me that this is already the case, in practice. Nevertheless, I am prepared to vote in favour of your motion in order to formalize everything.

[*English*]

The Chair: Mrs. Gray, go ahead.

Mrs. Tracy Gray: Thank you, Madam Chair.

We need to look at this from a practical and functional point of view. It may not always work to have everything go through the translation bureau. It's been consistent at another committee to add in some other ways of translation. I believe this has been approved at one other committee.

I would add an amendment to also add “an MP's office or a party research group" if that would be the wording?

To fully restrict it to just the translation bureau, the timeline for turnaround may not always work, and there are fully capable people within the various political parties in MP offices.

The Chair: Go ahead, Ms. Bendayan.

[*Translation*]

Ms. Rachel Bendayan: I would like to hear Mr. Savard-Tremblay's comments on the proposed amendment. It does not seem necessary to me, but I would still like to find out what the person who introduced the motion thinks.

Mr. Simon-Pierre Savard-Tremblay: I am thinking about the ins and outs. This is an amendment we could deal with, I think, but the original form seems more appropriate to me concerning the Translation Bureau.

Ms. Gray, could you propose specific wording, so that we would be sure to correctly understand each word and its importance in the motion?

[*English*]

The Chair: Mr. Hoback.

Mr. Randy Hoback: On the special committee for Canada-U.S., we actually put this amendment through. It didn't jam up the committee, so we could proceed with doing things quickly, yet it still provided the resources that the Bloc party, or anybody speaking French, required to get the appropriate documentation to them in a timely manner. It was a good compromise in that committee. It seems to be working well there. It might be something that we can also do here.

The Chair: Mr. Savard-Tremblay, are we okay going forth with your motion as amended, or did you want Mrs. Gray to clarify?

[*Translation*]

Mr. Simon-Pierre Savard-Tremblay: I would like to get a clarification on the wording please.

[*English*]

The Chair: Madam Clerk, can you reiterate that amendment?

The Clerk of the Committee (Ms. Christine Lafrance): It would add “an MP's office or a party research group” after the “federal department”.

[*Translation*]

It reads as follows:

> That all documents submitted for committee business that do not come from a federal department, an MP's office or a party's research office, or that have not been translated by the Translation Bureau be sent for prior linguistic review by the Translation Bureau before being distributed to members.

● (1255)

Mr. Simon-Pierre Savard-Tremblay: I am okay with this.

[*English*]

The Chair: Mr. Hoback.

Mr. Randy Hoback: Chair, could you read the whole motion as amended?

The Chair: Go ahead, Madam Clerk.

The Clerk:

> That all documents submitted for committee business that do not come from a federal department, an MP's office or a party research group or that have not been translated by the Translation Bureau be sent for prior linguistic review by the Translation Bureau before being distributed to members.

The Chair: All those in favour of the motion as amended?

(Motion agreed to)

The Chair: We'll go back to Mr. Savard-Tremblay on the other motion.

[*Translation*]

Mr. Simon-Pierre Savard-Tremblay: Yes, it reads as follows:

> That the clerk inform each witness who is to appear before the committee that the House Administration support team must conduct technical tests to check the connectivity and the equipment used to ensure the best possible sound quality; and that the Chair advise the committee, at the start of each meeting, of any witness who did not perform the required technical tests.

[*English*]

The Chair: Thank you very much.

Is there any discussion?

Go ahead, Ms. Gray.

Mrs. Tracy Gray: Thank you, Madam Chair.

We think that this is a good idea; it's good protocol.

The Chair: Is there any further discussion?

(Motion agreed to)

The Chair: Thank you, all, very much.

Have a good week, and we'll connect Friday, if not before.

The meeting is adjourned.