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Chair

Mr. Kevin Sorenson

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● (1110)

[*English*]

The Chair (Mr. Kevin Sorenson (Crowfoot, CPC)): I call this meeting to order.

Our orders of the day include the commencement of our study on Bill C-9, An Act to implement the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention).

In our first hour we will hear testimony from the Department of Foreign Affairs and International Trade. We have Allan Kessel, legal adviser, and from the international trade side of the department we will be hearing from Robert Ready, director of the services trade policy division.

We are also pleased to have from the trade law division Riemer Boomgaardt, special counsel; Sylvie Tabet, senior counsel and deputy director; and Meg Kinnear, senior general counsel and director general.

In our second hour we will hear from the Canadian Chamber of Commerce, so we will introduce them when we begin that.

This is one of the first pieces of legislation that this committee has looked at, other than a private member's bill, so we look forward to this. This is a fairly small bill. We want to hear from the department to better understand exactly what the bill does and the safeguards it provides for Canadian investment and others.

So we thank you for being here and being part of that.

On the protocol for the committee, we like to hear from you in the first portion of the committee business and then go into the first round of questioning. In the first round we'll begin with the opposition and then go to the government.

We welcome you here and look forward to hearing what you have to say. The time is yours.

Mr. Kessel.

Mr. Alan H. Kessel (Legal Advisor, Department of Foreign Affairs and International Trade): Thank you, Mr. Chairman. Good morning to you and committee members.

The Minister of Foreign Affairs is unfortunately not able to join us today. He is out of the country. He has asked me to speak on his behalf, and I am delighted to have a very competent team with me who will be able to answer many of your questions when we get to that portion of the discussion this morning.

[*Translation*]

I am pleased to speak to you today on the subject of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, which I will refer to as “the Convention” in my remarks.

The Convention was sponsored by the World Bank to facilitate and increase the flow of international investment. The Convention establishes rules under which investment disputes between states and nationals of other states may be solved by means of conciliation or arbitration. It also creates the International Centre for the Settlement of Investment Disputes, known as ICSID to administer cases brought under the Convention. Canada signed the Convention on December 15, 2006.

[*English*]

Mr. Chairman, before a country can join ICSID, as it's fondly known, it needs to pass legislation providing for ICSID awards to be enforceable in its courts. Bill C-9, which is under study by the committee, deals with enforcement of ICSID awards for or against the federal government and foreign governments, including constituent subdivisions designated by foreign governments.

There are numerous reasons to support Canada's adherence to the convention. It would contribute to enforcing Canada's image as an investment-friendly country. It would provide additional protection to Canadian investors abroad by allowing them to have recourse to ICSID arbitration in their contracts with foreign states. It would also allow investors of Canada and foreign investors in Canada to bring investment claims under ICSID arbitral rules, where such clauses are contained in our foreign investment protection agreements and free trade agreements.

International investment arbitration is growing in importance. For instance, the stock of Canadian direct investment abroad in 2005 increased to a record $469 billion. As a result of the globalization of investment, the number of investment disputes has greatly increased in the last five years.

ICSID arbitration has soared. Only 110 ICSID arbitrations have been completed over the past 40 years, but 105 proceedings are now under way. The NAFTA parties alone have faced over 40 investor-state arbitration claims since NAFTA entered into force.

The tremendous growth in investment and investor-stated disputes has made Canada's failure to ratify ICSID the focus of attention by Canadian business, the Canadian legal community, and our trading partners. To date, 143 states have ratified the ICSID convention. The majority of our major trading partners are parties to it, except for Mexico, India, and Brazil. Ratifying ICSID would bring Canadian policy into line with our OECD partners. In a survey conducted by the ICSID centre in 2004, 79% of the respondents said ICSID plays a vital role in their country's legal framework and 61% said ICSID membership has contributed to a positive investment climate.

The ICSID regime provides several important advantages, and compared to other arbitration mechanisms, the ICSID regime provides better guarantees regarding enforcement of awards and more limited local court intervention. Any arbitral award rendered under the auspices of ICSID is binding and any resulting pecuniary obligation must be enforced as if the award were a final domestic court judgment.

Moreover, all ICSID contracting states, whether or not parties to the dispute, are required by the convention to recognize and to enforce ICSID arbitral awards. Investors often prefer to rely on such arbitrations rather than on the local courts of the country whose measures are in dispute, to ensure an independent resolution of the dispute.

ICSID's relationship to the World Bank assists investors in obtaining compliance with ICSID awards and its roster of arbitrators gives investors access to well-qualified arbitrators at ICSID-controlled rates, with extensive experience in international investment arbitration. ICSID also provides important institutional support for litigants.

The ICSID convention is a well-known tool for the settlement of investment disputes, therefore the interpretation of the convention and its usefulness are predictable. It is difficult to quantify how often Canadian businesses active abroad would use the convention for protecting their activities.

Canada already has numerous links with ICSID. Provisions consenting to ICSID arbitration are commonly found in contracts between governments of other countries and Canadian investors. The NAFTA in chapter 11, the Canada-Chile FTA, and most of our bilateral foreign investment protection agreements, or FIPAs, provide for ICSID as a dispute settlement option that can be chosen by an investor if both the state of the investor and the host state for the investor are party to ICSID.

● (1115)

However, Canada and Canadian investors cannot benefit from this choice if Canada is not a member. This is an increasingly important problem. Within Canada the use of ICSID would be consistent with the government's policy of supporting the use of alternative dispute resolution mechanisms, or ADRs, for investor-state disputes. While ICSID is less expensive and more efficient than current alternatives, it is not expected to lead to increased litigation against the government.

For Canada, as a shareholder of the World Bank, there is no additional cost for joining ICSID by adopting the convention.

[*Translation*]

Provincial and territorial legislation is needed to ensure the enforcement of arbitral awards rendered in a dispute involving a province or territory designated as a constituent subdivision and which has consented to ICSID arbitration. The federal government has provided assurances that any province and territory that so wishes would be designated a constituent subdivision under the Convention.

The provinces and territories have indicated that they support the Convention in principle. They have also recommended that all jurisdictions, including the federal government must be take steps for the adoption of the legislation implementing the Convention.

● (1120)

[*English*]

Ontario passed implementing legislation in 1999. British Columbia, Saskatchewan, Newfoundland and Labrador, and Nunavut passed such legislation in 2006.

The Minister of Foreign Affairs would encourage you to study this bill and improve it in order to facilitate adherence by Canada to the convention as soon as possible.

Thank you, Mr. Chairman.

The Chair: Thank you, Mr. Kessel.

Are there any other presentations from the other representatives here? You're here mainly to answer questions and help in that capacity; all right.

Thank you for that, Mr. Kessel. It helps inform us more on ICSID and what we're doing.

We'll go to the first round and to Mr. Wilfert.

Hon. Bryon Wilfert (Richmond Hill, Lib.): Thank you, Mr. Chairman.

Thank you for coming, ladies and gentlemen.

I agree with the thrust of it. I just have a quick question.

On the issue of those that have not ratified—our major trading partners, Mexico, India, and Brazil—what are the implications that they have not ratified and what, if any, is the status regarding those particular states? And how does that affect us? Given the fact that we're signed on with another 143-odd states, what is the effect of leaving these three out?

Ms. Meg Kinnear (Senior General Counsel and Director General, Trade Law Bureau, Department of Foreign Affairs and International Trade): I will take a stab at this.

First of all, in terms of the status, we don't know the status. We know, informally, that Mexico would like to assent to it, but we don't know anything further. This really is an in-house domestic matter for those countries.

In terms of implications for Canadian investors, presumably it means that when they are dealing with those states, resort to the ICSID facilities would not be possible. But what we are looking at of course is that, if we do this, Canadians will have resort when they are dealing with the 143 other members.

So while it's correct that those three are not yet ICSID members, it does give access to ICSID facilities for those 143 others, which is obviously very significant.

Hon. Bryon Wilfert: I would agree that they are significant. In terms of the procedure for the three that are not, I would presume that, if this were to pass, our embassies certainly would be in contact with the respective governments, obviously notifying of that, trying to see what the status is in their own particular jurisdictions.

How do we make this information available to investors abroad? Sometimes you pass legislation and people assume it applies to everybody, and obviously in these three cases it does not. What do we do in order to educate people, so that we don't have people coming and saying they didn't know?

Ms. Meg Kinnear: Would this be Canadian investors in particular?

Hon. Bryon Wilfert: Yes.

Ms. Meg Kinnear: I think Mr. Ready might want to speak to this a little bit as well.

The Department of Foreign Affairs has various links with stakeholder groups, people who are interested. At times they will have companies that are investing in other countries and that are concerned or interested about this issue asking them, “Is there a treaty with this country, with what kind of protection?” So that is done.

As well, our legal group has constant contact with the Canadian Bar Association. We brief them at all times about the status of this. This has been something they are extremely interested in and very supportive of. We brief them on a regular basis about its status.

As well, there are frequent informal contacts where they have, for example, a client coming in saying, “I will be investing in a particular country. What is the protection?” They will often call us and ask the kinds of questions that you're posing as well.

So it's that kind of information process, I think.

The Chair: Mr. Ready.

Mr. Robert Ready (Director, Investment Trade Policy, Department of Foreign Affairs and International Trade): I really have very little to add to that. We are in contact with a number of groups, counsel who regularly handle international investment matters.

The only thing substantively to add is it would be part of the regular communication we have with respect to trade policy and international agreements on our websites and on our communication with the business community and posts abroad.

Hon. Bryon Wilfert: My final question, Mr. Chairman, is to Mr. Kessel.

In your comments you said that, “it is not expected to lead to increased litigation against the government”. On what basis do you make that statement?

Ms. Meg Kinnear: It's not expected to lead to increased litigation because this convention would allow us to have ICSID as an arbitral facility. In other words, it makes it available as a facility, but it doesn't give any substantive rights to start any kind of actions or claims. So it doesn't give you additional rights, those are already there. It just gives you another option, and perhaps a better option, in terms of where you go to have that claim heard. It also gives you a better and easier way if, at the end of the day, you win an award, to have that award enforced.

It doesn't affect the rights you may have, whether you think a right has been breached. It doesn't affect or operate in that realm. It really is a procedural mechanism. It provides you with a forum, the equivalent of a court, and provides you with a much easier, more expeditious way to enforce an award at the end of the day.

● (1125)

Hon. Bryon Wilfert: Thank you.

Maybe my colleagues have a....

The Chair: Thank you, Mr. Wilfert.

Does someone else from the official opposition want to speak to that?

Then we'll move to Madame Barbot.

[*Translation*]

Ms. Barbot, you have five minutes.

Mrs. Vivian Barbot (Papineau, BQ): Ladies and gentlemen, thank you for coming to meet with us today.

As you know, Quebec has not expressed its intent to join the Convention. As the Convention does not contain a federal clause, what will it change for those provinces that, like Quebec, have not signed it?

What situation are the provinces that have not signed the Convention in when Canada has ratified it?

[*English*]

Mr. Alan H. Kessel: Thank you, Mr. Chairman.

In fact, I note that the committee member has in the past supported this particular initiative of the government. We're encouraged by that, particularly because the provinces that have already indicated a strong interest in Canada adhering to this have indicated this is an alternative measure they see as important. Our understanding is that the provinces that have already prepared domestic legislation are prepared to use the federal accession immediately for their own interests, and they will include this in their contracts. Those provinces that haven't as yet done so are, I understand, seriously contemplating domestic legislation in their provinces so that they will also then be able to use this.

Our sense is that there's a strong will throughout the country that the federal government should get on with it and do it.

[*Translation*]

Mrs. Vivian Barbot: Moreover, if a foreign investor decides to challenge a Quebec act or government measure under an investment protection treaty that Canada has entered into, or to sue the Quebec government under a contractual agreement, can that person turn to ICSID? Can he continue to do so if Canada ratifies the Convention?

Ms. Sylvie Tabet (Senior Counsel and Deputy Director, Trade Law Bureau, Department of Foreign Affairs and International Trade): Currently, a foreign investor cannot sue either the Canadian government or the Quebec government under the ICSID rules, since we are not members of the Convention. Once that is the case, under the mechanism containing the ICSID clause—the clause referring to the dispute resolution mechanism—the answer might be different.

For example, if Quebec implements an act at the provincial level, it asks the federal government to designate it as a constituent subdivision. Then it is possible for the Quebec government to include an ICSID clause in its contracts and for a foreign investor to sue the Quebec government.

In the case of international investment treaties, since treaties are generally in the name of the federal government, only the federal government can be sued.

[*English*]

The Chair: Thank you.

Thank you, Madame Barbot.

Either Mr. Goldring or Mr. Obhrai is next.

Mr. Deepak Obhrai (Calgary East, CPC): I'll go first, and then Mr. Goldring. We'll share the time.

I have two questions. The first question is similar to Mr. Wilfert's, about these countries that have not signed the convention. With Mexico we have NAFTA, and with India we just signed the FIPA agreement in June. It covers investment in reference to protection for Canada.

What is the difference? Let's take the case of India. What would be the difference between the FIPA that was signed and this convention?

Second, just for curiosity, why did it take us so long to bring this thing up in Parliament? This has been in action for such a long time. Why did it take such a long time?

● (1130)

The Chair: Go ahead, Ms. Kinnear.

Ms. Meg Kinnear: If I may, I'll start with the last one. What took so long? That's a really good question. We ask ourselves that, and have for a long time. We always ask ourselves that because, frankly, we see this as a completely good-news story with no bad impacts. It really shouldn't be controversial. Maybe that's why it hasn't been able to capture attention.

We do know that over the years there have been flurries of attention when we've spoken with provinces. All the provinces have told us they support this. Then, for whatever reason, it seems to have slipped to the back of legislative agendas. That's why we are extremely encouraged now that this committee is looking at it today and that we have moved forward.

This was taken and signed at the World Bank in 2006. That was a very significant step and the most progress we've made, and we've received a lot of feedback from people saying it's fantastic that we're finally going to do this.

So your question is very good. I don't have a terrific answer to it except to say that we certainly share the same sentiment.

In terms of the question concerning the FIPA with India—and we have NAFTA, of course, with Mexico—I may not have totally understood the question, so please let me know if I'm not answering exactly what you were asking—

The Chair: I think the question basically asked you to differentiate between the protection in FIPA and what this ICSID would enable Canada to....

Ms. Meg Kinnear: Yes, okay, I can do that.

It goes back to one of the first issues we were discussing this morning. A variety of rights are standard in these treaties, and the FIPA provides substantive protection—the right, for example, not to be expropriated, and the right not to be discriminated against in terms of national treatment. There are a variety of standard rights. That is in the FIPA; in the case of NAFTA, it's in the actual NAFTA.

This treaty does not have any of those substantive rights. It doesn't say “Thou shalt not expropriate” or any of that. All it really deals with is that if one investor thinks another country has, for example, expropriated, then they have a place to go to have the arbitration heard, a facility that's very professional and up and running, and if they are successful in making their case, it provides a way to have it enforced easily, efficiently, and cost-effectively.

It doesn't give substantive rights; it's not substantive obligations. That's what's in the actual negotiated treaty—for example, the treaty we negotiated with India just a while ago, and the NAFTA in the case of Mexico.

The Chair: Thank you.

Go ahead, Mr. Goldring.

Mr. Peter Goldring (Edmonton East, CPC): Thank you for appearing today.

I'd certainly agree that this is a positive initiative with little downside to it. The more confidence there is in the international investment, the lower the cost will be vis-à-vis the risk factor to it.

My question is more to the relationship. You say two countries have not signed on to it, or agreed to it, but there are several countries, such as Great Britain, that have territories that are virtually self-governing. I think particularly of the Turks and Caicos Islands, or you might look at the Cayman Islands and other areas known for their offshore banking and offshore investment.

Have those countries, by themselves, made independent application, or are they under Great Britain's initiative? How do they fit into this, and is this intended to deal with these types of circumstances?

Ms. Meg Kinnear: We are just checking. We have a list of countries that have acceded and the territories they might have brought with them. I can't answer that off the top of my head, but it's certainly public knowledge, and we're trying to see if one of the materials we have from ICSID lists that. Basically it's something I think each country considers when they accede; depending on their relationship with the territories or other units like that, they will accede with or without them.

I'm sorry; I don't have that list with me. We can certainly undertake to provide it to you.

The Chair: Thank you very much.

We will have to get you on the second round, I'm afraid.

We'll go to Mr. Dewar, please.

Mr. Paul Dewar (Ottawa Centre, NDP): Thank you, Chair.

Thank you to our panel for being here today.

The question I wanted to start with, and you've kind of touched on it, is on provincial compliance. Just to clarify with you, if provinces don't sign on, is it an all-in, all-out? Is there a niche here?

The way you're reacting suggests that if a jurisdiction in, say, Manitoba or another province decides that it doesn't want to go in on the agreement, it can be excluded from it. Is that the case?

● (1135)

Ms. Meg Kinnear: What the federal government has said to all the provinces is that if you want to be what's called “designated” as a constituent subdivision, just tell us and we will do that.

The one thing you have to do before being designated is pass your own legislation, basically similar to this kind of legislation, enabling it. In fact, many years ago, the federal government worked with the provinces to basically create a model, so it's been very easy for them to do that if they want to, and as you know, five of them have.

Others, we know, are working on it, and others may decide, for whatever internal reason, that they don't want to or need to. So we have said that this is up to you, and if at any time later you decide that you would like to be designated, just tell the federal government. There is no problem with that, but it's totally up to the province to decide when they would like to do that.

Mr. Paul Dewar: Thank you.

Our party has been on the record as having concerns, as you know. A couple of concerns we have are about transparency and accessibility and accountability.

The transparency issue.... I understand it, and it's good news when you hear that it's not going to cost anything and that it's win-win. I'm from the school that believes there's also no free lunch. Transparency vis-à-vis the World Bank is an issue, not just with our party but with many, including people who are within the World Bank, if you talk to them off-line.

My concern, and my understanding of this agreement, is that it's a consent-based process. Once you consent to the process, what avenues do you have for appeal? And when a decision is made, what access do citizens have in terms of for-the-record decisions? Are we subject to the ATI here, and do we have any access to published decisions so that one can view any particular case?

I'll just start with that, and that's the transparency issue.

The Chair: Thank you, Mr. Dewar.

Ms. Meg Kinnear: Transparency, as you know, has been a big issue in international arbitration.

ICSID itself has actually taken a lead, and they amended their rules in April 2006 to go farther on transparency than any of the other existing regulations. Now at ICSID it is standard to have open hearings. There are obviously some exceptions for things like confidential business information. Those are obvious exceptions that we have in domestic law, as well.

Documents and pleadings are made publicly available. You can go on the ICSID website at any time and you will have access to all awards issued by the tribunals. ICSID has also gone a long way towards enabling what are known as amici curiae types of briefs where interested third parties would like to have a say or have something to contribute to the process. So ICSID has actually been a leader in that.

The other thing to note here is that Canada itself has been very forthcoming that this is extremely important to us, and we have built it into our model foreign investment protection and promotion agreements, or FIPAs.

We have made sure that if you are exerting a right under that FIPA, one of the things that is a given is that these will be, for example, open hearings. Documents will be publicly available, and awards will be published. We've actually taken the step before, saying that if you want to go under our FIPA and exert a right under that FIPA, here's what comes with the package: transparency.

The Chair: Thank you.

Mr. Paul Dewar: There are a couple of changes you've noted, and those were changes as of April 2006. The information that I had suggested that the amici curiae briefs weren't allowed previously, and you're saying that it's changed.

Ms. Meg Kinnear: There is a process now to ask tribunals to submit an amicus curiae brief, or the equivalent of that. It is always at the discretion of the tribunal, depending on how helpful it can be and on how relevant it is. That's exactly the same kind of test we have domestically.

Mr. Paul Dewar: With the compliance of both parties.

Ms. Meg Kinnear: No, it's not on consent. A tribunal could, if it were interested; even if a party didn't want the amicus to submit a brief, the tribunal could say, no, we actually would like to hear this.

In fact, that has happened.

Mr. Paul Dewar: But it doesn't have to—

The Chair: Thank you, Madam Kinnear.

We'll try to keep on the timelines here.

We'll come back to the government side and then to the Liberals, but first I want to ask this one question.

You've referred a number of times to NAFTA, and we know that there is a NAFTA panel, there's a NAFTA dispute mechanism there. I come from a rural riding where it has been in the news for the last five years about the BSE and the problems we've had. I became involved in the chapter 11 part of the NAFTA agreement.

Just so that I get this clear, if we had been a signatory to ICSID, the only other option we would have had.... In that dispute, we went through the NAFTA panel. Am I correct in saying that we would have had another option of being able to go through ICSID, in a case like that?

● (1140)

Ms. Meg Kinnear: No. Again, I get back to the basic difference. There are two things to distinguish. On the one side, NAFTA—or FIPAs—gives you a substantive right. You will not expropriate, you will not discriminate—that kind of thing.

The Chair: But there is a panel. There is the NAFTA panel.

Ms. Meg Kinnear: Yes, there is a panel. That's right. And the procedural rights come under a variety of instruments. ICSID is but one of those instruments.

If, for example, ICSID had been in place, if we had done this before those cases were brought up, the investor, for example, in the Canadian cattlemens' case, would have had the option of requesting that the case be heard by an ICSID convention panel at the ICSID facilities, and if they were successful, then enforcement would have come through ICSID. It would have been an additional mechanism they would have had as an option, but it would always be pursuing a NAFTA right or NAFTA claim. That's what doesn't change.

The Chair: But in that case it would have been a positive option.

Ms. Meg Kinnear: Definitely it would have been one more option...that's right; a positive option? It would have been one more choice they would have had. It would give them the option of...the leader in, you know, the world's running these and enforcement. It would have been the easiest enforcement mechanism—so not just another option but probably the best option.

The Chair: It's a shame this wasn't done a long time ago.

We'll go to Mr. Goldring, please.

Mr. Peter Goldring: My question was going to be along that same line, that the understanding of this would be that the organization itself would be covering the costs of grievances.

Could you explain this convention itself? Is it a type of rules? Is it a type of standards? There must be a lot of text to it. Is this something that gives guidance to many of these countries so that it never gets to the grievance stage?

If they're signatories to it, they're fully apprised of it. By being a signatory, it's certainly an encouraging thing for countries to want to sign up to it, just because of the confidence it would give investors.

So can this be perceived as a type of guidance mechanism before it comes to the grievance level?

Ms. Meg Kinnear: In terms of costs, the cost of the running of the organization essentially is already covered by the contributions Canada makes to the World Bank. So that's basically covered.

Now, the fact is that in each individual arbitration, a tribunal has, at the end of the day, the right to say that one party or the other will cover the costs of the tribunal, that kind of issue. Again, it's very similar to domestic law where at the end of the day a judge can order a party—often the losing party—to cover the costs.

In terms of conciliation settlement, I think it's important to note that ICSID is certainly best known as an arbitral facility, but they also have conciliation facilities with the ability to conciliate. So there is yet another way, hopefully, to try to settle disputes and resolve them before they get into a formal dispute settlement process.

The third thing to note in that respect is that Canada's model, FIPA, and all of our investment treaties actually have built in a first layer that says the two parties who are adverse in interest must sit down and try to resolve the dispute before going ahead into formal dispute settlement procedures.

There's a last thing I wanted to note. You asked if it set out rules, etc. You might have seen us referring to this, the ICSID convention, the governing rules. Then they have attached special rules that apply in an arbitration process.

We have many copies of this. It's also on the website. We can provide web addresses, certainly, but in terms of having rules to go to, these would be those rules.

The Chair: Thank you very much.

We'll go to the Liberals now. We're still in five-minute rounds.

● (1145)

Hon. Keith Martin (Esquimalt—Juan de Fuca, Lib.): Thank you very much.

Thank you to all of you for being here today.

I have a couple of questions. The first is on the appeal process for a loser in a dispute mechanism. What appeal process exists in that case? What is the makeup of the tribunal? Is it shared among the member states?

I know I'm going to get calls, as all of us are, about the multilateral agreement on investment. People are going to bring that up, as misunderstood as it was. Perhaps you could just share with us your views on how this differs from the MAI, to assuage any concerns that you hear, as we do also.

Thank you.

Ms. Meg Kinnear: First of all, in terms of appeal, part of the appeal process allows parties to go to what's called an annulment process. If a party wants to take an award that they're unhappy with one step further, they ask the ICSID to set up an annulment panel, and the annulment panel will hear and determine. At the end of the day, once that's done, that's the end of the road in terms of further appellate mechanisms.

Secondly, in terms of the makeup of the panels, the ICSID has rosters, and every country is entitled, upon accession to ICSID, to name four individuals to that roster. Those individuals are usually well-known judges, well-known advocates, well-known arbitrators, and they are named to the list. Then any country and any investor that has a dispute is then able to go to that roster and say, "Here's a list of 100 eminent authorities or eminent arbitrators. We think we would like to nominate Mr. or Ms. So-and-So as our arbitrator."

Many treaties, including Canada's treaties, also allow you to nominate what's called off-roster. In other words, if you aren't keen on any of the names in the actual formal roster, you can put forward your own names. That is the makeup of the panels.

In terms of MAI, that covers, again, the substantive obligations: you shall not expropriate, you shall not discriminate, etc. It did not affect anything that would be done under the ICSID convention. It doesn't cover the same materials.

Again, I go back to the basic distinction between the treaties, which provide your substantive rights, versus the ICSID, which gives you a place to prosecute those rights and a better, easier way to enforce them at the end of the day.

So they really are two separate things. This is not part of MAI or the MAI debate, whatever one might think of it.

Hon. Keith Martin: Thank you for that.

I have one brief question. If a country doesn't enforce an ICSID decision, and it has force in law, as I understand it, within the signatories, what recourse is there to put pressure on that country to enforce that decision from ICSID? Surely of the 143 countries that are there, some of them do not have, one might say, the level of quality of the judiciary and quality of the governance structures that we do.

To put it politely, if the country is not willing to enforce that decision, then what recourse does the winner of that decision have?

Ms. Meg Kinnear: The answer will be in the realm of speculation, because it has never happened. There have been over 200 awards. They have all been honoured. It has never happened.

We would expect that as state members to the World Bank.... The World Bank obviously has a very great interest in having decisions enforced. Hopefully we never get to that situation, but if so, certainly, there would, I assume, be a certain amount of diplomatic discussion at the World Bank level and elsewhere.

But as I say, that's speculation, because it has never happened. Any award that's been rendered by the ICSID, in the ICSID facility, has always been honoured.

The Chair: Thank you.

Mr. Chan, go ahead, please, very quickly.

Hon. Raymond Chan (Richmond, Lib.): Okay.

It's between states and nationals of other states, right, not between nationals of different states?

Also, when did China sign on to that convention?

If some of the provinces have not signed on in Canada, does that mean that those Canadians who reside in those provinces would not have the benefit of the convention?

● (1150)

The Chair: That's a good question.

Ms. Meg Kinnear: If Canada and China sign a FIPA—and you know that's being negotiated now—all Canadians will get the benefit of that. So if we are able to pass this bill, they will then also have the option of going under ICSID convention arbitration.

The Chair: Thank you, Ms. Kinnear.

Madame Barbot.

[*Translation*]

Mrs. Vivian Barbot: Last December, the government made public its use of the supplementary ICSID mechanism, the mechanism Canada will no longer be able to use when it signs the Convention. Does the fact that Canada signs the Convention mean that previously negotiated treaties must be renegotiated?

Ms. Sylvie Tabet: No, in fact, that's simply an option. In our treaties, investors can generally choose to use different types of arbitral rules, including the Convention and ICSID rules or the rules of the supplementary mechanism. That will be the investor's choice, whereas investors currently cannot choose the ICSID option.

Mrs. Vivian Barbot: Even in treaties that are considered bad treaties, the government will have this new option. Investors will be able to go to ICSID if Canada has signed.

Ms. Sylvie Tabet: I don't know what bad treaties you're referring to, but all our treaties contain a reference to ICSID, in addition to other dispute settlement mechanisms. Once we've signed, they will have access to those rules.

Mrs. Vivian Barbot: So there's an obligation to go back to treaties that were previously imperfect.

Ms. Sylvie Tabet: No.

[*English*]

The Chair: Thank you, Madame Barbot.

Mr. Goldring is next, and then we'll go to Mr. Dewar.

Mr. Peter Goldring: You mentioned some 200 grievances that had been dealt with. What is the size range of those, and what size of investor or investment are we talking about? By giving us the range in dollars from the lower to the upper, it would tell us what the investors.... Obviously some would be small in smaller countries, and there'd be quite a range.

Ms. Meg Kinnear: The damage awards range from the millions to the billions. They are not small claims types of issues because it costs something to bring this kind of a claim forward. But they have been all over the map in terms of the range of dollars.

Mr. Peter Goldring: So they range from millions of dollars. That's a small amount in terms of international investment. We're obviously not talking about individual investment, we're talking about corporations and large organizations. So it would be considered from millions into the upper stratosphere, if you like.

Ms. Meg Kinnear: Yes, it could be. Obviously there would be lots of corporations and lots of big corporations. But some observers have been interested to note that not just big companies and big corporations use it. We've had experience in the NAFTA context, and if you look at the caseload of the ICSID over the years, small and medium-sized enterprises have used this. So it's not just something that large companies feel comfortable with.

On the BSE case that was mentioned today, about 196 farmers are all individual claimants here. These are individual farmers who actually operate home farms. So it is a tool that is not just limited to any particular size of company.

The Chair: Thank you.

Mr. Dewar, please.

Mr. Paul Dewar: Thank you.

I want to go back to the transparency issue. In article 48(5), my understanding is that the awards would be published with the consent of both parties. Is that correct?

● (1155)

Ms. Meg Kinnear: Yes, it says that the centre shall not publish the award without the consent of the parties. The centre shall, however, promptly include in its publication excerpts of the legal reasoning. So they can put the legal reasoning if someone for some reason tries to say they don't want the particular facts. It is unheard of, frankly. If you look on the web you will see that you always get the full award.

The other really important point here is from a Canadian perspective. Our FIPA requires publication of the entire award, and it would override any kind of situation where someone might say, under article 48(4), they only want excerpts or they don't consent. So we've taken care of that in our FIPA.

Mr. Paul Dewar: Thank you.

My other question is about when it's seen as beneficial for someone—in this case, Canada—to withdraw. How does one withdraw if one prefers to do so?

Ms. Meg Kinnear: There is a termination clause. I will try to get you the exact citation. There is an ability—

Mr. Paul Dewar: The reason I brought it up—I know it's not something we'd be contemplating presently—is that there is the case in Bolivia right now. You know the issue I'm speaking of.

There seem to be some issues there that we should pay attention to. In a notice for termination, if there were overlaps between those investors who had been party to and privy to the arrangement, and the country decided to withdraw, how would that affect investors?

So I'm just curious about the process of termination.

Mr. Riemer Boomgaardt (Special Counsel, Trade Law Bureau, Department of Foreign Affairs and International Trade): Article 71 of the treaty provides that a contracting state may denounce the convention by written notice of six months. The denunciation takes effect six months after the receipt of such notice.

You're right that if there were a dispute under way pursuant to the convention, there's been a lot of discussion in the legal community about what the implications of that would be.

There has not been any final resolution of the matter. If there were a tribunal already formed—let's say, in the case involving Bolivia—that tribunal would make a ruling, and then Bolivia might seek annulment proceedings, but we don't know what the resolution of that would be.

Mr. Paul Dewar: So it's six months under article 71; that's the basic premise.

Thank you.

The Chair: Thank you very much.

Did you have one more quick one, Mr. Goldring?

Mr. Peter Goldring: Could you possibly expand a bit on the aspect of accountability of the arbitrators and the arbitration rules on that? Could you expand a little and talk about the accountability of it?

Ms. Meg Kinnear: Yes, I'd be glad to.

I'm not certain what exactly you're thinking of in terms of accountability, but as we say, these tribunals are three-member panels generally. Generally the hearings are open to the public. Often a treaty will set it up such that one member is appointed by one country, the other is appointed by the investor, and the presiding member will either be by consent of the parties or, if they can't consent, by the ICSID appointing one for them.

The hearing is in public, and then there is this process of annulment. If people feel there is a need to have a review process or an appeal process, decisions are made public, and there is a very active community that looks at, examines, and critiques these decisions.

You will find increasingly that arbitrators cite past decisions. It is not a formal precedent system such as we have in domestic law, but it is becoming increasingly so. So there is a developing, coherent body of law so that we can know much better and predict whether, if we do this certain thing, it will be potentially considered expropriation or will potentially violate a treaty obligation.

I think that's probably all part of the accountability process. I don't know whether there are any particular aspects you're thinking of, but if there are I'd be glad to address them as well.

Mr. Peter Goldring: One of the aspects would be with 200 settlements. What is the sense of how the settlements were resolved? Were the complainants....? Obviously they'd be generally satisfied by receiving a settlement, but is there a sense that they received generally what the specific claims they could establish would be, or was it arbitrated into much lesser levels?

● (1200)

Ms. Meg Kinnear: It should be clear that when I spoke of the 200 number, that's 200 decisions.

Sometimes investors win, sometimes they lose. Generally our experience has been that you're satisfied if you win, and you're not happy if you lose, I guess.

Mr. Peter Goldring: There's a general satisfaction from the investors, then.

Ms. Meg Kinnear: But in terms of process, that's one of the advantages of ICSID. People feel they get a fair and thorough hearing—that's the key, win or lose. Obviously you're happier if you win, but at least you get a fair, full hearing.

The Chair: Thank you very much.

It has a close relationship with the World Bank. If there is a challenge, do they meet, then, in Washington at the World Bank? Is there a place where they come together, or do they go to those countries? Is it right in Washington?

Ms. Meg Kinnear: The seat of the World Bank is in Washington, so as a general rule the hearings are held in Washington. They have very good facilities for hearings in Washington. There have been some instances...and it is possible to go outside of Washington for these hearings, but the general rule and the general practice is that it's in Washington.

The Chair: All right.

We want to thank you for coming to help our committee understand some of these conventions a little better. We appreciate your input on Bill C-9.

We're going to suspend for just a few moments.

Mr. Dewar mentioned earlier that he's never seen a free lunch. Well, there is lunch here. As we do the exchange between the guests and the next group that we're going to hear from, I would ask committee members to avail themselves of that lunch. It's one of the few perks of meeting in this time slot, through the lunch hour.

Thank you again for coming.

● _____ (Pause) _____

●

● (1210)

The Chair: Members, we now have an opportunity to hear from the Canadian Chamber of Commerce. Testifying we have Milos Barutciski, vice-chair of the international affairs committee, and Brian Zeiler-Kligman, international policy analyst.

Recently the Honourable Perrin Beatty, president and CEO of the Canadian Chamber of Commerce, extended to me the opportunity to send a congratulatory message to Donald Stewart, president and CEO of Sun Life Financial on the occasion of his being honoured as the 2007 recipient of the Canadian International Executive of the Year Award. So the committee may want to take a look at the message that was forwarded.

We certainly do appreciate the work of the Canadian Chamber of Commerce, and we look forward to hearing from them.

To our two guests today, we look forward to hearing what you have to say in our deliberations on Bill C-9. I know that some of you were here for the testimony we heard earlier.

Welcome here. The time is yours.

Mr. Milos Barutciski (Vice-Chair, International Affairs Committee, Canadian Chamber of Commerce): Thank you, *monsieur le président et membres*. I am in fact, as you said, the chair of the international affairs committee of the chamber. In my day job, I'm a partner with the Bennett Jones law firm and I'm head of the international trade and investment practice there.

Since we were invited to appear here on fairly short notice, I originally thought we might do an overview of ICSID and where the business community comes out on it. Having heard at least a good part of the presentation of Meg Kinnear and her colleagues, I think it would probably be a waste of your time. Everything I heard, we as a business group would have absolutely no concerns about. I think the description of ICSID and the process you heard is entirely accurate and consistent with our views, so I'm not going to go through that blow-by-blow.

What I would like to do in the short time we have is pick up on some of the questions individual members raised during the Q and A portion of the government presentation and try to put a bit of a business perspective on that to make you understand why business specifically supports ratification of the ICSID convention more than 40 years after it was signed.

There's no real order. I'm going to go through these issues as I jotted them down listening to your questions.

[*Translation*]

I'm going to start with the distinction between process and substantive. The Convention has nothing to do with substantive law. It's simply a process that follows the making of obligations by a member country. It is the process that enables investors to have their Convention rights recognized.

[*English*]

That's a fundamental distinction. A lot of the questions that went to the government members had a bit of that flavour.

Canada has signed NAFTA. Chapter 11 is part of NAFTA and creates the substantive investor rights. Canada has signed some 20-odd foreign investment protection agreements. The obligations Canada has agreed to in those agreements exist and will continue to exist regardless of what you do here.

As you know, there have been NAFTA disputes and Canadian companies have availed themselves on a very few occasions of making claims under the FIPAs. So regardless of your position or your views on the substantive rights, that's not really the issue here. And that's a very important point to bear in mind.

Secondly, once you have the ICSID process.... Obviously you have to ask yourself why it would benefit Canada in general, and secondly, from my constituency, the business community to have Canada as a member of ICSID, recognizing that there 143 countries. Virtually all of our trade and investment partners and virtually all of the countries where Canadian businesses invest have adhered to the treaty.

The answer to that is relatively simple. There are a few parts to it, but from a business perspective, the first thing that's attractive here is that you have a recognized forum, with well-established rules. As Meg and her colleague explained to you, there is a wealth of jurisprudence under ICSID with precedential value in the sense that the cases, while not binding on other panels, provide guidance in terms of the interpretation of investment law—not just ICSID itself, but the FIPAs.

The FIPAs have very specific rights that are roughly repeated, but sometimes in different language from investment agreement to investment agreement, whether it's expropriation, fair and equitable treatment, minimum standard of treatment, national treatment. For all of these obligations, the wording varies slightly but the subject matter is the same. So under the ICSID process you have panels, and an institutional structure that has that institutional history to understand, and to understand why the specific wording in this treaty might lead to a slightly different result because they didn't use the same language in that treaty.

By contrast, ad hoc panels.... Remember, I said the treaty rights exist. Investors will avail themselves of them, unless you would draw from the substantive treaty. So by contrast, under the substantive treaties—again, as my government colleagues explained—there are several different processes that you can avail yourself of. Usually it's an UNCITRAL rules process, which is essentially ad hoc. There's no similar, comparable institutional structure that administers UNCITRAL arbitration the way you have under ICSID. It's basically just a set of rules. So you can invoke that, or perhaps in some instances you can invoke, as you heard, the ICSID additional facility rules of the other country, the host country or the plaintiff country, if the claim is against Canada or ICSID members. But you can't do the main ICSID rules.

As I say, that becomes a bit of an ad hoc process, especially if you do ad hoc arbitration using the UNCITRAL rules. Here you have an institution that has experience in administering this area of law—a wealth of experience now over the past couple of decades, or the last decade especially, of some 200-odd cases.

So that is an important reason—the depth of experience, the knowledge, the understanding that the institution has and can bring to a dispute that benefits not just the business community, but the government as well, on the other side. In my respectful view, there's a lower risk of a rogue panel—and we've occasionally heard governments talking about rogue panels—in the context of an institutional forum like ICSID than you might have in an ad hoc panel.

So both government and investor benefit from an institution that has certain...as I say it's not binding; the panels are free. Panel decisions of the past are not binding on today's panel decisions, but when the panel takes place in an acknowledged forum with an administration, a secretary general, and so on, there is an institutional weight that's given that perhaps might not weigh as heavily on an ad hoc panel. So it gives both government and investor a measure of certainty.

● (1215)

Another key issue is the very limited review, the finality. Under ICSID, if you don't like the decision, there's really only one step you can take, which is to invoke the appeal or review procedure under ICSID—that's it. You don't go through potentially interminable litigation in the national courts. It's not necessarily the national courts of the jurisdiction where the plaintiff is, or the jurisdiction of the host country. They could have put the seat of the arbitration in a third country. In the Metalclad case under NAFTA, the seat was Canada. So the subsequent judicial review of that award against Mexico took place in the B.C. courts.

Our courts are pretty good at acknowledging the limits of judicial review of arbitral awards, but maybe other countries aren't quite as good. The finality of the ICSID process is critical to business and, I would suggest, should be important to government as well. You want things to have an end.

Also, the prospect of finality—one day you're going to be called to account—is an incentive to settlement. If I know I can litigate something repeatedly for years, if not decades, my incentives to settle aren't quite the same. I can grind the other guy down—grind the government down, if I'm a deep-pocketed investor, or grind the company down, if I'm a deep-pocketed government with a smaller medium-sized investor. So that finality is important from a second perspective.

A third point here is enforcement, and you've heard about that. The treaty provides that an award is enforceable, is binding, under international law against the defending government. That has immense ramifications for a business, for the successful investor. My colleagues and friends from the government side are probably at a better place to speak to the institutional extreme. My understanding at least is that since ICSID is in the context of the World Bank's world or penumbra, for reasons that shouldn't be too hard to figure out, host states that have had awards issued against them are probably going to think twice and be a little reluctant to violate the award that's binding on them under international law and a treaty they've signed with 143 other countries.

I've heard talk of instances where host states may have threatened not to make good on an award and then realized what the consequences might be within the World Bank world in terms of loans and grants that they may have outstanding from the bank, or possibly other member states that are sitting at the bank whose governments have bilateral grants or foreign aid and suddenly the bank says, “You know, you might want to think about this. They're just welching on their obligations here”. So there's an enforcement stick. It's an implicit stick more than anything that makes delinquent governments more prone to living up to their obligations.

Fundamentally, the key issue here that primarily is the concern from a Canadian point of view is it's outbound we're talking about, outbound investment. From the standpoint of the Canadian government's liability, the Canadian government is liable already. That happened when the government signed the 20-odd FIPAs, and it happened when the government signed the NAFTA and any future agreements. It incurs potential liability. It behaves contrary to its international obligations. It's not liable; it has obligations. So, signing or not, ratifying ICSID or not, really doesn't weigh one way or the other on it.

However, a Canadian investor looking for remedy overseas for the millions or hundreds of millions or billions they've sunk into the ground in a mine in Latin America and a plant in India or China or whatever, ICSID gives those Canadian companies a remedy and a recourse in the event that their rights are violated that is far more secure, far more attractive than what we have today in the absence of ICSID. That's basically why the Canadian Chamber of Commerce supports it. I think in the Canadian business community at large you'll be hard-pressed to find an association that doesn't support ratification.

● (1220)

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

Mr. Kligman, did you have some comments? Please go ahead.

Mr. Brian Zeiler-Kligman (Policy Analyst, International, Canadian Chamber of Commerce): Thank you.

Good afternoon. My name is Brian Zeiler-Kligman. As mentioned, I'm the international policy analyst with the Canadian Chamber of Commerce.

I will keep my remarks to simply a few comments on what the Canadian Chamber of Commerce has been doing in terms of its long-standing advocacy that Canada should ratify the ICSID convention.

Primary among these is our policy resolution process. We've had a series of policy resolutions over the years that have continually called on the federal government to ratify the ICSID convention. The most recent of these was passed at our 2007 AGM in September, in Markham, Ontario. It was passed unanimously by well over 200 local chambers of commerce, from coast to coast to coast. I have provided to the clerk, in both French and English, copies of that policy resolution, which should hopefully be distributed—if not already, then following the hearing.

As has been mentioned previously, there is a need to have our provinces and territories also implement the required legislation. In addition to our advocacy at the federal level, we have been working with our provincial and territorial chambers of commerce to inform them of the issue and also to get them to engage their own respective governments and put in process the implementation of legislation in those jurisdictions.

I will leave it at that, and I'm happy to answer any questions that you may have.

● (1225)

The Chair: Thank you, Mr. Zeiler-Kligman.

We'll go into the first round.

Mr. Martin, now that you have a mouthful of food....

As chairmen, we just wait for opportunities like that to call on you, with the clock running.

Hon. Keith Martin: Mr. Sorenson, you'd make a great dentist.

Thank you for being here today.

From your perspective, are there any concerns in terms of those who have not signed on to this, especially Mexico, and the fact that they are not signatories? Do you have any concerns that they are not a signatory, and what can we do to bring them on as a signatory? Could you also let us know what concerns they had and why they didn't sign on to this?

Mr. Milos Barutciski: In terms of non-signatories, Mexico is probably the most glaring example of a major trading country and a major investment host that's not a member.

I have concerns from the standpoint that, from a Canadian investor's perspective, once we ratify, assuming we ratify ICSID, it would be much better to have that process available vis-à-vis Mexico. However, the fact that one country out of 143...or a lot of those countries are fairly minor countries. But if you had to pick the top 20 countries where Canadian investment goes, or the top 30, 40, or 50, my bet would be that 49 of the 50 are on that list.

So on balance, while it would be better to have Mexico, on balance its absence—or the absence of any of the other countries—is certainly not a reason. How do you get them on board? That becomes....

I don't know why Mexico isn't on board, so that's something you could put to the foreign affairs people.

Hon. Keith Martin: Brazil and India are no small players in the international world; emerging markets for both.

Mr. Milos Barutciski: You're quite right.

Hon. Keith Martin: I'm just curious whether you know what their concerns are and why they did not.....

Secondly—you may or may not be able to answer this—if you're having a dispute and, say, China is the loser, if you will, in a resolution from ICSID, Chinese judicial structures are not what we would call sound, to put a fine point on it.

What faith do you have that countries like China would actually be able or willing to participate fully in ICSID? A lot of countries sign on to a whole slew of treaties and become signatories but don't live up to them at all in practice.

Mr. Milos Barutciski: China is a good example. I will get back to your comment about the Indias and the Brazils of the world, but China is a very good example. The country I think would have every incentive to comply with an ICSID award, which is quite different from complying with an award of a Chinese court or a Chinese arbitrator that might have gone to a foreign investor.

You're absolutely right, the rule of law in China, while they are struggling to enhance it, can be a dicey affair for an investor or a foreign claimant—for example, a foreign supplier who is exporting goods to China and gets into a dispute with their buyer. Usually it is the other way around. They are exporting more the other way, but there are Canadian companies that are exporting there too and I've acted for a number of them.

When you get into a dispute there are standard forms that force you into arbitration under the Chinese...and there are several Chinese commercial arbitration regimes. Under their standard form contracts, you are forced into that world. Then if you happen to be lucky enough to win in arbitration there might be a few other challenges in enforcing your award if you got an award.

So yes, you're right, there is a risk. The beauty of ICSID is that it doesn't go before the Chinese judicial system. If the Chinese government loses an award the only way they can have it reviewed is by going to the ICSID treaty review mechanism. Then on enforcement, enforcement when you're dealing with sovereign defendants is always a challenge. You have to find goods that are attachable and so on.

My point here goes a little further. I do not think the benefit of ICSID is an order that can be enforced the way you would enforce a domestic order, register it in a court and get a bailiff to seize assets. The beauty of ICSID is that it is an express international obligation of the member of the host country against whom the award has been made to live up to its obligation including paying the award.

So for a country like China that today is becoming a very significant outbound investor.... My former firm acted for a Canadian company, PetroKazakhstan, where they sold their assets—virtually all of the assets were overseas in Kazakhstan—to the Chinese national oil company. That is just one example. The Chinese have assets here. They have made substantial investments in Canada, which aren't particularly well known but they are here. They are looking for further investments, not just in Canada, the United States, or Europe but all over the world.

For a country like that to welch on its ICSID obligations has some serious ramifications in terms of the receptivity of the countries where it's going to make investment. That is part of the beauty of ICSID. It is a mechanism that everybody who is a party to it has agreed to. If you choose to welch on your obligations you put your own investors' rights and interests at risk. So I think that is an important function.

As to Brazil and India, let me just touch on them briefly. I do not know the facts why specifically they haven't signed on. But last time I looked, while we would love as a business community and I am sure as a country to increase our trade to India and our investment in India, frankly it's a drop in the bucket. I think our outbound trade is about $200 million and our outbound investment is about $500 million. I may be off by a couple of hundred million dollars, but frankly it is insignificant.

Brazil is a little better, but even there we are not—

● (1230)

The Chair: Thank you very much, Mr. Barutciski and Mr. Martin.

We will go to Madame Barbot.

[*Translation*]

Mrs. Vivian Barbot: Thank you, Mr. Chairman.

Thank you for coming to meet with us today.

Investment treaties and bilateral agreements currently enable Canadian investors outside Canada to sue certain governments if they pass legislation on, for example, the environment or social or public health issues that cause them to lose money.

Would the Canadian Chamber of Commerce object if investment treaties stopped exposing governments to such lawsuits when they pass an act or non-discriminatory practice consistent with the common good, but that at the same time would cause companies to lose money?

Mr. Milos Barutciski: Thank you very much for your question, madam.

First, your question is based on the assumption that the mere fact that a government passes laws on social issues such as the environment, education or public affairs gives a company rights under a bilateral treaty or NAFTA where those laws have the effect of causing that company to lose money. However, that is not at all the case.

Under all these bilateral investment treaties and NAFTA, governments are entirely free to legislate on social, environmental, business and tax issues, in short in any field. These treaties do not at all encroach on the legislative jurisdiction of governments, whether it be the federal government or provincial governments. However, when they legislate, they must take their obligations toward foreign investors into consideration.

That does not mean that they cannot legislate in a way that will in effect impose costs on investors, but it does mean that they will impose costs in an arbitrary manner, utterly without reason. The obligation of a minimum standard of treatment for investors will then be violated. If governments legislate in a way that amounts to an expropriation of an investor's property, that's different. For example, an investor builds a plant, the government doesn't take over the plant, doesn't expropriate it directly, but it puts measures in place that make the plant utterly inoperable.

● (1235)

Mrs. Vivian Barbot: I'm not talking to you about expropriation, I'm talking about health, for example. The situation is definitely not the same if we talk about expropriation.

Mr. Milos Barutciski: What I mean is that the situation is the same. Social, health or environmental legislation or an expropriation that make a company lose money will not enable that company to claim it back. But the fact that the government has legislated or acted in a manner that violates national treatment, and thus non-discrimination, obligations, the minimum rights and standards of treatment under those treaties or expropriation, will enable them to make a claim. Some legislation, environmental legislation, for example, has been attacked under NAFTA as being an expropriation, as in the Metalclad affair. Expropriation can even be involved in environmental or social issues.

My point was simple. When the government passes social, environmental, economic or tax legislation, or whatever, such that it encroaches on rights granted under the treaties, it becomes guilty or liable to investors for damages. I cited the expropriation example because that's one of the classic examples in international business law. In Poland, the Chorzów plant was rendered inoperable. It wasn't expropriated, but, as a result of a number of measures that the government took, the owner could no longer operate it. That wasn't done under an international treaty; it was decided by the Permanent Court of International Justice in the 1920s, I believe. The Court held that the country was liable in that matter.

It isn't the subject matter of the legislation that renders the country liable; it's the way in which it legislates. These bilateral treaties promise investors standards of non-discrimination, of fairness, that is to say fair and equitable treatment, standards against unwarranted expropriation, fair and equitable compensation, and so on. That's the operative principle, not the subject matter. The subject matter has nothing to do with liability; it's how the government acts that renders it liable.

[*English*]

The Chair: Thank you, Madame Barbot. That was a good question.

We'll move to Mr. Lebel.

[*Translation*]

Mr. Lebel, you have five minutes

Mr. Denis Lebel (Roberval—Lac-Saint-Jean, CPC): Thank you, Mr. Chairman.

Thank you for your very interesting presentation. The presentations of those who preceded you were interesting as well, but yours is more particularly so.

[*English*]

I was recently elected, on September 17. I'm new, but I'm very encouraged by what you said.

[*Translation*]

Seventy percent of people in my riding live off the forest. Every day, this government works to find solutions for forest people.

This morning, I heard the people from the chambers of commerce, with whom I've worked every day for years now, say that they have been trying for decades to get the ICSID Convention signed here at home in order to promote business people and trade, which would enable our people to earn more and pay more direct and indirect taxes back home.

How is it that the governments aren't ready to join it? If we had to join it, would there be an impact on the forest and timber market? Could we have looked further upstream and found solutions? Would that have promoted trade in the forest industry back home?

Mr. Milos Barutciski: As Bill C-9 was passed before the final stage in this dispute, which has been going on for some 20 years, I frankly admit I don't believe so.

Lastly, under Chapter 11 of NAFTA, there are already claims against the Canadian government in the softwood lumber affair, but I believe they have been settled in the agreement that the Government of Canada reached with the United States.

For the reasons I explained at the outset, this is a matter of procedure opposing a matter of substance. Certain rights may have helped us in those claims. That was very interesting because the Canadian softwood lumber companies had investments in the United States, but the main investment was made here in Canada. So there remains a legal issue that has not yet been decided. The issue has been raised once again in the disputes over beef, where Canadian claimants, in this case as in the softwood lumber case, also have investments in Canada for the purpose of trade with the U.S. market. They would not make those investments in Canada if the U.S. border closed.

So we wonder if investment treaties enable investors to file a claim over the impact that a foreign country has on investment in a second country, in their country of origin. That issue has not been decided.

That said, the procedural question would have no impact on this question. In fact, it's the way in which the claim was [*Inaudible - Editor*] rather than individual rights that were referred to in the claim.

Unfortunately, I would have preferred you to give another answer, but that's the necessary one.

● (1240)

Mr. Denis Lebel: I wanted the right answer. Thank you.

[*English*]

The Chair: Thank you, Mr. Lebel. We hear you advocating a lot for the forestry industry, so it was a good question to the group today.

Mr. Goldring, you still have two minutes.

Mr. Peter Goldring: I think it was an excellent question. Certainly, I would think that if it's not directly applicable to it, it would still have a reinforcing aspect to it that would help to bring resolve from another direction, and would be an additional tool, in this particular case, that would be very helpful. It's just too bad it wasn't used.

My question is on another aspect of Canadian investment, and that is the investment by Research In Motion in China, where their product was knocked off very quickly. I would think there'd be patent protection laws, design protection laws, and other things. Would these types of applications come under the sphere of this?

And could you comment if there are maybe other avenues that can be used like those traditionally used in softwood lumber? I really think this type of a situation here would greatly reinforce, at the very least, other avenues and could have brought about a substantial earlier resolution of the concerns.

Mr. Milos Barutciski: Let me start with the RIM China situation. There are a number of issues for RIM. One is exporting the hardware that's manufactured here to China. Another issue is having the software and licensing the system that is designed with Chinese telecom carriers. A third issue is actually being able to establish there and deliver the backup, the back office, the support services to run the RIM-type service through Internet suppliers and telecom suppliers.

So any of those aspects can trigger an investment obligation. It's not an investment-type obligation. It's either an investment treaty-related obligation and it falls within the parameters of the substantive treaty—which we don't have yet with China, but which is under negotiation—or it isn't. So that's a substantive issue.

Let's say one day we do sign a treaty with China. The fact of having ICSID in place, as I think I mentioned in my answer to Mr. Martin's question, I would say is of huge benefit, because, assuming RIM can fit its claim—whatever the claim might be—within the four corners of an eventual FIPA with China, then having the option of going the ICSID route is one that certainly, I would say as an investor's counsel, I would have recommended.

In one case that I initiated against the Government of Canada, we didn't have that option. I was acting for an American company, and we didn't even get that far. We eventually settled the case, which I think was a good thing for everybody concerned. But certainly, if it had gone further, I would have gone the ICSID option, if we'd had that option, so I think you're right.

Secondly, in terms of softwood lumber, maybe I was a little hasty in saying it wouldn't have made a difference. Substantively, it wouldn't have made a difference, but you know, to the extent.... I don't think it would have made a difference in terms of the Americans' approach to the dispute. The Americans are big fans of the WTO, but, boy, you put zeroing or any of their favourite issues in litigation, they will litigate them to the hilt to the final minute. That's just the American style.

So I don't think the fact that you're in ICSID is going to change that one way or the other. They might even drag their heels on implementation, once they've been found...in the final appeal that the WTO appellate body has gone through, they'll drag their heels perhaps a little bit. But ICSID isn't a monetary award. If there hadn't been a settlement and the softwood lumber companies had had to continue with the suit, and we had been members of ICSID, and etc., etc., it might have actually been a useful thing. I would like to have had it if I had been representing a softwood producer.

So yes, I think there would have been a benefit—marginal, but a benefit nonetheless.

● (1245)

The Chair: Mr. Dewar, please.

Mr. Paul Dewar: Thank you.

Thank you to our guests for appearing today on fairly short notice.

Chair, while I have the floor, I know we had asked other guests to appear, and they weren't able to, but I wonder if we could ask them for a written submission and if that's been done. I just put that to the clerk. I'm wondering if we could ask the two I had mentioned—the Halifax group and KAIROS—if we could ask them if they wanted to provide written comment.

The Chair: Yes, we can.

Mr. Paul Dewar: I guess from your perspective and that of investors, Canada—the last time I read so—is doing rather well in terms of attracting investment. Some would say there are some concerns about over-investment, if I can use that word, in terms of who's coming in, and there are some concerns about foreign investment and takeover.

Clearly we don't have a concern about investment, and that's not what this is about. I think there's been some clarification for all of us in terms of what this means. It's not about encouraging investment per se. It's about a place where you can arbitrate and have clear rules and a space to do that. Is that fair enough to say?

To play the other side of this issue, can you make the argument for why we should have to give up some sovereignty? You might not agree with that term. I know the government in its presentation said there are numerous reasons to support Canada's adherence to the convention, and one of the points was that it would contribute to reinforcing Canada's image as an investment-friendly country.

Well, the last time I checked, I didn't know we weren't that friendly. I didn't know that was a problem with regard to the amount of investment coming into the country, so that's a fair point to put forward. So I'd say okay, make the argument for why this is necessary. I'm sure you have a different perspective based on who you represent.

The second issue is that there are those who might say, well, that's fine for you and the group that you represent, but what about everyday Canadians who like things being dealt with here on our own terrain, in our own system, and not in Washington or at the World Bank where, quite frankly, we might not have as much reach? And what if things go wrong, etc.?

I'll leave it at that.

Mr. Milos Barutciski: I'm glad you're only leaving it at that, Mr. Dewar.

Voices: Oh, oh!

Mr. Paul Dewar: We haven't seen each other in a while.

Mr. Milos Barutciski: It has been a few years.

Let's start with the beginning, then. Giving up some sovereignty was the question that particularly caught my attention. I think it's at the core of what you were saying.

No doubt Canada is an attractive investment destination for foreign investors worldwide. We don't need ICSID to attract investment. I think to the extent we use that as a reason it's window dressing. Investors will keep investing in Canada. Why? Because we have an educated, efficient workforce. We're marvellously endowed in resources. We have a good, though perhaps somewhat neglected, infrastructure.

● (1250)

Mr. Paul Dewar: Somewhat.

Mr. Milos Barutciski: But most importantly for investors, we have an effective system of rule of law. So an investor goes in, and ICSID is really meant to get at issues of what happens when the investment goes wrong. If everything's going fine, nobody really cares if the government cuts a corner and raises a tax a couple of points. We're making away like gangbusters. That's not the issue. It's when things go off the rails.

So you're right, we don't need it. On your question about giving away some sovereignty, as I said earlier, I think there's no sovereignty being given away with respect to substantive rights. The rights that we are giving away, if you look at the substantive obligations of ICSID, are rights that we shouldn't have to invoke in the first place. They are the ability to behave capriciously and arbitrarily toward foreign investors, the way we wouldn't dream of behaving toward our own citizens. They are the ability to expropriate property without compensation and due process. That's what the substantive rights of the FIPAs and the investment treaties are about.

So in that sense, yes, we have given up a bit of sovereignty. Why? It's because in a civilized world, just as citizens we give up sovereignty through the members of Parliament and Parliament to legislate and impose obligations on us as citizens, as members of the international community we've given up certain obligations to behave in ways that really are not on. That's under the FIPAs and the substantive investment agreements.

In that sense I don't think we're talking about giving up sovereignty substantively, though there was a kernel of truth to what you were saying. That leads into your second question. We like to have things done here. Well, that's true. You might feel more comfortable having things done here, but what do we say to the companies like RIM, like the softwood lumber producers, like virtually any Canadian manufacturer that exports, period, not just to the United States, but overseas? As I recall, our trade with the U.S. used to be 84%. We're down to 70%. So our trade overseas has expanded considerably in the past few years as well.

The Canadian citizens who work in the plants and with the companies that make those exports deserve at least the backing of the government to secure their markets. So when we give up that bit of sovereignty, what we're giving up is we're saying to foreign investors that we will treat their interests as investors in our country according to certain standards that we expect them to treat our investors. And we will subject ourselves procedurally, in a sense, to a process, if you agree to submit to that process as well.

Yes, perhaps it is giving up sovereignty in terms of the process up to a point, just as there was an element of giving up sovereignty in signing the treaty—any international treaty.

To the citizen who says “I'd rather have it done here”, I'd say if your job depended on manufacturing pipe that was being exported to a pipeline in the Middle East, would you like your employer to have certain rights, and would you be prepared to give up that procedure, a bit of sovereignty, to protect your job? My hunch would be that most employees would say, “Okay, when you put it that way, maybe there's an issue.”

Yes, it is giving up sovereignty, but it's giving up sovereignty in a reciprocal and very incremental way that makes sense for Canadians.

The Chair: Thank you, Mr. Dewar and Mr. Barutciski.

I think any time we sign any international convention there could be an argument that we sign a human rights convention. We could say that we're giving up a certain degree of sovereignty, but it would be for the greater public good. I think Mr. Barutciski's argument here is that for the investment community and trade it's for the greater public good.

Mr. Goldring.

Mr. Peter Goldring: Thank you very much.

Reading the information here, I'm really astounded that this was signed on December 2006, when Canada became the 155th country.

I come from a manufacturing background, and I am quite conversant with importing, not so much in the exporting, but the companies I dealt with did considerable exporting too. I fully realize that for companies like Gildan, that are setting up working factories and plants in Haiti, that is a huge risk. What are the risks that can befall them? One of the largest risks of course is to lose their investment and not have any mechanism for recovery. When you have large capital costs on buildings, that is a considerable loss. I would think that would restrict some companies from wanting to go to the unknowns of international investing.

So I'm not sure you can ask what the hesitancy was, to be the 155th country in the world to recognize the benefit of this. Myself, and yourself, representing businesses and corporations...and we just talked about softwood lumber. We talked about Research In Motion. There are probably tens, dozens, maybe hundreds of other initiatives that might have been impacted, that might have been helped in their resolving, by being a signator to this earlier.

Can you comment on what on earth the reasoning would have been by the past government to be so hesitant to sign something that, in my humble opinion, is so obviously of benefit to not only Canadian businesses doing this investment and doing this work in foreign countries but also the number of businesses who were prevented from going into investment in other countries? How much did this hold our business communities back?

● (1255)

Mr. Milos Barutciski: Thank you, Mr. Goldring.

I'm not sure I can answer the last question in terms of how many business opportunities were prevented, although it's a good question to ask as a rhetorical question, absolutely.

What was the delay? I can't speak to why the six prime ministers we've had since 1966 and their various governments didn't choose to ratify and implement ICSID—well, sign, initially; we only signed it, as you pointed out, less than a year ago.

There are a bunch of considerations. I think one of the things is that for the first close to 30 years of ICSID's existence there was very little activity under ICSID. I gave a talk about a year ago in London on a related topic, to do with international trade investment law. I'd gone through the case law. The point I made is that from 1966 to 1996, the first 30 years of the convention, a handful of disputes—I can't remember if it was 23, or 27, or 29—had gone through the ICSID process.

Since the mid-nineties, in the past 10 years, as you heard from Meg Kinnear, we've had 200 or thereabouts. That's a tenfold increase in the last 10 years relative to the first 30 years. If you start doing the arithmetic, that is a 30- or 40-fold increase.

I think part of the reason was that it was a nice thing to have, but really, what were we losing? If you were looking at this in 1970: "What, six disputes? How many opportunities have we missed?" If you look at in 1980: "Fourteen disputes? Well, whatever."

There may have been an element of that kind of pure legislative, government—

Mr. Peter Goldring: From 1993 onward?

Mr. Milos Barutciski: Well, from 1993 onward, that's where it starts getting really interesting.

Think of the initials MAI. When MAI was under negotiation, it was well down....

I remember being an adviser to the industry department back in the early days, in 1994, when the MAI issue started percolating as prenegotiations; negotiations were launched officially in 1995. I'd bet you dollars to doughnuts that you could count on one hand the parliamentarians who knew that the MAI negotiations were under way. You could count on two digits the ones who actually knew what it was about. And that might or might not have included the minister of the day.

Voices: Oh, oh!

Mr. Milos Barutciski: It was a totally bureaucratically driven process that was completely under the radar. But then in 1996 or 1997, there was an election, and it showed up in the campaign.

I don't know which of you here were running then, but I just don't envy the poor candidate who might have been asked—let's say by Maude Barlow—"So what do you think of the MAI?" The answer was probably, "The *what*?" I mean, what do you do?

The MAI quickly became a tar baby. So in fairness to my colleagues and friends at the foreign affairs and justice departments, while I know for a fact...because acting for the chamber and the Canadian Bar Association, where I was chair of the international section back in those years, we were urging Ms. Kinnear and her friends to push this forward. There was not a lot of take-up by governments of any stripe.

That was the first issue. But at that point, MAI, and anything to do with international investment, started to become a little bit of a tar baby, the fifth rail of electoral politics.

Then you got the Cancun fiasco, and that comes up. There was a lot of diversion. And finally, perhaps most importantly, you have two provinces, Alberta and Quebec—certainly Alberta, and I think Quebec as well—whose companies and business communities are probably among the two most outbound-oriented business communities. Think of the companies like Alcan, think of companies like Bell International—well, they're becoming a little less international right now—but think of companies like Hydro International—

A voice: They're in Kandahar.

Mr. Milos Barutciski: Yes, exactly.

Or in Alberta, think of all those energy and resource companies, mid-cap companies, the $1-billion and $2-billion plays, that have assets, interests, exploration plays in the Middle East, all over the world, who could have easily benefited, but their governments, for one reason or another, have chosen to use the ICSID thing as a chip in the federal-provincial game: we won't let you do it unless you agree to certain things that are fundamentally unrelated.

So that's your answer. I think it was inertia initially, and then it became, as I said, a bit of a third rail. Then the federal-provincial thing kicked in.

I credit this government, and even the last government, frankly, for having made the efforts they did, but the fact that it was signed, I think, is a real credit to the government.

● (1300)

The Chair: Thank you.

I don't think there are any other questions. Our time is up.

Certainly we do want to thank you folks for coming. When we saw this legislation, many of us were, as you suggested, a little unsure as to the huge ramifications of it. We see the passion with you believe this. You talked about this being bureaucratically pushed and run. I mean, we saw them in the first hour, and saw how enthused and excited and passionate they were.

We thank you for coming and for providing to us excellent information on this bill.

The meeting is adjourned.

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