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Chair

Mr. Lee Richardson

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● (0905)

[*English*]

The Chair (Mr. Lee Richardson (Calgary Centre, CPC)): We will come to order. The tenth meeting is in session of the Standing Committee on International Trade.

Today, pursuant to Standing Order 108(2), a study of chapter 11 of the North American Free Trade Agreement, or NAFTA, we have as witnesses Steven Shrybman, legal counsel, from the Council of Canadians; and from Équiterre, Hugo Séguin, public affairs coordinator, and William Amos, their lawyer.

We're going to start with a couple of opening statements, first from Mr. Shrybman, then from Mr. Séguin. If we're all set, I'd like to begin. We'll follow that with questions in the usual manner.

Go ahead, Mr. Shrybman.

Mr. Steven Shrybman (Legal Counsel, Council of Canadians): Thank you very much, Mr. Chairman. Good morning, members of the committee.

I'm a partner in the law firm Sack Goldblatt Mitchell. I'm on the board of the Council of Canadians, and I have represented them in more than one investor-state dispute proceeding under chapter 11 of NAFTA. As you know, the Dow Chemical case you're concerned with today is such a dispute.

My job is not to talk about the case but to talk about the dispute regime so that you have the context for your consideration of the Dow Chemical case. I'm going to mention also some of the other environmental cases that have arisen under this extraordinary dispute resolution mechanism that's built into chapter 11 of NAFTA. I have about 10 minutes, so I'm going to go quickly and try to keep it at a fairly high level.

Under chapter 11 of NAFTA, private parties—investors and companies—from the other NAFTA jurisdictions, namely the United States and Mexico, can make a claim for damages arising from an alleged breach. We're going to take the case of a claim against Canada—a Canadian government, be it a federal government, provincial government, or municipal government—because of something the government has done that the private investor or the U.S. company, for example, argues is in breach of the broadly worded and ill-defined constraints of chapter 11.

My colleagues will deal with the rules. I'm just going to describe the mechanism and how it has been used.

Virtually any U.S. company is entitled to file a complaint if it has an investment interest in Canada. And the threshold is low. You need only have shares in a Canadian company to be entitled to bring a complaint. The only measure of a Canadian government—policies and laws and programs and practices are described as measures—that are off limits under chapter 11 are measures under the Investment Canada Act. Everything else is fair game. There may be exceptions that are relevant to health care measures, but that doesn't stop you from getting in the door and complaining that something a province has done by way of closing the door to private health care delivery offends NAFTA rules. You may argue about whether the measure is exempt, but you have the right to a hearing before a tribunal.

The tribunal is nominated by the parties. So if I'm the disputing investor, I nominate an arbitrator and Canada nominates an arbitrator. The two choose a third, and that is the tribunal that decides whether a government measure is in breach of NAFTA rules. Typically, the disputes are heard outside Canada. For example, we were involved as intervenors in a UPS case. They brought a complaint against Canada because of the activities of Canada Post. That was argued at the World Bank headquarters in Washington, D. C.

So you have the spectre of a quasi-private tribunal making a determination about the validity of something a Canadian government has done that is otherwise lawful and proper under the Constitution. And often that tribunal will be sitting outside the country, and often at World Bank headquarters in Washington, because that just tends to be a convenient place and is often chosen for the adjudication of these disputes.

That's a broad outline of the mechanism. There is very little opportunity for judicial review of an arbiter award, and the review can only be carried out in the jurisdiction that is chosen as the place of arbitration. So in the case of the UPS claim, for example, the place of arbitration was the United States.

I practise labour law and other types of law. We routinely judicially review decisions of arbitral tribunals. Had that tribunal found Canadian postal policy and law at odds with NAFTA—they didn't, fortunately—we would have had to go to a U.S. court to challenge the award. It's an idiosyncratic feature of the regime, but it describes how removed it is not only from parliamentary scrutiny but also from judicial scrutiny once the mechanism is in play.

● (0910)

Now, environmental laws have become a favourite target of this mechanism. There are several cases in which environmental laws, including Canadian environmental laws, have been challenged. One of the first cases was a challenge by Ethyl Corporation. They didn't like federal regulations that restricted the use of a toxic fuel additive. Canada settled that case and wrote the company a cheque for $19 million to cover its legal fees—the case hadn't even been argued yet—and rescinded its regulations.

Another case was by S.D. Myers. Canada banned the export of PCB wastes to the United States, as it's arguably obliged to do under the Basel Convention. The tribunal found against Canada and ordered it to pay $9 million in damages to this U.S. hazardous waste company.

There are a number of other cases. They're available on the websites. A good percentage of them are about environmental matters, but there are two cases proceeding right now that aren't about environmental matters and are terribly important for the future of the country. One is brought by a forest company called Merrill & Ring. It wants to get rid of the ban on raw log exports that exists at both the federal and provincial levels in Canada. But for these raw log export controls, we wouldn't have a pulp and paper industry in Canada. Yet this dispute is proceeding with very little notoriety, and I doubt many members of the committee have heard about it.

There's another case that's been brought by a U.S. health company, which is suing Canada for $160 million. What's its complaint? It argues that it wasn't allowed to establish private health care clinics in Canada, and it says that's a breach of its rights to invest under chapter 11.

These cases just give you a sense of the terribly important issues of public policy that often find their way into a forum that is really created to resolve private disputes, not public disputes, with respect to which there are no broader public or societal interests. Under NAFTA, what's happened is that we've allowed this private dispute mechanism, which used to exist to resolve commercial disputes, to be used now as a forum to resolve disputes about broad issues of public policy and law.

The last thing I'll say is that while a fair bit of attention is focused on chapter 11, much less attention has been paid to efforts to implement a similar dispute regime as a feature of interprovincial trade, investment, and labour mobility agreements. This has actually happened in the trade, investment, and labour mobility agreement entered into between British Columbia and Alberta, which goes formally into effect on April 1, 2009. They have built into TILMA precisely this dispute mechanism, in which a private investor in Alberta or B.C. can challenge a measure by the other government—it could be a municipality, or even a school board. It could be proper and lawful—the board had the authority to do it—but if it offends the broad constraints of this mobility agreement it can be challenged. This is flying so far below the radar screen that I'd be very surprised if any of you have heard of it. So that's in place.

The ministers of trade for Canada and the provinces signed an agreement last December to expand the dispute mechanism of the Agreement on Internal Trade along the same lines. They haven't made it public. I don't know whether you've seen it. We would very much like to see it. When I speak to federal trade officials, they tell me, well, you'll see it when it's finally ratified.

So just to bring home the concerns you might have about this dispute regime, please be aware there are efforts under way now to actually implement precisely the same dispute model as a feature of Canadian interprovincial arrangements. In my view, the mechanism is unconstitutional. I don't have time to speak to you about that today.

I'll leave you with that provocative thought—I hope—which might prompt some questions.

Thank you. I think my 10 minutes are up.

● (0915)

The Chair: Thank you, Mr. Shrybman.

Monsieur Séguin.

[*Translation*]

Mr. Hugo Séguin (Public Affairs Coordinator, Équiterre): Good morning, Mr. Chairman and members of the committee.

My name is Hugo Séguin. I am the Public Affairs Coordinator for Équiterre, an organization based in Montreal and involved since 1993 in sustainable development issues and problems, and their solutions. We have been particularly active in matters related to agriculture, energy, transportation, sustainable development and climate change. We are also very interested in the issue of pesticides, and have been involved in this area for several years now.

This morning I am accompanied by two researchers, one from the David Suzuki Foundation and one from Équiterre, which I represent, and by Mr. William Amos, a lawyer for Ecojustice Canada, who represents both Équiterre and the David Suzuki Foundation in this case.

This morning I would like to take a few minutes to talk to you about the substance of a case that we think is extremely important because it involves two fundamental governance issues for Canada: on the one hand, its commitment to comply with the international trade treaties it has signed in the past, including NAFTA; and on the other hand, its responsibility to protect public health, especially the health of children.

On the 25th of August last, Dow AgroSciences corporation served notice that it would challenge under NAFTA the application of the Quebec Pesticides Management Code, and in particular the ban on the active ingredient, 2,4-D, which is used as one of the ingredients in pesticides available on the market, among other reasons for the cosmetic purposes of lawn maintenance. Dow claims that this ban violates certain clauses in chapter 11 of the North American Free Trade Agreement. The Government of Quebec, which has the constitutional jurisdiction to act in the area of pesticides sales and use, is arguing the importance of protecting public health. For that reason it has banned a certain number of active ingredients used in the formulation of pesticides.

The Quebec Pesticide Management Code has been in effect since 2003. The ban on 20 active ingredients in pesticides has been in effect since 2006. For example, the Pesticide Management Code applies to turfed areas, including areas used frequently by children. Public health studies seem to show that children are exposed to even greater health risks when they play in parks, schoolyards or day care yards. Quebec has justified its actions on those grounds. I should say in passing that Quebec is not the only jurisdiction in the world to ban 2,4-D or other pesticides. This is also the case in Norway, Denmark, Sweden and Ontario where some pesticides have been banned, including 2,4-D.

As in the other jurisdictions that I just listed, Quebec has justified its actions based on the precautionary principle, which says that in the absence of scientific certainty about pesticide toxicity, caution must be exercised in their use. That is the very basis of the precautionary principle.

According to the Quebec government, pesticides used for cosmetic purposes can pose a risk to human health, especially the health of children. According to the Quebec government, children are particularly vulnerable to the harmful effects of pesticides because of their behaviour (for example, their tendency to put objects in their mouth), especially when they are playing on grassed surfaces where pesticides are used. Among other things, several pesticides, some of which are frequently used on grassed surfaces, are suspected of having long-term health effects, including cancer or disruptions to the reproductive, endocrine, immune or nervous systems.

In the specific case of 2,4-D, Quebec's National Public Health Institute twice took a stand on this issue and recommended to the Government of Quebec to ban the active ingredient 2,4-D based on the precautionary principle. The National Public Health Institute is the Quebec government's main advisor on public health issues. Furthermore, the National Public Health Institute's recommendations are also based on studies carried out by the International Agency for Cancer Research, a World Health Organization Centre, that labelled the entire family of active ingredients called chlorophenoxy herbicides, which includes 2,4-D, as being potentially carcinogenic for humans.

● (0920)

Following action taken by Dow on August 25, Équiterre and various other partners mobilized Canadian and Quebec civil society. Currently a hundred-odd organizations and individuals, both national and international, support our action to ask the federal government to protect the integrity of Quebec's Pesticides Management Code. A letter was sent to that effect to the Minister of International Trade, Mr. Stockwell Day, to encourage him to ensure that Canada would actively intervene before a future NAFTA panel on public health protection.

In conclusion, we want to take this opportunity this morning to share with you our three recommendations for the Government of Canada.

Our first recommendation is that the federal government should vigorously defend before NAFTA Quebec's ban on 2,4-D pesticides. Furthermore, the federal Minister of International Trade should immediately and publicly announce Canada's intentions in this regard and acknowledge the appropriate precautionary basis for Quebec, and now Ontario's position.

Our second recommendation is that the federal government should state the position that non-discriminatory regulatory measures enacted for a public purpose in accordance with due process are not, under international law, expropriations or unfair treatment. As such, such regulatory measures are not subject to any compensation.

Finally, the federal government should ensure more robust application of the precautionary principle in PMRA risk assessments of pesticides.

I will now give the floor to Mr. Amos, who will cover various related issues concerning trade rules under NAFTA.

[*English*]

Mr. William Amos (Lawyer, Équiterre): Thank you, Mr. Chair and committee members.

If I'd be permitted an extra five to seven minutes—which I recognize would go over the 10 minutes allotted to us—I think it would allow a better discussion of the case itself.

The Chair: If you get started now, you won't be over.

Mr. William Amos: Thank you.

My name is Will Amos. I'm the staff lawyer and a part-time professor at the University of Ottawa Ecojustice Environmental Law Clinic. Ecojustice is Canada's foremost non-profit environmental law organization. We're best known for our litigation work and our law reform work to help protect Canadians' right to a healthy environment. In this context, I am serving as counsel to Équiterre and to the David Suzuki Foundation.

First, I'd like to congratulate the committee for taking this step of holding this hearing. It is really important that NAFTA chapter 11 disputes the concerned matters of public importance, concerned matters of public regulation, that they're discussed in the light of day before our elected representatives. You certainly have a legitimate role to play in the context of this dispute.

I'd like to quickly give an overview of where this dispute is coming from and a very basic outline of the steps that have been taken and where it's going or where it may go.

On August 25, 2008, a notice of intent to arbitrate was filed. This is the first step Dow AgroSciences could have taken. They indicated they would be seeking $2 million in compensation from Canada in addition to further relief, including additional damages for lost profits resulting from Quebec's ban on the cosmetic pesticide 2,4-D. The claim was brought under NAFTA's chapter 11, article 1105 and article 1110. Article 1105 deals with the minimum standard of treatment owed to investors, including fair and equitable treatment in accordance with international law, and article 1110 deals with expropriation or measures tantamount to expropriation.

Dow asserts the ban was imposed without scientific justification. It disputes the cancer risk associated with the chemical 2,4-D. It asserts the ban ought to have been lifted, that it's arbitrary, irrelevant, and unfair. At first glance, since Dow is not alleging any trade protectionism issues, this matter is purely about process. It's about Quebec's ban and the process they undertook to enact it, so this is unlike other disputes we have seen in the past under chapter 11, in particular S.D. Myers and Ethyl Corp., where allegations of trade protectionism were involved, alternative motives the Canadian government may have had. In this case there were no alternative motives. It would appear Dow assumed the motives were to protect public health and the environment. They just don't appreciate the way Quebec has gone about doing it.

After this notice of intent was filed, there was a 90-day cooling-off period, and any time after that 90-day cooling-off period Dow was at liberty to file its notice of arbitration, which would kick off the entire process, including the choosing of arbitrators. They have not filed a notice of arbitration, so in a sense, we're playing a waiting game right now. At least according to the document filed by the Department of Foreign Affairs and International Trade for the purposes of this hearing, there were consultations in January. We're not certain where those have led, if settlement negotiations are ongoing. Civil society is sitting and waiting for the notice of arbitration to be filed and waiting for the process to kick off.

I'd like to outline a couple of very simple concerns and then try to hit what I think is the key issue in this discussion.

In terms of our main concerns, even where public interest regulation is challenged by eligible investors, civil society participation in these processes can be severely constrained. We're dealing with a matter of public health and environmental protection, so this is something where civil society's voice should be heard loud and clear. However, even if an arbitration were to go forward, my client's ability to participate would be limited at best to a 20-page written memorandum to an arbitration panel that may not even be in Canada. There is no guarantee the investors won't request confidential proceedings, which would further limit our ability to understand what case they're bringing, and there will be no opportunity for us to make oral representations before the tribunal. This is totally unlike the Supreme Court of Canada, where public interest intervenors, with the leave of the court where they have a distinct and unique perspective that the Supreme Court feels is usefully brought.... We will not have that opportunity because the arbitration panel will not have that jurisdiction to ask for it.

● (0925)

Second, as I believe my colleague Steven Shrybman mentioned, NAFTA chapter 11 establishes an imbalance between investor protection rights and the parties' sovereign duty to protect the environment and public health. Over the past several years a series of investor claims in each of the NAFTA parties have claimed that certain domestic measures, whether they were health or environmental, conflicted with the terms of chapter 11. Although recent decisions, notably the Methanex decision, have been better than earlier decisions, some of the earlier decisions, like Metalclad, have been pretty harsh. The uncertainty generated by these claims—the mere filing of a notice of intent—really has an effect on other jurisdictions, both provincial and municipal.

I don't want to be too negative about it, but the reality is that provinces and municipalities are nervous when they think about enacting regulatory measures like pesticide bans, because they don't want to face the consequences of a NAFTA chapter 11 tribunal. Certainly the Canadian government faces those same restrictions. Despite the underlying legal risk, we're very pleased to see Ontario enact the ban following Quebec, and we're hopeful that further provinces will join the parade.

I want to go to our two key recommendations now. The first is that the federal government should vigorously defend Quebec's ban on 2,4-D lawn pesticides if Dow proceeds to arbitration. The federal Minister of International Trade should immediately and publicly announce Canada's intentions in this regard and acknowledge the appropriate precautionary basis for Quebec's action. We also want the federal government to assert the position that non-discriminatory regulatory measures enacted for a public purpose in accordance with due process under international law are not expropriations or violations of the minimum standard of treatment. As such, they should not be subject to compensation.

One of the most controversial issues in investment law raised in this claim is how to distinguish between a valid regulation that is not compensable, and direct or indirect expropriations that would be compensable. Dow argues that the ban is compensable expropriation. If this goes forward, we will argue—and we believe Canada ought to argue and will argue—that the Quebec ban is a non-compensable public interest regulation. We believe we're supported by the most recent NAFTA chapter 11 decision in Methanex. I'll quote from that decision:

> But as a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, *inter alios*, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.

Obviously we don't feel that Quebec made such representations. However, international law has yet to identify, in a comprehensive and definitive fashion, precisely what regulations are permissible and commonly accepted as falling within the police or regulatory powers of the state, and thus non-compensable. So there's no bright yellow line—that's the issue here. I think it's a critical issue of public importance, and we're very pleased that this committee has invited us here to speak on this issue.

If and when this arbitration proceeds, I would request that this committee hold a similar hearing to follow up on the arguments that are being made, formally hear the position of the Government of Canada and Dow AgroSciences, and give the Canadian public's elected representatives the opportunity to ask the questions of the government and the investor. This is not just about Dow's investment; this is about our children's best interests.

Thank you.

● (0930)

The Chair: Thank you, Mr. Amos and Mr. Séguin.

In addition to the statements from Équiterre and the Council of Canadians, the committee has received submissions from Meg Sears, Ph.D., from Dunrobin, Ontario—these have been circulated—and from Industry Task Force II on 2,4-D research data; and from Dow AgroSciences.

We also have a statement to be read into the record from Dow AgroSciences:

> Dow AgroSciences wishes to thank the members of the House of Commons Standing Committee on International Trade for their invitation to appear. While we recognize that activities and testimony at committee falls under the banner of parliamentary privilege, because we are currently engaged in litigation with the Governments of Canada and Quebec, in the interests of prudence we must respectfully decline appearing before you today.
>
> In our absence we have provided a written submission to the Committee which outlines our position and which we ask you to consider in your deliberations. If we could kindly highlight one theme, it is that Dow AgroSciences fully supports the responsibility of Canadian governments to establish effective regulations to protect Canadian's health and safety and Canada's environment. Furthermore, we believe that Canadian governments have a responsibility to enact effective health and safety regulation that follow established science-based risk assessments/risk management principles.
>
> Should there be questions related to our submission, we would be pleased to address them in writing. Thank you for your consideration.

That's from Dow AgroSciences Canada, Jim Wispinski, president and CEO.

I think all of those submissions have been distributed to the members of the committee.

This is an interesting topic. We've heard from our witnesses, and we're now open to questions. We're going to begin the questions with Mr. Brison, and we're going to try to limit the first round to seven minutes for questions and answers. So I would ask the witnesses to try to keep their answers commensurate with the questions and try to keep them all within seven minutes.

Mr. Brison, please begin.

● (0935)

Hon. Scott Brison (Kings—Hants, Lib.): Thank you, Mr. Chair.

Thank you very much for your interventions this morning.

The principle of chapter 11, of national treatment and inherent investor-state provisions, is one that I think most of us understand: the notion that a Canadian company doing business in another country with whom we have a free trade agreement could not be discriminated against by that government or a subnational government in that country. By the same token, we would respect the same principle in terms of a foreign company doing business here. The principle of chapter 11 is as much to defend Canadian companies doing business abroad as it is to defend the rights of American companies, or Mexican in this case through NAFTA, doing business in Canada.

We've seen cases in which chapter 11 yielded what seems to have been a just result. Based on your analysis, Methanex was one. Other cases were resolved differently. If you go back to MMT, you would allege that it was different in terms of how it was resolved.

It strikes me that legislators, whether provincial or state or federal, national or subnational, face a significant challenge in terms of designing legislation that, by nature, is not seen or demonstrably proven to be in some ways discriminatory.

For instance, with 2,4-D, if the ban had been on pesticides broadly as opposed to being on 2,4-D specifically, would it have been more tenable under chapter 11 than it is if you ban a specific chemical?

Mr. William Amos: It's an interesting hypothetical. The Quebec government took a targeted measure. This is about 2,4-D and lawn pesticides, cosmetic pesticides in particular.

There are specific carve-outs for different applications—for agriculture, for forestry. Whenever the argument gets mixed together, we say this is not about agricultural or forestry applications of 2,4-D; this is about a limited target group. At the end of the day, the government made a decision based on the precautionary principle to protect certain subpopulations. It would have been more difficult for them to justify, on the precautionary principle, a ban on 2,4-D in agriculture or forestry.

I don't want to take a position on whether there should be a ban on 2,4-D in agriculture and forestry, because it's neither here nor there for us today. It's obvious that the Quebec government felt they had a strong argument via the precautionary principle to say that they needed to protect their children from these pesticides, and that even in the absence of scientific certainty they were going to move forward to protect them. They went for it, and I agree with them in the strongest terms possible.

● (0940)

Hon. Scott Brison: Sure.

Mr. Steven Shrybman: Mr. Brison, can I respond to your premise?

It's difficult to argue that this mechanism has been of any utility to Canadian investors. We have lost every single case that we have brought against the United States. Until recently there were no cases against Mexico, though I'm not absolutely current in that regard. If you look at the cases we brought against the United States, they were arguably as meritorious, perhaps more so, than the successful cases that have been brought against Canada. I'm thinking of Loewen in particular. A jury in Mississippi ordered a $500 million damage award against Loewen because of some dispute involving $1.5 million. It actually put the company into bankruptcy, because under state law it didn't have the money to appeal, which would have meant posting a bond.

There have been very meritorious cases brought against the United States, even though I'm no fan of the mechanism, and we lose. The cases brought against Canada succeed. Why would that be? Why asymmetrical results? I think there are two reasons for this. These are private tribunals, and they get paid extremely well. If they want ongoing business, they have to find occasionally in favour of disputing investors. If they find against the United States, I think they understand they risk killing the goose that's laying the golden egg, because Congress wouldn't put up with it.

Hon. Scott Brison: But you don't dispute the merit behind the principle of chapter 11 of providing national treatment. We cannot discriminate against foreign companies simply because they're foreign companies. You don't dispute that.

Mr. Steven Shrybman: National treatment is one rule. There are performance requirements that would preclude, say, value-added processing requirements for Canadian resources or the types of stimulus measures that the Canadian government might want to put into place. There are rules about expropriation, which has been interpreted too broadly. There's this jackpot article 1105 about treatment in accordance with international law.

So the fairness principle I wouldn't dispute. But I would argue that it's a feature of Canadian law in any event, and no U.S. investor can claim—

Hon. Scott Brison: You support the principle of national treatment and the need for investor-state provisions, but you believe that chapter 11 is poorly worded.

Mr. Steven Shrybman: I don't support the mechanism. I don't think there's any argument that it has served Canada or Canadian investors.

Hon. Scott Brison: We're talking about chapter 11. I'm acknowledging that it may be poorly worded.

Mr. Steven Shrybman: I'm also talking about chapter 11.

Hon. Scott Brison: But in respect of the principle of investor-state provisions for national treatment, if you oppose that, then you oppose free trade.

Mr. Steven Shrybman: No. We don't have an investor-state mechanism at the WTO.

Hon. Scott Brison: In fact, if countries within NAFTA do violate national treatment, there is a provision there. Now, you could argue that under the WTO, which is not free trade, the WTO is not free trade to the extent that an FTA represents.... My bias is that I believe that investor-state provisions are important and I think that they are essential.

I do acknowledge that there are challenges with the wording of chapter 11. This is really helpful to us. We need a longer discussion, frankly, on chapter 11, where we bring in more witnesses at some point and we can actually go through this, because I know people from the business community who believe in investor-state provisions but who believe that chapter 11 is poorly worded.

If a Canadian company manufactured 2,4-D, for instance, it would not have the same right to challenge the government. It would not have the same right. Chapter 11 does provide more rights in some ways to a foreign company than to a Canadian company. That could be argued as being wrong. With MMT, that ban was a case of the government using interprovincial trade barriers as opposed to an outright ban, and as such it seemed to be a circuitous way to approach it, and as such it violated the principles of national treatment.

But I think the fact that we do have investor-state provisions and national treatment is very important to Canadian companies and to Canadian jobs. The question is, what are the problems with chapter 11, and how can we address those problems? I think that's where we're going to have to drill down on it at some point.

But I really appreciate your help in shining some light on this issue this morning. I just think we're going to need a lot more light from a lot more people and a lot more time to really understand this. I think we have to be fairly open-minded in looking at it.

● (0945)

The Chair: I want you to comment very briefly. We're at nine and a half minutes.

Go ahead, Mr. Amos.

Hon. Scott Brison: Thank you very much.

Mr. William Amos: Very quickly, I appreciate the statements and the question with respect to national treatment. Without taking any position on the utility of investor-state provisions, without making any comments with respect that matter, I think it's very important to distinguish between a number of the provisions that are within chapter 11. Article 1102, which deals with national treatment, is entirely distinct from article 1105, which deals with the minimum standard of treatment. National treatment deals with the fact that Canadian investors are going to have to be treated the same as U.S. investors. The minimum standard of treatment deals with an objective standard of treatment that any investor must be granted.

Dow is not claiming that Canadian investors were treated more favourably. There's no article 1102 claim. This is about article 1105 and the minimum standard of treatment.

I think what we need to do is start drilling down into this issue and look at what wording in chapter 11 is simply not working right now. As I pointed out, the main issue is determining what is a compensable expropriation versus what is a non-compensable regulation. That's the key issue. The problem is that NAFTA, chapter 11, doesn't specify well enough. There's a raging debate out there as to what kind of regulations should be non-compensable. We really need the Canadian government to take a firm position and a very transparent position as to what they feel is non-compensable regulation. I think that's the core issue here.

Hon. Scott Brison: Thank you.

The Chair: Monsieur Cardin.

[*Translation*]

Mr. Serge Cardin (Sherbrooke, BQ): Good morning, gentlemen, and welcome to our committee.

Someone said earlier, regarding your main concern, that a simple notice of intent created some commotion when complaints are filed. That can in fact be the case. Although I don't like this possibility, this can be an opportunity to review and analyze chapter 11. In that way I am quite happy. Of course, there are environmental and scientific aspects to this, but I am convinced that an in-depth study of chapter 11 is essential because the trend is for new free trade agreements to include increasingly fewer such provisions. Of course, investment agreements are sometimes separate, but the same provisions are not included. There was the question of the expropriation principle, which is quite broad, but we're not necessarily defining public interest, or at least not specifically. So there could be a huge problem between the two.

With regard to pesticide 2,4-D, the ban applies in Ontario and Quebec, but other provinces are still using this product. However, for the United States, the fact that it is allowed in some areas and banned in others confirms that they are entitled to file suits or complaints. Under NAFTA, a free trade agreement between two countries, it's easy for them to step in and file suit if standards vary from one province to another.

● (0950)

Mr. Hugo Séguin: The commotion that was created by Dow's filing of the notice of intent has had two effects. You're absolutely correct in saying that this bri ngs attention to extremely significant issues concerning chapter 11 and how it is interpreted. Indeed, a number of elements therein are not clearly specified, for example, the whole notion of public interest. It is my sense that a number of committee members would like to further study this issue. On behalf of the organization I represent, I can say that we would be completely in favour of reviewing the content and meaning of chapter 11.

I would like to say that the uproar has also had a positive consequence. This is basically a governance issue. Canadian governments are often trying to find ways to protect public health. The action taken by Dow has brought the ban on pesticides to the fore, has led provinces like Ontario to question their approaches and develop regulations banning certain pesticides. The issue has been brought back to public attention and is getting people mobilized. I would not be surprised if the uproar leads municipalities, provinces and the federal government to review their own regulations governing the use of pesticides and to make them more targeted in order to protect public health.

Mr. Serge Cardin: We met with representatives of the European Union a few weeks ago. They spoke to us convincingly about their standards. They screen their imports. When a product does not meet their standards, that's that, they do not import it. However, as I said earlier, our standards are not applied evenly. Things vary from one province to another, and that opens the door to lawsuits. You said that the uproar could bring the issue back to the fore, that people could come together and become mobilized, and uphold certain standards. Indeed, I do not believe that a foreign country could oppose the standards that are widely shared by the citizens of another country.

Mr. Hugo Séguin: We are trying to show that the regulation is non-discriminatory, completely acceptable and supported by the public. That is what we are trying to achieve. This leads me to talk about an issue that is somewhat related to the matter at hand.

In Canada, there are at least three levels of jurisdiction that can be brought to bear on pesticides. The federal government, through the PMRA, has a procedure banning pesticides. The agency assesses a number of pesticides and certifies their use in Canada. In a way, the PMRA establishes a minimum standard across Canada. Provinces can adopt more stringent measures: they can exclude a greater number of products than the PMRA. Municipalities can be even more stringent with regard to the use of pesticides within their jurisdiction.

Based on what we have seen in Quebec and Ontario, through their adoption of the precautionary principle, we tend to believe that some provinces place much greater importance on that principle than does the federal government, when assessing the same uses and chemical elements. This goes to show that regulations in Canada play a major role in this issue.

Mr. Serge Cardin: Since Quebec has now been recognized as a nation, if it were to decide tomorrow morning that all products had to be organic and that was the standard throughout Quebec, Quebec would be the target of all producers of chemical products and pesticides, etc. There would constantly be litigation.

In reading article 1114 concerning environmental measures, the conclusion states: “Accordingly, a party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor.” In other words, and I again quote: “The parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures.”

Now, there needs nonetheless to be consensus throughout Canada, since you are saying that the provinces and municipalities have the right to legislate such matters. If Quebec did so, for example, with regard to chapter 11, it would never end, there would constantly be litigation. First, we need to get rid of chapter 11, or better define it. Then, we need to be able to adopt higher standards for all of Canada.

● (0955)

Mr. Hugo Séguin: I would add a very short comment on this matter.

Pesticides are far from being the only subject in which constituent entities or municipalities are more proactive than the federal government. Often, the provinces or municipalities are used as a test for very progressive initiatives that are then adopted in other regions throughout Canada. We think this is a good thing.

Mr. Serge Cardin: Thank you.

[*English*]

The Chair: Thank you, Monsieur Cardin.

Thank you for your brief answers as well.

I'll go now to Mr. Julian.

Mr. Peter Julian (Burnaby—New Westminster, NDP): Thank you, Mr. Chair.

Thanks to our witnesses. You make a very strong case for how chapter 11 undermines our democracy and our ability to establish stronger standards for quality of life.

I'd like to start with you, Mr. Shrybman. You've been very eloquent about how Canadian governments and crown corporations have essentially lost about 80% of the cases brought forward under chapter 11. American government and public corporations have won every one, so there's very clearly an imbalance. Could you give us briefly a summary of what has happened with the language around chapter 11 subsequent to NAFTA being adopted? In other words, what path did the United States take around investor-state provisions and what path did Canada take around investor-state provisions in bilateral agreements? You made reference to TILMA and internal agreements.

Mr. Steven Shrybman: Congress has taken an interest in this mechanism and instructed U.S. trade officials to moderate the language.

Mr. Peter Julian: So the language has changed in the U.S.? They're not using this in subsequent agreements?

Mr. Steven Shrybman: No. They're using other language in subsequent agreements.

It's also important to appreciate that the WTO regime, which is a free trade regime, doesn't include this mechanism because it was rejected on three different occasions by the members of the international trading community. That includes the United States. So it's true, the yardsticks have moved in the United States, and arguably internationally. But that's not true of Canada's position.

Mr. Peter Julian: Just to clarify, then, for agreements like the U. S. and Chile, or the U.S. and Singapore, Australia, Morocco, whatever, in the United States they ensure that it can't attack legitimate public welfare, public health, or public safety objectives that are set by government policy.

Mr. Steven Shrybman: I believe there is at least one bilateral agreement that doesn't include an investor-state mechanism. I think they're moving away from it as a reasonable way to moderate the interests of investors in states under these treaties.

Mr. Peter Julian: In the United States they've rejected the type of chapter 11 structure that was—

Mr. Steven Shrybman: They've moderated it in some cases and rejected it in at least one.

Mr. Peter Julian: What's happening in Canada?

Mr. Steven Shrybman: We seem to be moving to implement it domestically. Certainly we're staying the course in our commitment to the NAFTA mechanism. One of the reasons I think Canada is losing and the U.S. is winning is that Canadian officials haven't been doing a wonderful job of defending Canadian measures, to judge by the way we've responded to some of the claims.

We caved on Ethyl before we had a determination from the tribunal. If you look at the S.D. Myers case, you have federal trade officials conceding that the measure wasn't a valid environmental measure. I think that was wrong: it was clearly a valid environmental measure. So you have to scratch your head about the way in which Canada's interests have been represented before these tribunals. The case we did win, the UPS case, I was involved in. There were intervenors for the first time, but Canada Post put up a very spirited defence. If Quebec is interested in seeing its measures defended, it needs to get itself in the middle of the dispute process to ensure an appropriate outcome.

But we're moving not only to keep in place our commitment to this regime, but also to implement it domestically as a feature of the Agreement on Internal Trade. It's actually now being implemented as part of this agreement between B.C. and Alberta.

Mr. Peter Julian: So to summarize, this is bad policy. The United States moved immediately away from it, but in Canada our international trade ministry has continued to implant these bad investor-state provisions in bilateral agreements and is even using them domestically. That's important information to have.

Thank you, Mr. Shrybman.

● (1000)

[*Translation*]

Mr. Séguin, I'd like to come back to the issue regarding 2,4-D. In Dow's presentation to the committee, its representatives almost said that 2,4-D is so good that we could even put it in shampoo. They say that there is no problem with 2,4-D.

First, could you again list the number of countries where 2,4-D has been banned or restricted. Second, when you say that we need to review chapter 11, could you tell us exactly what you want the federal government to do with regard to chapter 11? You referred to international law, Mr. Amos as well, but international law is not what we are following in this instance, it's the fact that the country has signed an agreement with regard to chapter 11. What should we do? Withdraw chapter 11? Try to change it?

Mr. Hugo Séguin: Thank you for your question, sir. As I said in my opening remarks, Quebec is not the only jurisdiction in the world to ban 2,4-D, but other than banning 2,4-D, dozens of chemical ingredients have been banned elsewhere, namely in Denmark, Sweden, Norway and Ontario. Furthermore, various Canadian provinces intend to do the same shortly.

Jurisdictions are not banning 2,4-D because they don't like the name. There is a procedure that is followed to determine whether a product has potential consequences on human health. The Quebec government used, among other things, recommendations or the ranking by the International Agency for Research on Cancer, a United Nations agency, under the World Health Organization, and which ranks the family of pesticides to which 2,4-D—dichlorophenoxy—belongs as being potentially dangerous for human health.

It is this notion of something that is "potentially dangerous" that generates reflection around the precautionary principle. If a product is potentially dangerous and we cannot prove beyond all reasonable doubt its harmful nature, the precautionary principle demands that caution be taken and the substance be banned. It is on this basis that 2,4-D was banned in Quebec, twice, not just once.

Concerning your question regarding chapter 11 of NAFTA, in my opinion, it would be correct to say that our organization has, in this case, significant concerns, which are confirmed by Dow's action before the NAFTA dispute resolution mechanism. We believe that the fundamental principle is that it is the right and responsibility of governments to protect the environment and public health must prevail over the rights of companies to make a profit or protect their commercial interests.

With regard to what exactly we would like the Canadian government to consider here, I believe that it is not for us to say. It is fair to say that we have significant concerns, but that we prefer to leave it up to the committee members to study this issue and to respond in the way that seems the most interesting and intelligent to the concerns of civil society, which includes the organization that I represent.

Mr. Peter Julian: Do I have time for another question?

[*English*]

The Chair: I'm sorry, but it's already been eight minutes. We've been trying to keep to the record, so I have to go to Mr. Harris now.

Mr. Richard Harris (Cariboo—Prince George, CPC): Thank you, Mr. Chair.

Thanks for coming this morning, gentlemen.

In your opening presentations, as Mr. Brison pointed out, none of you mentioned that this was in fact a reciprocal process, where private companies in Canada or citizens could launch disputes against the United States under chapter 11. I think that's important. You know, what's good for the goose is good for the gander, as the old saying goes. It works both ways.

You also pointed out that it isn't fair, because the United States is winning more cases than Canada. I'm not a lawyer, but this is what I'm getting from your tone: if you win it's good, if you lose it's bad, and because we've lost so many cases, it's bad.

It sounded from your comments, Mr. Shrybman, that you thought it was wrong for citizens or private companies in Canada to be able to challenge government policy, even international government policy as the provision in chapter 11 provides for. It appeared that you were saying this shouldn't be allowed, in some respects.

I'm assuming that what you're presenting today is very similar to the legal presentation that will be presented when this comes to arbitration under the provisions of chapter 11. What we have on our hands here is a legal question. It will have two sides to it, as always. There will be the defence and the plaintiffs. There's always a winner and there's always a loser. It depends on who has the best lawyers or the most money, it appears.

As to the qualities of 2,4-D and the case, I will leave it to the health scientists. They're the most equipped to answer whether it's good or bad. I think—most people might—that most things with chemical-sounding names may be bad. On the other hand, they may be good.

That brings me to my question. Not being a lawyer, I have to ask it just as a private citizen. It's perhaps for Mr. Amos, or Mr. Shrybman.

If the Province of Quebec is in fact successful with the defence of its actions banning 2,4-D, using the arbitration provisions within chapter 11, and there is no compensation and 2,4-D is banned, is it reasonable for an average citizen like me—not a lawyer, not a scientist—to assume that chapter 11 provisions in fact are good because Quebec won its case? Is that a reasonable assumption?

● (1005)

Mr. Steven Shrybman: Let me try to respond to that.

The question of pesticide regulation in Quebec has actually been resolved by the Supreme Court of Canada in the Hudson case, which did apply the precautionary principle, a principle that an investor-state tribunal could not apply.

So if your question to me is whether or not a complaint like this should come forward or be allowed, then I would say no. If a foreign company has a complaint with something that a Canadian government has done, there are two places it should be able to take that complaint—to the political process, to you, to this committee, to the legislature, to the people who represent the companies and their constituencies; or to the Canadian courts. Those are the only two places that a complaint about public policy and law should be allowed, not to a tribunal sitting in another country to pass judgment on Canadian laws.

Mr. Richard Harris: If I can interrupt, though, the process of arbitration works in so many different cases. I think it's unfair to suggest that an arbitration process that works in.... In Canada we use it all the time in labour disputes. They don't automatically go to court. The court isn't the only place to decide the outcome of a dispute.

So arbitration shouldn't be painted as something that's not useful.

Mr. Steven Shrybman: No. I think that's an excellent question.

The difference between arbitration and investor-state litigation is this. In an arbitration, there's a contract. There are two parties to a contract. It's a reciprocal arrangement. They both have obligations under the contract and they can decide if they would rather resolve their disputes before an arbitral tribunal, as happens under collective agreements, rather than before the courts. In the case of NAFTA, there is no contract and there is no reciprocity. Private investors who have been given the right to enforce this regime have no obligations under it. It's a completely asymmetrical arrangement. It's a non-reciprocal arrangement.

International treaties are agreements among nations. If there is a breach of those treaties, the nations are entitled to enforce them, and that's true under NAFTA. There is no reasonable basis for giving private parties, who have no obligations under those treaties, those enforcement rights. There's no contract. There's no privity of contract. There's no reciprocity.

That's what distinguishes investor-state litigation from arbitration, which, I agree with you, has a very important role to play in sorting out commercial and other disputes.

● (1010)

Mr. Richard Harris: Okay. So just answer this final question, then: if Quebec wins this case, will you still be of the same opinion about chapter 11?

Mr. Steven Shrybman: Yes, I would be. We will have dodged another bullet.

Mr. Richard Harris: Thank you.

The Chair: Mr. Silva.

Mr. Mario Silva (Davenport, Lib.): Thank you, Mr. Chair.

I want to like to thank the witnesses as well for their comments and for allowing us as a committee to get to know about and familiarize ourselves more with some of the issues of chapter 11. I agree with some of the statements that have been made. Although I'm not quite sure of all of the complexities, I do understand that there is a need to make it a fairer system. I'm not sure whether it needs to be replaced or whether there's a need to put some new mechanisms in place that would in fact deal with some of those concerns.

I would like to ask the witnesses if they could share some of their comments about what they think would be some of the ways we could improve the systems in chapter 11 without necessarily ripping the whole thing out. If the idea is to rip it all out, I'm not sure how it can be done within the framework of NAFTA. I'm not an expert on that particular aspect of the law, but I certainly would like to know whether there's a possibility that we, as legislators, could introduce some mechanism that could in fact make it a little better.

Maybe Professor Amos could reply.

Mr. William Amos: Thank you for the question. I think it's a good one, and I think it starts moving us towards solutions. While we're dealing with the conflict in this scenario, it does point us towards the need for changes. It also gives me a chance to provide what I think is a different perspective from what Mr. Shrybman provided in relation to Peter Julian's questions on Canada's negotiations of bilateral investment treaties and what direction they have taken on investment negotiations.

First, in terms of distinct improvements that could and should be made in the future, it's very clear that we need the Canadian government to negotiate very clear, bright-line distinctions as much as possible between what are compensable expropriations—whether they're direct or indirect expropriations—and what are non-compensable public regulations. That's absolutely critical.

The second area where the bilateral investment treaties or chapter 11 types of provisions could be improved in terms of promoting sustainability while we're promoting international trade and investment...and this goes back to a point that Mr. Shrybman made earlier, that chapter 11 is a decidedly one-way street. It guarantees foreign investor protections by the host state that the foreign investor can enforce through arbitration; however, there are no corresponding obligations on the foreign investor. There are no mechanisms to hold foreign investors accountable for breaches of international law—for instance, international human rights law and environmental law—through a binding arbitration mechanism. They have a mechanism to challenge measures that they feel affect their investment, but citizens of the states of the party or the parties themselves don't have that same mechanism to challenge their actions. So I think it has to be made a two-way street.

I would simply say, though, to return to Mr. Julian's question—I don't think it would be fair to say that the Canadian government has been standing still in relation to its investment treaties. I think they have definitely made some improvements, and the history of chapter 11 disputes has assisted them in moving towards improved investment protection processes. In 2001 the NAFTA Free Trade Commission issued an interpretive statement on chapter 11—this was really one of the first steps forward—and it issued guidelines on non-disputing party participation in chapter 11 arbitrations. Those are people like us who want to be part of the process. They made it clearer that the arbitrations would be open to the public and that the draft negotiating texts, when they're negotiating these deals, would be made open to the public.

Canada has released—and this is old news, from 2004—a new model foreign investment protection agreement, a FIPA, which serves as the template for negotiations of bilateral investment treaties and for chapter 11-like provisions in trade agreements.

I would certainly not suggest that the 2004 FIPA is perfect; I think there are a lot of things that could be improved with it. This is simply to say that since NAFTA has been signed, Canada has been moving forward and they've been making suggestions for changes in these bilateral investment treaties in relation to issues that we're talking about here: scope of expropriation, a minimum standard of treatment, and access to hearings.

● (1015)

The yardsticks have been moving forward, but not enough. I'm happy to speak to some of the areas where they have moved forward. I don't want this to be all doom and gloom. I think a balanced perspective is necessary on this issue. I don't think it's necessarily helpful to have a really polarized discussion about chapter 11. But if chapter 11 were to be reopened, if there were a will to do that, I think many measures could be taken to ensure not only that investors are protected but also that civil society is protected and the measures go in both directions.

The Chair: Thank you.

I'll remind our witnesses as well as our committee that on the second round the questions and answers are five minutes, so we can't have six-minute answers.

Mr. Steven Shrybman: If I just might add something—

The Chair: I'm sorry, we finished that question. It's a five-minute round. We're at six and a half minutes. I just wanted to make that clear. So you could maybe answer a little later in the next round.

Mr. Cannan.

Mr. Ron Cannan (Kelowna—Lake Country, CPC): Thank you, Mr. Chair, and thank you to our witnesses for being here this morning.

I appreciate, Mr. Amos, your comments about a balanced approach. I think that's important as we try to find constructive ways of moving forward so Canada can expand its trade agreements around the world, as we've been falling behind for the last decade-plus. I appreciate your comments.

I have just a couple of follow-ups. I'm going to share my time with my colleague Mr. Keddy.

We've heard in Newfoundland about the AbitibiBowater case, that the company has indicated that it is examining all the legal options. I'm just wondering what the time line is. What's the statute of limitations on when a company can initiate a claim and throw that kind of fear into the community, the province, and the country? How long do they have to take action?

Mr. William Amos: There's a limitation period of three years from the time they're aware of the measure. I can't remember if it's article 1117 or article 1118. It's somewhere around there.

Mr. Ron Cannan: We're going back to the Dow situation. They've initiated, and now they're in discussions. It's not just a matter that, if talks break down between the province and the Government of Canada and Dow, it would proceed on to the tribunal?

Mr. William Amos: It's difficult to speculate. To tie this back in to your question about the limitation period, the 2,4-D ban was enacted by Quebec in April 2006, so by my math, we would be in theory coming up quite close to this limitation period. However, there's an open issue as to whether or not this measure is an ongoing measure. The ban is still in place, so I'm uncertain and don't have an answer as to whether or not a limitation period issue is raised here in this case.

Mr. Ron Cannan: I'm aware that it's been an outstanding issue. I was nine years in local government, and I was involved in Communities in Bloom and integrated pest management seminars and all the rest.

You mentioned that Ontario, Toronto, and Halifax have also instituted bans. What is the rationale from your perspective as to why Dow hasn't initiated any action against those two municipalities?

● (1020)

Mr. William Amos: I can speculate. Municipalities are small fish. Provinces are bigger fish. Quebec and Ontario are among the bigger fish in Canada. I think with Quebec enacting the first ban, it's quite conceivable that Dow decided they were going to try to draw a line in the sand and try, at best, to prevent future bans and repeal this ban, and at worst, to delay the other provinces' decisions in enacting bans through this NAFTA chapter 11 discouragement process, if you will. While there's uncertainty as to the outcome of the litigation, other provinces might be less enticed to move forward, as well as municipalities.

Right now, it would appear that Ontario is moving forward strongly. Municipalities close to home—I live in Chelsea here, one of the leaders in this issue, and they're not going to back down either. They welcome the challenge. I guess municipalities are smaller battles, so maybe they decided it wasn't worth it.

Mr. Ron Cannan: Obviously it takes time to get through this arbitration and to tribunal. Who covers the costs? You are representing different organizations.

Mr. William Amos: As legal counsel with Ecojustice Canada, my services are pro bono for the environmental groups that I work with. Ecojustice Canada is a non-profit charitable organization. We are funded by public donations and by private foundations. We don't receive a penny of government money, so all of our work is being done for free minus the photocopies and phone expenses.

The Canadian taxpayer, quite obviously, is paying for the legal fees associated with the defence of this claim and Quebec's ban.

Mr. Ron Cannan: I have one last comment with regard to Mr. Shrybman.

In your opening preamble, you talked about the tribunal and the perception of it being sort of an American body. As you alluded to, it's one Canadian, one American, and the third member of the tribunal is at the agreement of both parties. Do you feel it's American biased because it's located in Washington? Is that what your reference is to, or how would you be able to clarify your comments?

Mr. Steven Shrybman: No, I wouldn't suggest that it's an American body. It's a private adjudicative or a quasi-private adjudicative body.

I mentioned the fact that the cases are often heard in Washington, which doesn't make it an American regime. I also made a point, though, about the place of arbitration. That's a determination the tribunal makes, and in claims against Canada that's usually some place outside the country, which means that only a court in that jurisdiction has the authority to review an arbitral award.

So it's the removal from the purview of Canadian courts and from the purview of Canadian elected officials that I find problematic with this regime—and I think you should as well—not necessarily to an American body but to one that sits outside the framework of Canadian law and outside the framework of the Canadian Constitution. It exists in an international law space largely created to resolve commercial disputes, not disputes about public policy and law. That's the concern.

Mr. Ron Cannan: In the spirit of trying to improve chapter 11 and Mr. Amos' comments, that would be part of your recommendation, then, to try to find a better mechanism, not just as my colleague Mr. Harris said.... You still have arbitration, but are you totally against chapter 11 and for removing arbitration out of this part of the dispute resolution mechanism?

● (1025)

Mr. Steven Shrybman: I think it's very difficult to argue that it serves a useful purpose. I just don't think the evidence is there. When you look at the studies the World Bank has carried out of whether the mechanism even works, you have to have questions about it.

When we had a free trade agreement with the United States in 1988, we had an investment chapter, but we didn't have investor-state dispute resolution. So there's a basic question about whether you need the mechanism, and I think the evidence is that it has not served Canada well and certainly hasn't served Canadian investors. If you wanted to cooper it up, there are ways to do that, exhausting local remedies. There are a number of technical changes that you would make to the regime to make it more transparent, to make it possible for people to participate in the process.

We've intervened in disputes. I'm now intervening in the Merrill & Ring case, but I don't get to see the evidence. So it confounds any notion of fairness that certainly would apply to labour arbitrations or proceedings before Canadian courts.

It's a system that wasn't created to resolve public disputes. I don't think it's the appropriate forum for that type of argument or legal claim. It could be fixed up, but I think you really have to answer the question first as to whether or not it's serving a valid purpose.

Mr. Ron Cannan: I know the courts prefer to go to mediation rather than litigation.

Thank you.

The Chair: Monsieur Guimond.

[*Translation*]

Mr. Claude Guimond (Rimouski-Neigette—Témiscouata—Les Basques, BQ): Thank you, Mr. Chair.

Good morning to our witnesses. We are having an interesting discussion this morning around health issues and the environment, especially as they relate to chapter 11.

Without wanting to throw the baby away with the bathwater, could we improve on chapter 11? I am thinking in particular about article 1110. Could the clause dealing with public interest be better defined, in order to give it more teeth and increase our say? We know that the corporation is very powerful. If we better define public interest, as set out in article 1110, could we better serve the interests we are talking about this morning?

Mr. William Amos: Yes, that is a good question. I would like to come back to Mr. Shrybman's argument, which in my view hits the nail on the head.

Before deciding if we should make improvements to chapter 11, we should determine whether it helps promote investments. It is quite unclear whether chapter 11 and the protections therein, especially its arbitration measures, foster investments in Canada and abroad. The first step is to determine whether the arbitration process is useful. If it is found to be a good way to promote investment, then changes could be made.

Clearly, one has to distinguish between a non-compensable regulation and a compensable expropriation, whether it be direct or indirect. Chapter 11 is very clear on that issue: expropriation, whether direct or indirect, is compensable. The chapter refers to "measures tantamount to expropriation", meaning measures that very closely resemble expropriation. There could be a very clear definition of a non-compensable regulation, so that Canadian jurisdictions are aware, from the outset, of the measures that can be taken in the interest of Canadians, without having to worry about any potential arbitration.

● (1030)

Mr. Hugo Séguin: I have a slightly different opinion than that of my two colleagues. In the case of Équiterre, the primary objective of chapter 11 should not be to increase investment in Canada. International trade agreements should not place private interests above the responsibility of governments to protect the environment and public health. To the extent that trade agreements fulfil that responsibility, they can take into consideration investor protection. But one responsibility takes precedence over the other, and that is protecting public health and the environment.

[*English*]

Mr. Steven Shrybman: I would like to give you a more fundamental point about article 1110. You are entitled as the Government of Canada to expropriate property for public purchases, and you're entitled as the Government of Canada to decide how much or whether you're going to pay compensation when you do that, because we have not entrenched private property rights in the Constitution. That was debated in 1982 and rejected.

What article 1110 does is entrench private property rights in NAFTA, so let's say it is the taking of property, as perhaps would be true of Newfoundland not taking back its water licence but taking the company's mill. It's up to Newfoundland, under our Constitution, to decide how much money to pay, but under NAFTA, Canada must compensate Abitibi for the fair market value of its investment. We rejected that notion as a feature of our Constitution and yet it's been imposed on us through the back door of NAFTA. That's a fundamental problem with article 1110, however you read it.

The Chair: Thank you.

Thank you, Mr. Guimond.

Mr. Keddy.

Mr. Gerald Keddy (South Shore—St. Margaret's, CPC): Thank you, Mr. Chairman.

Welcome to our witnesses.

I have a couple of quick questions.

Are you folks involved at all in the Newfoundland case that Mr. Shrybman was just talking about?

Mr. Steven Shrybman: I think I will be, but there is no case yet.

Mr. Gerald Keddy: If it comes forward.

Mr. Steven Shrybman: Yes, I've had a couple of clients ask me to represent them if it comes forward.

Mr. Gerald Keddy: Is one of them the Province of Newfoundland?

Mr. Steven Shrybman: No.

Mr. William Amos: Just so that we're clear, the Province of Newfoundland would always be represented by the Department of Foreign Affairs—

Mr. Gerald Keddy: Absolutely. Yes, I understand that. But they also have a certain vested interest here, as does AbitibiBowater. That's an interesting case, and at this point I think it's pretty hypothetical exactly where it goes.

I'm more interested in picking up on Mr. Brison's line. If we have an imperfect system—if that's the case—and chapter 11 needs to be massaged or amended to work better and to be more equitable straight across the board, then do we throw the baby out with the bathwater or do we simply try to amend and make changes to chapter 11?

I was interested in Mr. Shrybman's comment that when we're in a court outside of Canada and you want to appeal that decision, then you have to appeal through that jurisdiction. For those of us in the room who are not lawyers, and I think that's most of us, that does present a fairly serious problem.

I will just follow up on that statement. If it's in the state of Mississippi, are you back in the state of Mississippi? Are you in the same court jurisdiction as you were in, state versus federal, or how exactly does it work?

Mr. Steven Shrybman: In the Loewen case?

Mr. Gerald Keddy: Yes.

Mr. Steven Shrybman: I think one of the things, essentially, about the Loewen case is that it was brought to challenge the determination of a jury in a jury trial that held Loewen liable for this extravagant amount of money.

Under this mechanism you can actually review the decisions of courts, including the Supreme Court of Canada. There's no limit to the level of court that you can seek an arbitral tribunal hearing on. In fact, it happened in another case involving Canada going after a decision of a U.S. district court of appeal—so right up there. And that's problematic, in my view. Why would you entitle a private tribunal to sit in judgment on the determination made by a Canadian court and whether it was properly made? But that's permitted under this regime.

I'm not sure where the place of arbitration was in the Loewen case, but you wouldn't be back before a court in Mississippi; it would be whatever court in the United States has jurisdiction to review arbitral awards, probably a court of appeal at an appellate level. In Canada it's a superior court.

The Metalclad case, for example, was a dispute between a hazardous waste company in the United States and a small community in Mexico. Of course, it sued the Mexican government. When the decision was made against Mexico, Canada had been chosen as the place of arbitration—in fact, British Columbia. And so the only court that Mexico could turn to to set aside the award was the Supreme Court of British Columbia, and that's where it went. And the court upheld the award.

But here you have the spectre of a Mexican measure being challenged before an international tribunal, and then if Mexico wants to judicially review the decision, it has to go to a court in British Columbia. Ask yourself this: if it had been the United States, do you think U.S. lawmakers and Congress would put up with an outcome like that?

● (1035)

Mr. Gerald Keddy: Well, I'm not certain on that hypothetical question, but I think that if an international tribunal is being held, there would be some reason to allow for a third country. So if it was a dispute between Mexico and the United States, Canada would make the third country, being under NAFTA. With a dispute between Canada and the United States, perhaps Mexico should be the seat.

We have to have a process in rules-based trading to settle disputes. There has to be a process. A good portion of what doesn't work in Canada is interprovincial trade barriers. We had that discussion here this morning. For a truck to haul a load of freight from Nova Scotia to British Columbia, there are several different licences required. That's not promoting trade. So how do we break down these barriers and how do you put a dispute mechanism in place that allows it to happen? And maybe chapter 11 is not perfect—that's not the discussion—but you do need a process to settle disputes.

Mr. Steven Shrybman: I think those processes have to be consistent with—

Mr. Gerald Keddy: Mr. Amos is trying to get a word in here as well.

Mr. Steven Shrybman: Very quickly, they have to be consistent with Canadian constitutional norms, if Canada is a party; and they have to be reciprocal and fair. By all three measures, chapter 11, you'd have to conclude, would fail.

The Chair: Mr. Amos.

Mr. William Amos: I would make a very brief point. Ecojustice obviously is a public interest environmental organization and doesn't make a habit of taking positions on matters of international trade, and so I should probably speak in a personal capacity.

I would simply say that I agree with the need for dispute settlement, particularly between trading nations, but I think there's a very open question as to whether or not investors need a specific mechanism to protect their investments vis-à-vis the host state of their investment. They can use domestic court processes. The chapter 11 investor-state dispute resolution process is something specially designed for those investors. It doesn't have to be there; they could go through the Canadian court system. For instance, they could conceivably challenge—

Mr. Gerald Keddy: I have one last quick question that maybe you could shine some light on.

There are several jurisdictions in Canada that have banned the chlorophenoxy herbicides. There must be, and I'm sure there are, jurisdictions in the United States, whether at a state, city, or municipal level, that.... I'd be shocked if there are not. When a ruling is brought down, does that affect Canada and the United States, because we've signed on to this trade agreement? If so, why aren't we seeking allies? Anyone can be an intervenor in a case, I would expect.

● (1040)

Mr. Steven Shrybman: One of the idiosyncrasies of this regime is that there is no doctrine of precedence. It's not like a court, which is bound by higher authority or which needs to respect the decisions of other tribunals. So it's open season in every case. Even though the cases might be similar, one tribunal is quite free to ignore the decisions of others if it thinks it has a better view.

So I don't think there's any precedential value arising from a dispute like that, if that's your question. I'm not sure I understood it.

Mr. Gerald Keddy: My question, I guess, specifically is, if there are jurisdictions in the U.S., wouldn't they have the same interests as Quebec has, and Ontario in this case, and the Halifax municipality and other areas that have banned the use of certain pesticides, or herbicides in this case?

Mr. Steven Shrybman: The United States federal government has the right to make submissions to the tribunal. There's no other right of intervention. You can petition the tribunal and ask for its consent to participate, but there's no right for any other party to participate in the process other than—

Mr. Gerald Keddy: There's no intervenor status on behalf of anyone else?

Mr. Steven Shrybman: Only if the tribunal agrees to give it to you. The process that's been set in place for that is that you make your submission and your application for standing at the same time. You don't necessarily get to see the evidence, or any part of it the company decides should be confidential—and that has happened in every single case. A large part of it has been reserved, and there are confidentiality orders in every case. And you don't know until the decision is rendered whether or not the tribunal is actually giving you standing. It may refer to your submissions; it may not. You don't find out until the end of the day whether or not they've taken your views into account.

Mr. William Amos: As I mentioned earlier, it's also highly relevant that there's no open door for oral submissions. Whereas the Supreme Court can decide that a given intervenor will bring an important perspective to help them make a better decision, in the case of chapter 11 arbitration, that will not be the case. If we submit an application to be a non-disputing party and file an amicus curiae brief, they will not be inviting us to make oral submissions, whether or not they think our perspective would be useful to them.

The Chair: Mr. Brison.

Hon. Scott Brison: Mr. Chairman, earlier today Mr. Julian said Canada has never won a case, but we did win the UPS case, as an example.

I'm very intrigued by what Mr. Shrybman said earlier, that the Canadian government has not vigorously defended or utilized legal defence mechanisms effectively to defend Canadian interests. I don't know the cases well enough to judge that, but it strikes me that I would like to know, first of all, whether or not the Canadian government has done a good enough job using what provisions are in chapter 11 as it stands now, and what specific approaches we could take that would be different to strengthen our defence of our interests.

Then a separate issue is, notwithstanding defending our interests better with the existing chapter 11 provisions, what improvements we should make potentially with chapter 11 and NAFTA—and that would involve a reopening—or at least, further to Mr. Julian's point, for future FTAs so that we can seek to ensure that investor-state provisions are better designed, if there are any.

I'd appreciate any further insight into the specific cases where Canada did not do a good job in effectively going to the wall to defend a Canadian legislative decision. Second, Mr. Amos has actually proposed some changes that could improve that, and it's helpful to have those granular recommendations.

So there are those two points: what have we not done effectively so far in terms of defending our interests with the existing chapter 11, and what specific changes should we make, going forward, to any investor-state provisions to make sure they are better positioned to defend our interests?

● (1045)

Mr. William Amos: I'm going to leave the answer on the issue of what Canada has not done well enough to Mr. Shrybman.

What I would like to point out here answers your question, I think, but it is in the context of this specific case. What can arise and what may be arising in this case is a situation in which the Canadian government may not be in the best position to defend the interests of a given subnational entity such as a province—say, Quebec—and I'll highlight why.

Dow has invoked the Pest Management Regulatory Agency's re-evaluation of 2,4-D as a reason justifying their claim that the Quebec process has been unfair and arbitrary and unjust. They're saying Quebec has decided that on a precautionary basis they're going to ban 2,4-D for cosmetic use, but that flies in the face of the federal Pest Management Regulatory Agency's own re-evaluation. The agency apparently takes a precautionary approach, and it has decided that in fact it can be registered in Canada. They're playing off the federal and the provincial processes. What can happen is that the federal government's own approach to the precautionary principle gets called into question, but they're having to defend the province's own precautionary principle.

I would like to highlight the fact that it's well known that Canada has adopted, on several occasions, a less than progressive stance on the precautionary principle in its international negotiations. In the trade context in particular, there was the EU beef hormones case that went before the World Trade Organization. In that case the European Community argued that the precautionary principle was customary international law and justified its prohibition of beef imports from Canada and the U.S. that were produced with artificial hormones. Canada and the U.S. argued that the precautionary principle was not part of customary international law.

What we have in this case, to bring it back to Dow, is that the Government of Canada has taken certain positions vis-à-vis the precautionary principle in other international fora; now they're having to represent Canada before a NAFTA tribunal, or potentially will have to represent Canada before a NAFTA tribunal, and defend the precautionary principle in a particular circumstance. There's the potential for conflict, and that's one of the reasons groups like Équiterre and the David Suzuki Foundation, represented by Ecojustice, are so keen to be involved in the process. It's because we think we have a specific perspective on the public interest that the Government of Canada may not be able to bring or may not feel comfortable to bring, because it may find itself in a conflicted situation. That may not be the case, but it also may be the case.

Mr. Steven Shrybman: I agree with that analysis. That's not the only conflict of interest, I think, that resides not within the Canadian government so much as within the international trade department. The lawyers who work for the department have carriage of Canada's trade agenda; they may at one moment be assailing the precautionary principle in a dispute with the United States and in the next moment be called upon to defend it.

I would do two things. I would take carriage of Canada's defence of its measures out of that department. There are many talented lawyers who work for the federal government, or you could retain outside counsel. I often am involved in cases with the federal government, and often on the same side, happily. We often have a collaborative and cooperative working relationship with lawyers within the federal government. In fact, my firm represents the lawyers in the federal government in labour-management relations.

When it comes to these trade cases, even though we're on the same side, you wouldn't know it, because I don't get my calls returned. It's very difficult for us, because they know we're critics of the regime, and I think they haven't removed themselves from their support for the regime. They negotiated these agreements. They're still negotiating them, and they need to vigorously defend the interests of the government writ large, and even of departments whose values they maybe don't share, such as Environment or Health, in defending Canadian measures.

● (1050)

Hon. Scott Brison: On that point, simply taking the legal carriage out of Trade and putting it with, say, Justice—Justice lawyers can work in the Department of the Environment—is a very specific and constructive approach that could make a real difference.

Thank you very much. I hope this is not our last discussion on chapter 11.

The Chair: Thank you.

We have about five minutes here, so I'm going to ask Mr. Julian to sum up and keep the questions and answers to five minutes, if we can, and we'll adjourn at 11:55.

Mr. Julian.

Mr. Peter Julian: Thank you, Mr. Chair. I appreciate the opportunity for a supplementary.

I have two very quick questions, one to Mr. Shrybman. My question to you is this. When we're talking about bilateral trade agreements, have we found that the chapter 11 provisions Canada has signed on to in bilateral trade agreements—and I'm thinking of Canada-Chile, Canada-Costa Rica, Canada-Israel—have essentially maintained intact the chapter 11 structure? That's my first question.

[*Translation*]

My second question is for Mr. Séguin. You said that there needed to be a strong response from the federal government. Are you satisfied with the way the federal government has reacted up until now in the case of Dow AgroSciences against the Government of Quebec?

[*English*]

Mr. Steven Shrybman: The basic structure of investor-state dispute resolution is intact in the Peru agreement. Is it the Peru agreement? The one I've seen is the one with Colombia.

But I think Mr. Amos is correct. There has been some softening around the edges, and I'm sure Canada is reflected in those new agreements, the trilateral statements that have been made by the commission, which he referred to. But those weren't Canadian initiatives; those were three-party initiatives. However, the essential features of allowing private investors to claim against the state under an agreement to which they are not a party and to walk away with damage awards if they succeed remain intact.

Mr. Peter Julian: Thank you for clarifying that.

So with the bilaterals that Canada is signing, we're essentially maintaining the chapter 11 provisions, which means we have a NAFTA template that Canada is continuing even though the U.S. has clearly moved away from it. That's an important point for the committee, so I appreciate that.

Mr. Steven Shrybman: You know, I'm not sure how much light exists between the reforms the U.S. has put in place and those Canada has put in place. I wish I were more up to speed on this, but I understand the U.S. has negotiated a bilateral without an investor-state mechanism in the agreement. Now, that would be a significant reform, if I'm correct in my recollection.

And when I responded to your question previously, what I tried to bring home was that the federal government is fully supportive of implementing a regime like this domestically, which doesn't moderate these disciplines; in fact, it arguably expands them, if you look at the TILMA model.

Mr. Peter Julian: Thank you.

Monsieur Séguin.

[*Translation*]

Mr. Hugo Séguin: Thank you for your question.

If I understand correctly, you want to know whether we received a clear and unambiguous response from the federal government. The answer is no. Questions were asked in the House of Commons, and Stockwell Day, the Minister of International Trade, gave an answer that we find is ambiguous. We would like for the government to clearly state that Canada will defend Quebec's Pesticides Management Code. But we are still awaiting that response.

Our coalition has also sent a formal letter to the minister, but we have yet to receive a response. We recently heard that consultations were held with the company and the Government of Canada in January. That could perhaps explain the ambiguous response. This is of concern to us because we do not know what was actually discussed or what is going on. In the absence of a clear position from the minister or the government, we would welcome a motion from committee members stating that they would like the Canadian government to vigorously defend this case before the courts.

● (1055)

Mr. Peter Julian: Thank you. This is simply to clarify...

[*English*]

The Chair: I'm sorry, Mr. Julian, I think we've gone over time with that one.

I'm going to say thank you for your questions and thank you to our witnesses. It was very useful, and I think the committee was very pleased with the presentations and the questions, so thank you very much. With that, I'm going to dismiss the witnesses with thanks.

I want to remind the committee that on Thursday I will be bringing to the committee a budget for travel to Washington. There will have to be discussion about that. Apparently there are two other committees visiting at the same time, and that may be one.... So I want you to bring your thoughts to the committee for Thursday with regard to the Washington trip.

Mr. Peter Julian: Will you be bringing the budget, or do you want us—

The Chair: No, I'll bring the budget, and that will focus on debate. All right, so we'll debate that on Thursday.

The meeting is adjourned.

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