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Chair

Mr. Kevin Sorenson

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● (0900)

[*English*]

The Chair (Mr. Kevin Sorenson (Crowfoot, CPC)): Good morning, colleagues.

This is meeting 43 of the Standing Committee on Foreign Affairs and International Development, Tuesday, December 1, 2009. Our orders of the day include a return to our committee's study of Bill C-300, An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries.

On our first panel today we have, from the Department of Foreign Affairs and International Trade, Grant Manuge, the director general of the trade commissioner service, operations; Mr. James Lambert, the director general for Latin America and the Caribbean; Sabine Nölke, director of the United Nations human rights and economic law division; and Ms. Sara Wilshaw, the director of trade commissioner service support.

We welcome you to our committee this morning. I'll invite you to make your opening statements, and then we'll proceed into the first and second round of questioning.

I want to remind the members of our committee today that we are going to try to adjourn this by 10:15 to 10:30, somewhere in there, and move into steering committee. We'll really be on the time clock today in terms of the seven-minute rounds for questions and answers.

Mr. Manuge.

Mr. Grant Manuge (Director General, Trade Commissioner Service, Operations, Department of Foreign Affairs and International Trade): Thank you very much, Mr. Chair.

Thank you for inviting the Department of Foreign Affairs and International Trade— "DFAIT", as we refer to it—to return to this committee.

Today we would like to build upon previous testimony made by this department and comment on the potential implications of implementing Bill C-300, the challenges of the quasi-judicial process it would create, and the CSR-related activities in which DFAIT is currently engaged as part of our mandate when it comes to fostering the expansion of Canada's international trade and commerce and coordinating Canada's international economic relations.

[*Translation*]

Officials at the department have been following closely the committee's study of Bill C-300 and have carefully reviewed your comments and questions, as well as the testimony provided by the many witnesses and stakeholders who have appeared since the department last appeared in June.

During that appearance, officials spoke of the new corporate social responsibility strategy tabled by the government in March, the work of the national contact point and the network of foreign service officers around the world. It was also noted during that appearance that departmental officials had some concerns with the proposed implementation of this bill. That appearance was followed with a written submission outlining these concerns and questions.

Since that time, many issues have been raised by the various stakeholders. You have heard from the industry, civil society organizations, Export Development Canada, the Canada Pension Plan Investment Board and some of our partner departments.

[*English*]

Rather than focusing on areas that have already been substantively addressed by others, DFAIT would like to use its time today to raise a number of issues that would have considerable impact on this department and on its work. These issues include the use and operation of the Special Economic Measures Act; the question of applying international human rights standards to non-state actors; the way in which DFAIT provides CSR support to Canadian companies, including those in the mining, oil and gas sector; and the foreign policy implications of the bill.

To highlight some of these issues, it might be useful to undertake a close examination of the implications for this department of setting up and conducting an examination process as it is set out in the bill.

As the department that would ultimately be responsible for implementing and applying many of the provisions of this legislation, we needed to look carefully at what would be asked of us should this legislation pass. In so doing, we felt it was important to carefully examine the provisions of the legislation as it currently stands and to assess the various implications, some of which I will mention here.

Bill C-300 asks the ministers of the Department of Foreign Affairs and International Trade to draft a set of what appear to be mandatory regulations using a number of internationally recognized, voluntary guidelines and one policy that is internal to the International Finance Corporation. This is challenging, because these instruments are currently drafted as guidelines, and not regulations, so that they remain flexible enough to embrace the wide range of complex circumstances and conditions under which firms from Canada and other countries operate in countries around the world.

The bill also asks the ministers to incorporate human rights standards and "any other standard consistent with international human rights standards". In this regard, Dr. John Ruggie, special representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises, noted in his report of April 22, 2009, that "human rights instruments were written by States, for States. Their meaning for businesses has not always been understood clearly by human rights experts...." It would be difficult to determine which international human rights standards to apply and how those standards should apply to non-state actors prior to the completion of the work of Dr. Ruggie.

This point also serves to highlight the fact that Bill C-300 would require DFAIT to build or acquire the capacity to investigate and adjudicate claims of human rights abuse and environmental degradation. In addition, ministers would need to take into account not only the legal risk of making a determination, which could be subject to judicial review, but also potential impacts such a determination might have on local communities, host governments, Canadian companies, civil society organizations, and other stakeholders.

As noted in our earlier submission, the link between the actions of a Canadian extractive company and grave breaches of human rights by states is unclear and does not seem to be consistent with the purpose of enhancing corporate social responsibility abroad.

Bill C-300 requires the Department of Foreign Affairs and International Trade to set up a quasi-judicial process. That process would need to meet all the requirements of due process, procedural fairness, and natural justice. Foreign Affairs and International Trade currently does not have the ability to function as a quasi-judicial body. There is no provision within the DFAIT Act to house such a mechanism.

In order to set up a process to accept or reject complaints, conduct examinations, and make decisions based upon those examinations, a carefully drafted framework would be required, firmly respecting the principles of natural justice. This extensive regulatory framework would be required to ensure that rights are being protected.

The issues outlined above also raise questions as to whether or not DFAIT officials have the right skills or will have sufficient resources available to train or recruit individuals with the appropriate professional competencies to do this work.

It may be helpful to review the current practice of the department when DFAIT officials are presented with allegations of wrongdoing by a Canadian company abroad. When the department learns of such allegations, we take these very seriously and try to play a constructive and helpful role. Our heads of missions and foreign service officers in Canada and abroad consult and work closely with companies and the affected communities, and with governments, indigenous peoples, and civil society organizations to facilitate an open and informed dialogue among all parties.

● (0905)

[*Translation*]

In the event that the territory in which the alleged activity took place is not a signatory to the OECD guidelines for multinational enterprises and does not have their own national contact point, or NCP, we would offer the services of Canada's NCP to the affected individuals, communities or their representatives.

The Department of Foreign Affairs and International Trade currently chairs the interdepartmental committee that is Canada's national contact point (NCP) for the OECD guidelines. These guidelines are a key element of Canada's CSR approach.

The NCP promotes the guidelines, handles inquiries, and can foster a constructive dialogue between stakeholders when issues arise. If the allegations fall outside the scope of the OECD guidelines, the department could offer the services of the newly appointed Extractive Sector CSR Counsellor to the affected communities for issues that fall within her mandate.

[*English*]

The department's approach to engaging with stakeholders in the event of such allegations is one that reflects the principles that guide Canada's foreign relations and the observance of Canada's commitments under international agreements and obligations, including respect for the sovereignty of states.

It is an approach that is consistent with the way states in general work with one another when issues such as these are raised. It also demonstrates a commitment not only to help companies perform better and act in a socially responsible manner but also to work with host governments and local communities to enhance their ability to manage natural resources and benefit from the development opportunity afforded to them by such endowments.

When amending the DFAIT Act to put constraints on the kind of support officials are able to provide to Canadian companies in certain circumstances, it might be useful to note what some of those activities are. It will be challenging to draw a distinction between the activities of DFAIT officials that promote and support Canadian companies, and would have to be withdrawn in the case of a negative determination by the ministers, and activities that could be considered improving overall CSR performance.

These activities include hosting sustainable development and CSR conferences, seminars, and workshops; assisting Canadian delegations of indigenous peoples to meet with groups of indigenous peoples in other countries to talk about CSR and natural resource development; visiting mining sites and speaking with stakeholders; providing information about Canadian policies and programs to foreign governments; assisting in bringing foreign delegations to trade shows, such as GLOBE and PDAC, to meet with Canadian companies and learn about new technologies and approaches to natural resource development; advising companies with respect to the local cultural, political, and social environments and encouraging them to develop CSR best practices; participating in dialogues with civil society organizations and other stakeholders to better understand the range of issues and concerns and to adapt our policies and practices accordingly; sharing advice and information with partners across government and working together to create a whole-of-government approach to promoting CSR; actively supporting the creation of the CSR centre of excellence; and engaging on CSR at the bilateral and multilateral levels in a vast array of fora and through a wide range of instruments.

In summary, the experience of this department has demonstrated the value of seeking to facilitate dialogue to identify shared objectives among multiple stakeholders and build a consensus about how they can be most effectively realized. This requires flexibility, creativity, balance, and readiness to adapt approaches to specific circumstances, particularly in light of the highly complex political and economic situations that exist in many developing countries. This is particularly true if the goal is not only to promote respect for human rights but also to work toward remedy where the potential exists for behaviours inconsistent with the proposed guidelines.

Insofar as the analysis undertaken of the potential impact of Bill C-300 on DFAIT, it could restrict our ability, in areas where we most need to engage, to influence a positive outcome and ultimately limit the ability of this department to make positive contributions in the area of corporate social responsibility.

● (0910)

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

We'll move to the first round of questioning.

Monsieur Patry.

[*Translation*]

Mr. Bernard Patry (Pierrefonds—Dollard, Lib.): Thank you very much.

I thank our witnesses very much. Welcome once again.

Mr. Manuge, in your presentation this morning, you mentioned currently drafted guidelines. You told us, and I quote:

> Bill C-300 asks the ministers of the Department of Foreign Affairs and International Trade to draft a set of what appear to be mandatory regulations using a number of internationally recognized voluntary guidelines and one policy that is internal to the International Finance Corporation.

You also say:

> ... Bill C-300 would require [you] to build or acquire the capacity to investigate and adjudicate claims of human rights abuse and environmental degradation.

Is it reasonable to assume that the Department of Foreign Affairs and International Trade could effectively manage the complaints mechanism provided for in this bill?

[*English*]

Mr. Grant Manuge: Thank you for the question.

During the course of the past months, after this department appeared before the committee in June, following our written submission after the appearance in June and in the lead-up to our appearance today, we felt that as the department that would ultimately be responsible for implementing a large part of the provisions of the bill, we should in good faith assess very carefully what the provisions of the bill would mean in terms of implementing for our department.

In this regard, the comments that I provided in the opening statement, and the ones noted in our written submission subsequent to our last appearance, itemized in some detail our concerns with the process of transforming what are currently drafted as guidelines into what would appear to be regulations that would require compliance on the part of Canadian companies abroad. At the same time, we wanted to look at how we would actually implement the process of examination that would be required.

It would appear to us that this would require the creation of a unit within our department that would focus on accepting complaints that would be submitted, on assessing them, on reviewing them, on establishing a process to be followed, and on providing related legal services.

This would require certain human resources, financial resources, that we believe could potentially be very significant.

● (0915)

[*Translation*]

Mr. Bernard Patry: In your testimony, you also mentioned a quasi-judicial process. You said the following:

> The Department of Foreign Affairs and International Trade does not have the ability to function as a quasi-judicial body. There is no provision within the DFAIT Act to house such a mechanism. To set up a process to accept or reject complaints, conduct examinations and make decisions based upon those examinations, a carefully crafted framework would be required, firmly respecting the principles of natural justice.

To whom do you think the responsibility for setting up that framework should be entrusted in order to move this bill forward?

[*English*]

Mr. Grant Manuge: Perhaps I could ask my colleague from the legal division to address this question, given the legal implications.

[*Translation*]

Ms. Sabine Nölke (Director, United Nations, Human Rights and Economic Law Division, Department of Foreign Affairs and International Trade): Thank you very much.

Since your question is legal in nature, I would like to answer in English.

[*English*]

Mr. Bernard Patry: That is no problem. I speak in French because that's my mother tongue.

Ms. Sabine Nölke: Thank you.

We are not, I believe, as officials, in the position to suggest alternative mechanisms to the ones proposed in the bill, but we can certainly note that the framework that is currently provided in the bill would very likely not satisfy the administrative law requirements that would be necessary in order to establish a process that leads to a potentially prejudicial decision, which would then ultimately be subject to judicial review if it adversely affects a company.

The mechanism itself would require, clearly, investigators. It would require lawyers who provide legal advice to the commission. It would require the set-up of a whole new procedural framework that is not currently in existence within DFAIT and is not foreseen in the DFAIT Act.

So the minister would have to be given extensive new powers that he currently does not have. In our view, the legislation as drafted would not necessarily provide a sufficiently clear framework for that to happen.

Thank you.

The Chair: Mr. Rae.

Hon. Bob Rae (Toronto Centre, Lib.): Thank you very much.

Thank you for this presentation.

Following on the comments of Ms. Nölke, the counsellor is housed in the international trade department. Is that where she is? Where is she operating out of?

Mr. Grant Manuge: The counsellor will be housed in an office, which we are identifying currently, in Toronto. We are seeking space within a government office building in Toronto.

This was a decision that was taken on the basis of proximity to key stakeholders, civil society organizations, and head offices of the extractive industry.

Hon. Bob Rae: But I'm just saying that it wasn't beyond the imagination of government to devise a.... I mean, you have to think through a mechanism. There's no legislation providing for the counsellor, and you're simply providing a mechanism.

I agree with Ms. Nölke's conclusion that a process would have to be created.

I think, Mr. Manuge, you referred to this in your comments, that there has to be some kind of a process created that would allow the minister to make a determination as to whether or not guidelines have been followed.

Persuade me, I guess, that somehow this is outside the jurisdiction of the minister's authority. If the minister is granted this authority by the bill, the minister is required to make a determination. The minister then has to create a process that allows that determination to be made and the process has to be seen to be fair. That's completely understood.

It will also require staff to advise the minister. Obviously the minister isn't going to make up the decision on the basis of what he or she reads in the newspaper.

My question is what's wrong with that? Why would you think that wouldn't be anticipated by virtue of the proposal?

Of course it's anticipated that this is work that will have to be done. Whether it's additional or not is up to the minister to decide how resources are allocated. But I don't think it's incompatible with the mandate of the minister.

● (0920)

The Chair: I think we're probably going to have to ask for a written submission, or maybe you can work it into a couple of other questions. We're a minute and a little over already on that round.

Hon. Bob Rae: I apologize.

The Chair: That's all right.

Madame Lalonde.

[*Translation*]

Ms. Francine Lalonde (La Pointe-de-l'Île, BQ): Could you tell us what you currently do when you are informed that a given company is committing acts that are considered deplorable in terms of human rights and the environment?

Mr. Grant Manuge: We take it very seriously. We examine every complaint that is brought to our attention, whether directly or through a report in the media. Clearly, there are repercussions on our relationship with the country in which the company in question is carrying out its activities.

With your permission, I will continue in English.

[*English*]

What we normally do is that officials—both at headquarters and in our office abroad, where the company activities may be located, as well as our regional offices, should that be appropriate—will consult with the key parties who would be able to provide us with additional information. Obviously we have to undertake a process of due diligence to better understand why the complaint has been brought forward. We seek to draw information from as many of the parties involved as possible, including the company, civil society organizations, local government, indigenous communities should they be affected—all the possible parties who could help us understand whether there is a foundation to the complaint.

In terms of what we seek to do in those situations, we're very conscious of the diplomatic and legal restrictions with which our presence is governed abroad. We have to assess the implications that the diplomatic and legal restrictions could have on our ability to act. That being said, our approach is to offer our good offices, to open a dialogue among interested parties with a view to seeking a constructive and results-oriented remedy should there be a well-founded concern about misbehaviour or improper behaviour on the part of the company.

Should the issue that has been brought forward prove to be vexatious or in bad faith, then obviously it is important to clarify that at a very early date because of the potentially very negative impact that could have on the reputation of not only Canada but also the company in question.

The Chair: Thank you, Mr. Manuge.

Madame Lalonde.

[*Translation*]

Ms. Francine Lalonde: In the absence of any other framework, you already make sure that you identify the wrongdoing to the extent that you can and you consult a number of people about it. You already have a mechanism that allows you to establish responsibility.

What else would you have to add in order for you to be able to comply with Bill C-300?

[*English*]

Mr. Grant Manuge: Thank you.

To clarify my answer, we do not have the authority to undertake formal investigations abroad. We do not have the authority to establish who is at fault in situations like this. When I mentioned that we lend our offices to open dialogue with a view to seeking results-oriented, constructive solutions, that's exactly what we do. We seek to help the various players reach a consensus on a way forward.

Our intention in that regard is obviously to assist all of the players to reach an outcome that will help provide positive results.

● (0925)

[*Translation*]

Ms. Johanne Deschamps (Laurentides—Labelle, BQ): Continuing along the same lines as Ms. Lalonde, I would like to know how the new CSR Counsellor's work is going to blend in with what you are already doing.

[*English*]

Mr. Grant Manuge: Thank you.

The mandate of the CSR counsellor for extractive industries as set out in the order in council is, we believe, complementary to the work currently being done by the Department of Foreign Affairs and International Trade both here and abroad.

Her mandate is twofold. On the one hand, it's to review any issues that are brought to her attention regarding the behaviour of Canadian companies abroad, to look at those very carefully and to review them through a process that she is currently setting up, to engage in an informal examination of the issue, to undertake fact-finding, informal mediation, and to provide access to formal mediation, should that be appropriate. In addition, she will be reporting publicly on that at the appropriate stage in the review process.

The mandate that she will be implementing we believe will be an essential part of the overall strategy that was announced in March. It builds on the additional work that has been undertaken by the national contact point for OECD multinational enterprises, which, as I mentioned in the opening statement, is an interdepartmental committee chaired by this department. The order in council that sets out the CSR counsellor's mandate specifically addresses how the two mechanisms should work together.

[*Translation*]

Ms. Johanne Deschamps: Is the counsellor going to be able to conduct investigations overseas?

[*English*]

Mr. Grant Manuge: She will be able to undertake fact-finding abroad, yes, but to undertake formal investigations, my understanding is that she cannot.

The Chair: Thank you, Mr. Manuge.

We'll go to Mr. Abbott.

Hon. Jim Abbott (Kootenay—Columbia, CPC): Thank you.

I want to be careful that I'm not putting words in your mouth. I believe, in answer to a question of Mr. Patry, your response was that in your judgment it would require a new section or arm or department, which would require additional human resources or financial resources. Is that correct?

Mr. Grant Manuge: Yes, that is correct.

Hon. Jim Abbott: Presuming that there is a finite amount of money in DFAIT's budget, which there is, where would you take those dollars from? What department or current function that DFAIT is doing would have to suffer? Or in fact would it be possible to do it without having to come to the Treasury Board for additional funds?

Mr. Grant Manuge: Thank you for your question.

In this case, at this stage in our analysis, we are indeed aware that additional resources would be required, not only human resources, financial resources, but also significant investment in training or in recruiting highly qualified individuals who provide the competencies that would be required to carry out that function.

At this point in our analysis, we would not be in a position to indicate whether that could be addressed through reallocations within our department, but our departmental resources are completely allocated, so this would be a decision that would have to be reviewed very carefully. As you say, there could potentially be impacts on the ability to carry out our mandate in other areas of the department.

Hon. Jim Abbott: I respect the fact that you, as a civil servant, have to be precise and cautious. But I wonder if you could give this committee a ballpark guess as to the dollars and cents that would be required to establish this in the first place and to have it continue to function on an ongoing basis.

● (0930)

Mr. Grant Manuge: I think I would have to limit myself to saying that it would be a significant amount of resources we would be looking at, as we said in the previous statement.

Hon. Jim Abbott: I think it's interesting; your department is taken very seriously by all Canadians, and certainly by this committee, and I'd just like to read, again, the closing statement of your presentation:

> Insofar as the analysis undertaken of the potential impact of Bill C-300 on DFAIT, it could restrict our ability, in areas where we most need to engage, to influence a positive outcome and ultimately limit the ability of this department to make positive contributions in the area of corporate social responsibility.

In other words, in spite of all its good intentions—everyone in this room, including me, support the intentions of the bill—the fact of the matter is that you have given us a shopping list of items where you would have tremendous difficulty in continuing to do the good CSR work that DFAIT is undertaking. I did want to underline that, because I take your testimony as being expert testimony.

I give the floor to Mr. Goldring.

The Chair: Go ahead, Mr. Goldring, please.

Mr. Peter Goldring (Edmonton East, CPC): Thank you very much.

Thank you for appearing here today.

My question is along the same line, although it doesn't necessarily deal with the costing of it. I'm sensing from your comments here that it's in agreement with what we've been hearing from industry, what we've been hearing from EDC, and, quite frankly, what we heard from an earlier witness. The earlier witness from Argentina gave the implication that they were looking towards this bill to in effect codify, institute, responsibility to Canadian...Canadian concerns, to pick up the slack where Argentina's laws may not be complete, or to institute Canadian laws that are more complete. Quite frankly, what we then have is a scenario of interfering with another country's national aspirations and sovereignty, in effect, which would lead to the complications that poses.

I'm sensing from what you're saying in this dissertation that you also see that. That is one of the major reasons you can't quite quantify what this legal responsibility might be, ultimately. Is this one of the concerns?

You can extrapolate this to other parts of the world where mining interests might be. If we try to have our mining concerns involved in and adhering to the various laws and legal systems of the various countries around the world, you'd have to have an amazing amount of knowledge and capability in your legal department. We even go into some parts of the world where there are things like Sharia law. Should the mining concerns be adherent to Sharia law because that is the local custom in the local area of consideration?

Are these large complications? Can we kind of quantify this and say more coherently to what level this would take the legal requirements of the department?

Mr. Grant Manuge: We have with us today the director general for Latin America and the Caribbean. With respect to our relationships with countries in the hemisphere, perhaps I could invite him to comment on the implications the bill would have for our foreign policy relationships.

Mr. Peter Goldring: We have to know clearly on here, because we're not talking in just small terms. I sense that we're talking about quite substantial concerns with respect to where our legal department requirements would be heading.

Also, there is the countering aspect to it of the companies themselves. Will they leave the industry from Canada to escape these huge requirements?

The Chair: Thank you, Mr. Goldring.

Be very quick, Mr. Lambert.

Mr. James Lambert (Director General, Latin America and Caribbean, Department of Foreign Affairs and International Trade): Thank you very much.

I'm very happy to have the opportunity to respond to the question.

I currently oversee 26 Canadian embassies and high commissions in the Americas. Our economic footprint in the region is a lot about investment and exploitive industries as well, where the CSR issues are front and centre. The ability of the people in our missions to engage constructively has been set out by my colleagues.

I'd like to mention one concern that can be identified about this. It's in the latter part of the draft, which deals with the Special Economic Measures Act. It seems to me there's a very unclear linkage between the discourse on corporate social responsibility and the larger intent that's written in here, to change the act to in fact address entire regime offences against human rights violations.

First of all, procedurally there's a lack of clarity about how the issues involving a Canadian corporation on the ground in a given country would then be extended to deal with the broader issues about human rights abuse, past and present, as it's currently written in this draft.

Secondly, there's a question here about whether this is an appropriate mechanism indeed to get into the classification of regimes in this region or other parts of the world.

It does seem to open up a great window. When we talked about the number of resources that would be required, I think Mr. Manuge was addressing himself largely to carrying out the corporate social responsibility elements of this. If we extend this to take into account assessment of human rights regimes in the Americas or around the world, it becomes an enormous task.

● (0935)

The Chair: Thank you very much.

Mr. Marston.

Mr. Wayne Marston (Hamilton East—Stoney Creek, NDP): Thank you, Mr. Chair.

This is one of those topics that I'm sure many of us around the table have high emotion around—the value that Canadians put on human rights.

In thinking in terms of Mr. Ruggie, where he talked about having a duty to respect human rights, it seems that a bill like this comes forward when people start to make the assumption that perhaps Canadian corporations have been too flexible in some of the countries they've gone into. However, there's another side to this. If we are policing Canadian companies, to an extent we're also protecting them from the frivolous kinds of accusations that could be made.

I do agree with Mr. Rae—that happens on occasion—when he talks about ministerial responsibility and how, once a bill is passed, the regulations come into place, and it's up to the minister to get to that point.

I've had a number of people come through my office from the Philippines and other countries talking about Canadian corporations. The way I express it best is with what King Henry said about Thomas Becket: Will no one rid me of this troublesome monk? All of a sudden you get trade unionists being murdered.

I'm not suggesting Canadian companies are doing that with any deliberation, but even a casual conversation in some countries can lead to such things. I think that's the impetus behind a bill like this coming forward.

I understand from previous testimony—I just want to check the name of the group, because I'm not a regular on this committee—that the Rights and Democracy group talked about the human rights impact assessment tools that are available.

If we're talking tools and we're talking cost, as you were a few minutes ago, you have no suggested value, not even remotely close, that could be put on what it would cost?

Ms. Sabine Nölke: I'm with the legal bureau at foreign affairs. We did a fairly informal assessment of the possible cost. The only comparable mechanism that we could see was the Human Rights Commission. Of course, at this point, it would be truly guesswork, because you don't know how many complaints would come forward.

The way the bill is drafted is that literally billions of people could theoretically file a complaint, because any Canadian, or any person in a country where a Canadian company operates, could bring a complaint. The possibility for receiving complaints is virtually endless. At this point, even a frivolous complaint would have to be investigated in order to determine whether it's founded.

So it's very difficult to put a dollar figure on it, but it also needs to be taken into consideration that any investigation would have to necessarily take place abroad. In simply setting up a mechanism that requires Canadian officials to set up shop abroad for any period of time, the resource implications are quite considerable, even allowing for the difficulty necessarily in getting the permission of the host state so that they can enter to carry out such an investigation.

We don't have an exact figure because of all the uncertainties, but it would clearly be in the millions.

● (0940)

Mr. Wayne Marston: Mr. Goldring raised a point about the administration of local law. When you're a guest in any country, you're subject to the laws of that country in the first place. You're not going to suddenly have Sharia law pop up. If it's already part of the country, you have to abide by the laws of the host country when you're there. I think there's a bit of red herring in the middle of that one.

Again, a bill like this wouldn't have surfaced or started in the process unless there were some major concerns out there with the... of some Canadian companies. We know that a majority of our companies are very upstanding, and they do their work very well.

What process do you have in place to protect Canadian companies from one of these frivolous accusations?

The Chair: Mr. Manuge.

Mr. Grant Manuge: I would like to clarify a response made earlier to Mr. Rae with regard to where the CSR counsellor is housed. Perhaps I responded to that too literally. Her staff will be staff of the Department of Foreign Affairs and International Trade. We will be developing a protocol with her as an order in council appointment to govern the relationship between the department and her office. I apologize if I was less than clear when I responded in the first instance.

I believe my colleague Ms. Nölke would wish to respond to this question.

The Chair: Ms. Nölke.

Ms. Sabine Nölke: If there are any difficulties for individuals in a company, the immediate protective mechanism would of be through consular relations. There are also mechanisms available in international law to protect companies that have been adversely affected or targeted by the host country in matters that are inconsistent with international law. A company could file a claim against the state in question. They would first have to go through the necessary court proceedings in that state.

If these are ineffective or unavailable, the company could then turn to the Canadian government, with a view to having its claim against the host state espoused. If the claim meets the criteria that exist in international law for the espousal of a state, then Canada could take that claim as its own, raise it to the diplomatic level, and take it as far as the International Court of Justice.

This doesn't happen often, but those are the mechanisms that are available. In a lot of cases, an expropriation matter, for example, would get settled through diplomatic channels. It might include reparations or other forms of dispute settlement.

Mr. Wayne Marston: This bill has sanctioning mechanisms built into it. They would revoke taxpayer support for a company that's irresponsible, and that would free more resources for the responsible ones. Would you not see this as encouraging Canadian companies to be as responsible as they should be?

Mr. Grant Manuge: The type of work we do abroad in support of embassies and missions is related to key services that we deliver to Canadian companies. In addition, there is a whole range of generic support that we provide in relationship-building. We also advocate on behalf of Canadian interests, writ generally or linked to a particular industry or sector.

In respect of these activities, because they're not linked specifically to a Canadian company, we're unsure whether they would be affected by the provisions of this bill. This is one of the issues that we have highlighted in our written submission. The resources that we have available for our work abroad are focused primarily on advocacy and promotion. If we're pushed in the direction of implementing a more quasi-judicial role, our concern is that our staff abroad currently do not have the skills and competencies to undertake that type of role. Hence, the ability to train or recruit such people will be tremendously important in any reallocation of resources.

● (0945)

The Chair: Thank you very much. We've gone about a minute over there.

That pretty well sums it up.

I don't know whether this is the time to read this or not, but just to put it on the record, Marleau and Montpetit deals with private members' bills. It says:

> There is a constitutional requirement that bills proposing the expenditure of public funds must be accompanied by a royal recommendation, which can be obtained only by the government and introduced by a Minister. Since a Minister cannot propose items of Private Members' Business, a private Member's bill should therefore not contain provisions for the spending of funds.

Today I think we've been fairly clear. This is going to take an extra, as I think one witness said, millions; another said it would be the same as another human rights commission.

There is another way: if the recommendation comes, the Speaker... but I don't know whether that would make this a confidence measure. I imagine it would.

Anyway, thank you for your testimony here today. We appreciate hearing from our department.

We will suspend and invite our next guests to take their places.

While the department is still here, there was a question that Mr. Rae asked earlier dealing with process. Perhaps you would take a look at the blues and examine the question dealing with the set-up of the process. If you would make a written answer to that, we would surely appreciate it.

● _____ (Pause) _____

●

● (0950)

The Chair: Welcome back. We'll call the meeting to order again.

In the second hour, we're continuing in our study of Bill C-300. We're very pleased to have, from Alternatives Canada, Catherine Duhamel, an international human rights lawyer.

Ms. Duhamel, I welcome you to our committee this morning and invite you to make your initial presentation. We hope that you will have the time as well to take some questions from our committee.

Welcome.

[*Translation*]

Mrs. Catherine Duhamel (Lawyer, International Human Rights Law, Alternatives Canada): Thank you, Mr. Chair.

Members of the committee, I am a lawyer. I have more than 16 years' experience in international cooperation, in institution building and in democratic development in Latin America and Africa. I have spent time in countries that have allowed Canadian mining projects and I have investigated a number of cases of human rights violations with the UN and the OAS. I have worked with the War Crimes Unit in Canada. I am currently working with the Clinique internationale de défense des droits humains at UQAM. Thank you for inviting me here today.

My presentation will focus on three points: first, the status quo is not a viable solution; second, Bill C-300 is an option that would strengthen corporate social responsibility; third, Canada needs a bill on civil responsibility for human rights violations committed overseas by our companies.

[*English*]

> You cannot have a functioning global economy with a dysfunctional global legal system: there has to be somewhere, somehow, that people who feel that their rights have been trampled on can attempt redress...and if the complaints turn out to be unfounded, so be it....people with bona fide claims of abuse have no recourse or remedy, while companies who are falsely vilified for alleged complicity in human rights abuses can not effectively clear their names....it points to the need to have some forum in which this kind of complaint can be ventilated and resolved, and not [be] simply left as a dissatisfied local population squared off against a foreign company with no means of introducing a legal structure to look after the fall-out.

[*Translation*]

The status quo, meaning the lack of a forum at which parties can be heard, is not a viable solution. This is what Supreme Court Justice Binnie has just told us. It is not viable economically, socially, politically or legally, and this applies to all stakeholders.

Bill C-300 provides for an accessible, predictable and legitimate forum where the two parties can be heard. It is a domestic administrative process that has repercussions beyond our borders, but it is not Canada exercising extraterritorial jurisdiction. Bill C-300 means that decisions made by agents of Canada must comply with Canadian legislation and with Canada's international obligations. The decisions are made on Canadian soil; this therefore gives the federal government the authority to exercise its jurisdiction.

Canada's extraterritorial jurisdiction is exercised directly on a person or firm that has committed acts overseas when a connection with Canada exists. Under certain circumstances, Canada already exercises its extraterritorial jurisdiction on Canadian companies operating overseas. This includes criminal matters, under the Crimes Against Humanity and War Crimes Act. Canada already conducts investigations in the field under that act and under others.

Canada is not the only country to monitor the activities of its mining companies. In fact, some states go much further. They monitor the activities of foreign mining companies. This is the case for Norway, the United States and France, to name but a few.

If we compare what this bill is proposing with what Norway has put in place since 2004, the Norwegian finance minister authorizes extraterritorial investigations into the activities of foreign mining companies. The minister's Council on Ethics uses public sources of information and conducts investigations in the field.

In Canada, neither the 2009 strategy nor the C-300 process allows us to go and conduct investigations overseas at the moment. It remains to be seen what the protocol and the budget will allow, once approved. Even with a budget, an investigation conducted by the CSR counsellor will have the same challenges and constraints as those foreseen by Bill C-300, such as the availability of Canadian resources for investigations, the permission to investigate in host countries, and so on. However, none of that seems to pose any problems for Norway.

As to the way in which complaints are dealt with, the rules of procedural fairness and natural justice apply to all administrative bodies established by a Canadian act. It is assumed that Bill C-300 complies with the Constitution and with the principle of procedural fairness. A recommendation from the counsellor that a company must comply with environmental and human rights standards would have the same force as a decision by the minister under bill C-300, because agents of the state, as representatives of Her Majesty, remain bound by Canadian law. So their decisions must comply.

An agent of the state could not continue to support and encourage a company that has to comply voluntarily. If the company is accused of complicity in torture, rape or war crimes committed in the host country, for example, the agent could also be accused of complicity and tried in Canada.

While we are discussing whether we should make voluntary standards mandatory for government agencies, the United States is discussing *The Conflict Minerals Trade Act* , a private bill that not only seeks to identify mining companies operating in conflict zones in the DRC, but also seeks to make a map available to the public, and to require communications technology companies, among others, who import those minerals to certify that the minerals used in their consumer products do not come from conflict zones.

So it must be said that, not only is Bill C-300 a tiny step for Canada internationally, but that the mechanism is also far from achieving the compliance that the United Nations recommends for Canada and for mining companies. In fact, the United Nations Committee on the Elimination of Racial Discrimination has already recommended that Canada act to prevent natural resources companies in its jurisdiction from violating the human rights of aboriginal peoples overseas and to make them accountable for their actions.

● (0955)

Bill C-300 does not prevent Canadian companies from violating the standards outside Canada, it does not deal with the responsibility of those that do, and it provides no recourse or compensation for the victims. Should a Canadian act provide for all that? Yes; there is such an act in the United States. It allows complainants to obtain compensation, if need be, and it allows companies to re-establish their reputation. This is exactly what happened with Talisman Energy.

As the American act, the *Alien Tort Claims Act*, has no equivalent in Canada, provincial programs of civil responsibility apply, or tort law. There is a major legal obstacle: the judge has the discretion to determine whether the most appropriate court to hear the case is here in Canada or in the host state. So the judge can send the case to another country. This is the doctrine of *forum non conveniens*.

Sending cases back to the host country sometimes results in a denial of justice and a lack of compensation for the victims. This is exactly what happened in the Cambior case. That 1995 case dealt with 2.3 billion litres of liquid containing cyanide, heavy metals and other pollutants that had been spilled into two rivers in Guyana, one of which was the main source of water for the people who lived there. In 1998, a Canadian judge sent the case back to Guyanese courts and they dismissed all subsequent suits, leaving the victims with no recourse and no damages.

The Copper Mesa Mining case, which is currently before Canadian courts, is trying to get round this legal obstacle by contending that decisions made under Canadian jurisdiction, at the head office of a Canadian mining company, gave rise to human rights violations in Ecuador.

Some states are also trying to get around the doctrine. At the end of the 1990s, some countries in Central America passed what are called *blocking statutes* designed to discourage judges from sending cases back to their countries. In Europe, *forum non conveniens* is now limited in its application. National courts in member countries of the European Union cannot use the doctrine to dismiss complaints against companies headquartered in those countries.

We are now seeing Canadian companies being sued in the United States and Australia, sanctioned by the World Bank, Norway and France, and investigated in England. Perhaps, with the bill in the United States, we may soon see them overseen by various UN committees, or subject to UN investigations or restrictions or prohibitions in host countries. Canadian mining companies will become more and more watched over, controlled and judged by third party states or international organizations, thereby filling the legal and administrative void in Canada.

In conclusion, at this time when everything is equitable, or eco-, or bio-, when buildings are green, when consumption is ethical, when responsibility is social and when development is sustainable and certified, industries like textiles and agri-food have, both in the North and in the South, set a new course towards greater transparency and greater compliance with human rights. And it has brought them handsome profits.

Are we in Canada going to set that course too and start the journey? Are we going to continue to have others make us do so?

● (1000)

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

Mr. Rae, you have five minutes.

Hon. Bob Rae: Ms. Duhamel, were you here when the people from the department made their presentation? Would you like to comment on that presentation?

Mrs. Catherine Duhamel: I have worked in the field. As I told you, I worked in an embassy myself and I have dealt with many embassies in a number of countries. Yes, I can confirm that information is gathered through embassies.

They are already conducting investigations, basically because it is the job of the political section and the trade section to keep abreast of what Canadian citizens and companies are doing so they can interact with the government and develop markets for Canada in those countries. So these investigations are done in the field. CIDA is also involved in the process, in that its projects are also part of an environment in which Canadian officials gather information.

I would like to bring up one very important point. If a Canadian official overseas breaks a local law, he is liable to be charged, not only in the country, but also in Canada. It is an offence under the Criminal Code. So, in the event of support, advice and encouragement to companies in the field, whether before or after the fact, a federal employee may be accountable.

● (1005)

Hon. Bob Rae: As Mr. Abbott said to the other witnesses, I do not want to put words in your mouth. I gather from your presentation that you are essentially emphasizing that this idea of corporate social responsibility is everywhere: in international law, in Norwegian law, in French and English law. There is a whole international movement and Canada cannot stand in its way. Bill C-300 gives Canada the ability to be part of this international movement.

Is that what you are saying? Is that the crux of it?

Mrs. Catherine Duhamel: Exactly.

It is important to understand that other states are defining it for Canada because of our prevailing situation. A fundamental principle of international law is that we are all equal under the law. This principle is enshrined in the universal declaration, and elsewhere. It is in our Constitution, in the Canadian Charter of Rights and Freedoms.

When a company owes money to a bank and does not pay, there are consequences, and the bank will no longer continue to invest in the company or lend it money. For mining companies, that law does not exist. It is all very well for us to ask them all to be equal under the law, but sometimes, in Canada, that law does not exist and, overseas, it is not applied.

Hon. Bob Rae: Did you hear the government's thinking on the legal process that they would have to set up in order to implement Bill C-300? Do you agree that they would have to find an internal system in the department which would provide people with the means to seek justice? Do you agree with that statement?

Mrs. Catherine Duhamel: You have to understand the point that our colleagues from Foreign Affairs raised. The counsellor will also need the investigators, lawyers, and other resources that Mr. Manuge mentioned. The counsellor will also be faced with the same challenges and constraints that were mentioned just now.

Hon. Bob Rae: So the challenge will be the same. Anyone can complain to the counsellor, right?

Mrs. Catherine Duhamel: I am not sure I understood your question.

Hon. Bob Rae: They said...

[*English*]

The Chair: Very quickly, Mr. Rae.

[*Translation*]

Hon. Bob Rae: They said that the complaints could come from anywhere under Bill C-300. That also applies to complaints to the counsellor.

Mrs. Catherine Duhamel: Exactly. The problem with the counsellor is that she can just set them aside without having to justify doing so.

Hon. Bob Rae: Right.

[*English*]

The Chair: Thank you.

Madame Deschamps.

[*Translation*]

Ms. Johanne Deschamps: Good morning, Ms. Duhamel.

Bill C-300 has been debated by people who have come to testify before us as individuals, particularly members of civil society and several NGOs. Even people from mining companies took part in the round tables. There has been a wide consensus. According to the reports from the round tables, and also according to you, Bill C-300 is just a small step.

The government is afraid that, because of the bill, industries will stop spending and that we will be swept away in an avalanche of baseless complaints. From your experience and your work in the field, can you tell me if the small step that Bill C-300 takes will have the tragic consequences that we are led to believe will occur?

● (1010)

Mrs. Catherine Duhamel: I would like to answer that question with this one: where are the companies going to go? To the United States or Australia, where they can be sued? To China? To England? The expertise and the financial wherewithal are here, in Canada. The mining capital of the world is Toronto. The exploration capital of the world is Vancouver. That is not going to change overnight. It took a number of years to build and is going to remain.

Ms. Johanne Deschamps: Since most companies have nothing to be ashamed of, they have no reason to leave.

Mrs. Catherine Duhamel: Correct, and that brings up another question.

The compliance required by the government under its 2009 strategy is the same as the compliance required in Bill C-300. The compliance will be no greater under Bill C-300 than it is at the moment. The compliance is the same in both cases. The only difference is that it is mandatory. Voluntary standards have been made into mandatory standards.

[*English*]

The Chair: Very quickly, Madame Lalonde.

[*Translation*]

Ms. Francine Lalonde: Last week, companies represented by eminent lawyers came to make their case. Those representatives said a number of times that, under Bill C-300, given that the complaint process goes through the department, companies would not be adequately judged and had no other way to be heard.

What do you think about that?

Mrs. Catherine Duhamel: Professor John Ruggie, the United Nations' special representative, has issued criteria to determine whether a mechanism is credible and effective. It must be accessible, predictable, equitable and legitimate.

The government's mechanism is not entirely accessible. Nor is it predictable. There is no certainty that there has been an investigation. Recommendations, if there are any, cannot be applied. In addition, since one of the two parties can never be heard, can it really be said to be equitable? The result is anything but predictable. So is it legitimate? Because of all this, there are serious doubts about the credibility and the effectiveness of the process.

[*English*]

The Chair: Thank you very much.

Mr. Lunney.

Mr. James Lunney: Thanks, Mr. Chair.

Ms. Duhamel, the committee has heard from many witnesses on this, as you know, and it's been raised numerous times, the concern about frivolous and vexatious complaints that may be made by anyone, any citizen of the country where the extraction process may be taking place, or even by someone who's not from that country, a third party, even by a mining company with competing interests.

I thought I heard you say in your opening remarks that if complaints turn out to be frivolous, so be it. There are members of this committee that actually are concerned about that. I just wonder if that's what you actually intended to say or if you would care to qualify what you mean by that, because it sounds like you're being very dismissive about frivolous complaints.

● (1015)

Mrs. Catherine Duhamel: First of all, I would like to specify that I was using a quote from Supreme Court of Canada Judge Ian Binnie's conference . Actually, he's requesting a law as well in Canada to hold the Canadian companies operating abroad responsible for that.

It remains to be proven that they are frivolous. It remains to be proven that the allegations are unfounded.

Mr. James Lunney: So even if allegations go out there, as you say, the department has clearly testified that sometimes it's a lengthy procedure to establish guilt or responsibility in a case like this, especially—as the department said just recently—the link between actions of a Canadian extractive company in grave breaches of human rights, which might be committed by the state itself, is unclear.

You think the fact that a company's stock could be decimated, the value of the company and their shares...their stockholders...is just a price of doing business, when a complaint may turn out to be actually frivolous or unfounded?

Mrs. Catherine Duhamel: I'm not sure if you're implying that frivolous complaints can destroy a company.

Mr. James Lunney: Yes—or severely damage.

Mrs. Catherine Duhamel: I don't know if you've been following what's going on in the States with the lawsuits.

Mr. James Lunney: Please clarify what you're talking about.

Mrs. Catherine Duhamel: The lawsuits in the States have enabled the companies to clear their reputation.

Mr. James Lunney: Many times the damage is already done. A company like—

Mrs. Catherine Duhamel: They have survived.

Mr. James Lunney: Your expertise, as I understand it, is human rights law. Is that correct?

Mrs. Catherine Duhamel: International law and international human rights law, yes.

Mr. James Lunney: Just recently we had another firm before committee that made this submission. They said:

> The bill abandons the collaborative multi-stakeholder approach to CSR accepted worldwide as the most effective way to enhance CSR in favour of a punitive approach. We believe such an approach will not only fail to enhance global CSR standards but will stunt the achievements of Canadian mining companies in the area of CSR.

You heard the DFAIT officials themselves a few minutes ago talk about the necessity of establishing processes, that procedural fairness, due process, and natural justice have to be applied here. That is not something that can be established instantly, and you seem to be quite dismissive about the legal challenges that presents in having the department be able to do this quasi-judicial approach.

Mrs. Catherine Duhamel: No, no. I would clarify what I just said in my presentation:

[*Translation*]

"As to the way in which complaints are dealt with, the rules of procedural fairness and natural justice apply to all administrative bodies established by a Canadian act. It is assumed that Bill C-300 complies with the Constitution and with the principles of procedural fairness."

[*English*]

The Chair: You have about 20 seconds, Mr. Lunney.

Mr. James Lunney: Oh. I was going to....

On the role of the CSR counsellor, once she has done a process, which is public and the results of which are made known, if a company were not to cooperate with that—because one of the criticisms is that there's no teeth because they can't force them—do you not feel that public censure for not participating would be a serious problem for the company?

The Chair: Make it a very brief answer, please.

Mrs. Catherine Duhamel: I would answer that unresolved allegations have amounted to violence and degradation of the situation in the field for all parties. Canadians have been the subject of *pillages incendies*. The stakeholders are all affected by this.

What I'm saying is that we need a forum for people to be heard, and not leave these claims unresolved.

The Chair: Thank you, Madam Duhamel.

Mr. Marston.

Mr. Wayne Marston: Thank you, Mr. Chair.

I believe I heard at the start of your testimony that you had experience within DFAIT?

Mrs. Catherine Duhamel: Yes.

Mr. Wayne Marston: Okay.

We heard, and it has been alluded to here, that this bill would generate a cost, and as a result it may need royal assent before having the potential to go forward, or it might even be a matter of confidence before the House.

Listening to what you've just said, and you talked about the existing procedures, it sounds like changing over is more a matter of holding accountability than it is some exorbitant new cost. How would you address the difference between what we have today and where this takes us, and how would you see the cost within DFAIT?

● (1020)

Mrs. Catherine Duhamel: I am not in a position to answer that. Although I was a consultant for DFAIT, I don't know the machine inside.

Mr. Wayne Marston: Okay. Then I'll take you to another area.

In my experience in dealing with Canadians, in my riding and across the country over the years, there's an innate sense of what is just here, and a belief that Canada is a nation that believes in human rights and stands up for human rights.

Earlier, in the previous testimony, I talked about the fact that I've had people from the Philippines and other communities come through my office talking about situations that have occurred in those countries.

I'm not asking you to name a Canadian company in what I'm about to ask you, just to be very clear. Are you aware of any Canadian companies through this "self-management" system, as I call it, that they're under when they're in foreign lands, where they, either directly or indirectly, or by neglect, were complicit in the violation of human rights?

Mrs. Catherine Duhamel: I will answer that 320 human rights abuses involving corporations were treated by John Ruggie's team from 2005 to 2007. Within these there were, of course, mining, or extractive sector, human rights allegations treated. John Ruggie has detailed all the impacts on which category of human rights, and published in a report...in 2008, if I recall.

So there are allegations of human rights violations out there, definitely. To only name that and not—

Mr. Wayne Marston: That gives us a point of reference, though.

The difficult situations that I have heard of seem to come quite often come from indigenous people who are displaced. I've heard over the years of stories of trade unionists who were actually murdered. Again, I want to stress that I don't have any information that a Canadian company was behind it. What was said is that the Canadian company had not gone out of its way to make it very clear that it was troubled by this, and also that casual conversations at times can lead to very tragic results.

In your experience, have you see situations that are similar to that?

Mrs. Catherine Duhamel: John Ruggie's framework, "Protect, Respect and Remedy", is very clear on the duty of the companies. In a few words, they have the duty to respect human rights, whether the state itself does not, and, as John Ruggie put it, to do no harm.

Mr. Wayne Marston: Any company, Canadian or otherwise, on the ground in another country has the best ability to prevent human rights violations within the context of its work, as opposed to a government someplace. To some degree it will always be a self-managing kind of system, but if there's accountability, where they know at the end of the day they have responsibilities that are not only acknowledged by the company but by their government at home, and they're accountable to them, that would be of great value, I would think.

The Chair: Very quickly, Ms. Duhamel.

Mrs. Catherine Duhamel: Definitely, I think, where a state's obligations cannot be complied—meaning that it is very clear that companies operating abroad come under host state obligations first—some host states...and the government, as Canada has recognized in the 2009 strategy, do not necessarily have the judicial capacity or the governance

● (1025)

[*Translation*]

to monitor the activities of mining companies in the field.

[*English*]

This is an impasse for all stakeholders. Do we sit there and not do anything and see these situations become violent and degrade and become a bigger problem for all the stakeholders—Canada, the host states, the victims, and the company—that are suffering from this?

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

Thank you for the questions and the answers; much appreciated.

I would invite the steering committee to stay for some in camera work.

The meeting is adjourned.

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