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Chair

Mr. Dean Allison

Standing Committee on Foreign Affairs and International Development

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● (1100)

[*English*]

The Chair (Mr. Dean Allison (Niagara West—Glanbrook, CPC)): Good morning everyone.

Pursuant to the order of reference of Tuesday, June 4, 2013, we are considering Bill S-14, an act to amend the Corruption of Foreign Public Officials Act.

I want to thank our witnesses because they have now been back twice—they were supposed to testify before us on Tuesday.

Thank you very much. We do understand that you have busy schedules and so we appreciate your changing your schedules to be here.

It looks like we will once again have the bells within 20 minutes. Voting would be at about 10 minutes to 12:00, which means that we would not be back here until 12:05. I thought it would be helpful to get the testimony in now and then go a little bit longer, if it's okay with the witnesses.

We also will understand if you have other things that you need to do. At least we'll get the testimony in. We will come back and finish off with 30 minutes of questions and answers. If we can get you to stick around, that would be great.

I want to introduce each of our witnesses here today.

From the Canadian Bar Association, we have Noah Arshinoff, staff lawyer for law reform, and Michael Osborne, member of the CBA anti-corruption team. Welcome Michael. Thank you for being here.

From the North-South Institute, we have Joseph Ingram, president. Joseph, it's good to see you here today, sir.

Joining us from Calgary, Alberta, from Transparency International Canada, is Janet Keeping, chair and president. Thank you, Janet, for working us into your schedule. I think the last time we talked you were in Edmonton.

Ms. Janet Keeping (Chair and President, Transparency International Canada): Yes, that's correct.

The Chair: You're moving around. If we have to go another day, we don't know where we're going to catch you. We're glad that you can join us via video conference.

I want to start with the Canadian Bar Association. We'll get your remarks, then we'll move over to Mr. Ingram, and then finish off with Ms. Keeping, in Calgary.

Mr. Arshinoff, you have seven to ten minutes for your opening statement.

Mr. Noah Arshinoff (Staff Lawyer, Law Reform, Canadian Bar Association): Thank you, Mr. Chair, and honourable members.

We're pleased to appear before you today on behalf of the Canadian Bar Association.

The CBA is a national association representing over 37,000 members of the legal profession. Our mandate includes improvement of the law and the administration of justice. It's through that optic that we've analysed the bill.

The submission before you has been prepared by the CBA's anti-corruption team, comprising lawyers in private practice and in-house counsel across Canada, who are experts in the field of anti-bribery and anti-corruption.

The CBA's anti-corruption team was put together to respond to all matters relating to anti-corruption laws and to provide a resource for Canadian lawyers to learn about anti-corruption legislation, and their compliance requirements.

My colleague Mr. Osborne is a member of the CBA's anti-corruption team and I'll turn it over to him to speak to our submissions.

Mr. Michael Osborne (Member, CBA Anti-Corruption Team, Canadian Bar Association): Good morning, Mr. Chair, and honourable members.

[*Translation*]

The Anti-Corruption Team of the Canadian Bar Association shares the convictions expressed in Bill S-14. As expressed in the Convention, bribery in international business transactions raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions. That is why the ACT generally supports Bill S-14.

[*English*]

We do, however, have two concerns to bring to your attention today: first, the difficulties associated with repealing the facilitation exception at this time; and second, the difficulties created by increasing the maximum sentence to 14 years.

Turning first to facilitation payments, these are small payments made to officials to get them to do their jobs. They're different from payments made to obtain a business advantage, in the sense of a bribe to get a contract.

The current international consensus seems to be that facilitation payments should be discouraged, but it is not clear that the time is right to require the criminalization of facilitation payments made to foreign officials. Bill S-14 appeared to us to reflect this consensus by providing for the repeal of the facilitation payments exception, but not yet, since this repeal will come into force on a date to be fixed by the Governor in Council.

In the view of the CBA anti-corruption team, or ACT, this is not an optimal way of dealing with facilitation payments. Parliament, not the cabinet, should determine when the time is right, and it should do so after a fuller consultation with Canadians who do business abroad. Some of the important considerations that need to be addressed are as follows.

First is the impact on disaster relief. Charities that deliver humanitarian relief need to be authorized to do what it takes to save lives. One in-house counsel with a major charity told us that feared the day when facilitation payments would be illegal and a vital delivery of food would be held up in some hopelessly corrupt country by a jaded customs official who demanded $50 before releasing the food. The question, he said, would whether they could pay the man $50. If they did not, a thousand people or more would die.

There are other exceptions. Sometimes, for instance, people have no choice but to pay. In some countries, we're told, exit visas are routinely held up until money is paid. In others, the police demand a payment before they will even take a report of a crime. There are reports of cases where officials threaten the health or safety of people in order to extort money. I would think that most people would agree that in those circumstances the payment should not be a crime.

Thirdly, on penalties, as Bill S-14 stands, people who are coerced into making facilitation payments do so in fear of committing an indictable offence punishable by up to 14 years in jail. In other words, this is among the most serious offences on the books in Canada. The question that needs to be asked is whether or not this is an appropriate treatment for small payments of this nature.

For these reasons, the CBA-ACT recommends not proceeding with the repeal of the facilitation payments exception in this bill.

The second general point is the increase in penalties.

● (1105)

[*Translation*]

The maximum penalty under current legislation is five years' imprisonment. The bill proposes that the maximum jail term be increased to 14 years.

[*English*]

Fourteen years will be the new penalty, and this will make the corruption offence one of the most serious offences on the books. By way of comparison, this 14-year maximum is higher than the maximum sentence for domestic corruption, for instance, which is generally five years, although it can be 14 years in some cases; for child pornography, which is 10 years; for abandoning a child, which is five years; for criminal negligence causing death with a firearm, which is four years; or for assault causing bodily harm, which is 10 years.

The increase in penalty from 5 to 14 years has important knock-on effects. Fourteen years is effectively a magic number in Canadian criminal law. Offences that carry a maximum sentence of 14 years are not eligible, first of all, for discharges, either conditional or absolute. Incidentally, this responds to a question from one of your colleagues the last day, when she asked about the availability of discharges.

Conditional sentences—that is, sentences served in the community—will not be available sentencing options for this offence. This severely constrains the range of remedial outcomes that are available to prosecutors, defence counsel, and the courts. It will, to put it bluntly, make it difficult to make the punishment fit the crime.

Suppose, for example, a Canadian business person is at the airport, trying to leave a developing country. The customs officials demand a facilitation payment. He pays in order to be allowed to leave the country and return to Canada. Has this person really committed one of the most serious offences on the books in Canada? Does this person deserve to have a criminal record? If the answer is no, then the penalty needs to be changed so that discharges remain available.

With respect, prosecutorial discretion is not the answer. The law should be as clear as possible so as to provide reliable guidance. I would also add that it is not the custom in Canada for the prosecution to issue guidance on the substance of offences. This isn't done, except perhaps in the realm of competition law, unlike, for example, in the United Kingdom, where they do have fairly extensive guidance on their Bribery Act.

Suppose a Mr. 10% somewhere requires a Canadian business person to pay a bribe to get a contract. Suppose the contract is relatively small, and the business person is a first-time offender. This would fit within the existing offence under the act. Of course, it's not a facilitation payment, it is a bribery offence. Do we really need to lock this person up? Why not impose a sentence to be served in the community for a person who does not pose a risk to society?

Under Bill S-14 as it stands, this outcome would not be available, although I should hasten to add that probation would remain available.

Thank you, honourable members. Those are my submissions.

● (1110)

The Chair: Thank you, Mr. Osborne.

We're going to turn it over to Mr. Ingram.

Sir, you have seven to ten minutes, please.

Mr. Joseph K. Ingram (President, North-South Institute): Thank you, Mr. Chairman.

I want to thank you and other members for inviting the NSI to comment on the proposed amendments to this bill. It's an honour for the institute, Canada's oldest independent development think-tank—and, I might add, ranked for the past two years as the world's leading development think-tank by the Global Go-To Think-Tank survey. Despite our annual budget of less than $5 million, we were also ranked in the same survey as Canada's leading development think tank.

In addressing the significance of the bill, I wanted to briefly describe the global context in which the bill is being considered. I don't do it as a lawyer or as an expert on the amendments themselves, but rather as a Canadian development economist concerned about the defining challenges of 21st century global development. I also do it as someone who has worked in international development since 1970, including 30 years with the World Bank, including 14 years living in and managing financial support to some of the most corrupt countries on the planet, according to Transparency International's Corruption Perceptions Index—and I won't name them in this room.

I know first-hand the insidious and devastating effect that corruption, fed by an absence of representativeness, transparency, and accountability—the three pillars of good governance—has on a society's economic and social health. It's not pretty and it's not how Canadian or any other taxpayers' resources should be used.

As noted in the recent “Africa Progress Report 2013”:

> Transparency and accountability are the twin pillars of good governance. Taken together, they are the foundation for trust in government and effective management of natural resources—and that foundation needs to be strengthened.

As also suggested by this eminent international panel, the absence of these pillars is especially damaging in resource-rich states where the financial stakes and temptations to maximize personal gains by political and economic elites, including foreign investors, are high. The unprecedented growth in demand for natural resources, particularly extracts coming largely from the emerging economies, is producing both volatility and rising commodity prices, with global competition for resources intensifying, especially in Africa where the potential is as yet relatively unexploited. For Canada, a globally connected resource-rich country whose economic health depends increasingly on its capacity to globalize its trade relations, the intensified competition constitutes a particular challenge. The comfort zone of producing primarily for domestic consumers and the U.S. market is quickly evaporating.

As noted by the Conference Board of Canada in 2012, the past decade has effectively been a lost decade for Canadian exports:

> The 2000s were a “lost decade” for Canadian exports of both goods and services, as essentially no growth in volumes occurred—even though the volume of global trade in goods expanded by 68 per cent during this period.... We have lost export market share to emerging markets in a wide variety of products, including Canadian stalwarts like wood and paper products.

During the same period, as noted recently by the former Governor of the Bank of Canada Mark Carney, “We've dampened our [2013] forecast of exports because we're seeing a competitiveness challenge...”. Indeed, among the G-20 countries during the same period of 2000 to 2012 Canada was one of eight economies that lost market share of world exports, by about 37%, just behind the U.K., which had the biggest loss of about 40%. The 12 gainers were led, not surprisingly, by China with a gain of 170%—but Australia also saw a gain of 50%.

This loss of market share in exports at the global level is also consistent with a loss of competitiveness of Canadian extracted investments in Africa. Whereas in 2007 Canada was the leading investor in mining on the continent, notwithstanding an increase in the stock of Canadian investment from just under $3 billion to about $31 billion today, we are now fifth, exceeded by China, Australia, South Africa, and the countries of the European Union.

We recently discussed some of these issues at NSI's Ottawa forum entitled “Governing Natural Resources for Africa's Development”—and here I should add that both Dean Allison and Lois Brown made important contributions to that discussion—and addressed how Canada could elevate itself in that sector to being a leader on the continent in natural resource exploitation and investment.

● (1115)

This is at a time when African governments themselves and members of the G-8 are increasingly concerned about using mineral and energy resources more effectively, thereby ensuring that they become the economic blessing they should be rather than the curse they have tended to be.

Indeed, a senior vice-president of one of Canada's leading mining investors in Africa said during the conference that Canadian mining companies could no longer compete on the basis of cost alone, that we needed other attributes.

Enhancing the Canadian brand is one of them, as is being a policy-maker on dealing with corruption in natural resource exploitation, rather than being a policy-taker. Canada needs to be seen as a leader in setting global best practice standards, especially at a point in history where African governments, many of them democracies, are taking active measures to enhance domestic resource mobilization and stem the illicit outflow of financial resources.

Just to give you an example, it's estimated that the outflow of illicit funds in the form of mispriced trade, transfer pricing, etc., from Africa was about $63 billion in 2012, exceeding the inflow of aid and foreign direct investment of about $62 billion. The new Africa mining vision that was developed by the African Union in collaboration with the UN Economic Commission for Africa sets out a compelling agenda for facilitating such changes by shifting the focus from simple mineral extraction to much broader developmental imperatives in which mineral policy integrates with development policy. This means effective regulations governing extractive companies, the strengthening of institutional capacity, and policies that ensure that resources generated are spent to produce sustainable and more equitable outcomes.

For the international community, this means creating a level playing field where natural resource investors are subject to the same set of rules, building on the U.S. Cardin-Lugar amendment and the EU transparency directive adopted by the Europeans earlier this week, so that companies operating in Africa apply the same accountability principles and the same standards of governance that they are held to in rich countries. They should also recognize that disclosure matters.

In our view, Bill S-14 is an important step in that direction, in that it would strengthen the accountability of Canadian firms operating in developing countries and seek to apply the same standards as applied in Canada. We therefore commend the government for preparing it.

On its own, however, it falls short of what is needed for Canada to be seen as a global leader in stemming corruption in that it only deals with one of the pillars of good governance, namely, accountability. Indeed, China adopted its eighth amendment to its criminal code, a law not dissimilar to the Canadian legislation, in 2011. What is also needed is regulation that requires transparency on the part of Canadian investors. Per the call of Prime Minister David Cameron in the lead-up to the G-8 meeting later this month:

> we must lift the veil of secrecy that too often lets corrupt corporations and officials in some countries run rings around the law. The G-8 must move toward a global common standard for resource-extracting companies to report all payments to governments, and in turn for governments to report those revenues. This will encourage more investment in resource-rich countries and level the playing field for business.

In my discussions with members of the Mining Association of Canada, some of whom participated in our recent forum, I've heard the same desire expressed, along with concerns that rising resource nationalism in Africa and elsewhere will first target the firms from those countries seen as being less rigorous in their application of laws to stem corporate corruption by their own firms. Indeed, the Africa Progress Panel report explicitly cited Canada, stating: “Not all the opposition [to stronger regulation] emanates from industry. The Canadian government has opposed the introduction of mandatory standards.”

Canada being perceived by African governments and civil society as one of those recalcitrants is neither good for our brand nor for our competitiveness in the medium term. The statement, therefore, by Prime Minister Harper yesterday in London that Canada “will establish new, mandatory reporting standards for payments made to foreign and domestic governments by Canadian extractive companies” is a welcome development, and the government is to be warmly applauded for this step.

This new policy will help change perceptions and enhance our brand, and should it include compliance with the Extractive Industries Transparency Initiative, Canada would align itself with 23 countries that are currently compliant with this initiative. An additional 16 are candidate countries, including Australia and the United States. France and the U.K. will apparently announce their compliance during the G-8 summit, while Germany recently informed EITI's former chairman—who's a German—that it too is on the verge of joining.

● (1120)

Canada's compliance would demonstrate our full commitment to transparency and provide comfort to Africa's governments and civil society that Canadian extractive firms investing in Africa are being subject to the same standards they would be in Canada.

This would contribute both to Africa's economic development and Canada's economic prosperity. It would also move Canada, once again, into a position of global leadership in the area of natural resource governance.

Thank you, Mr. Chair.

The Chair: Thank you, Mr. Ingram.

We're now going to Ms. Keeping, from Transparency International.

Ms. Janet Keeping: Thank you very much for this opportunity to speak to the committee.

I'll just correct something right off the bat. I am with Transparency International Canada. I'm president and chair of the board of Transparency International Canada, which is a national chapter of Transparency International. That parent organization was formed in 1993 and is based in Berlin. It has about 100 chapters around the world and is often considered the leading NGO committed to the struggle against corruption globally.

TI Canada, on the other hand, was formed in 1998. We're a coalition that includes professionals, lawyers, such as me, and accountants, and people from the NGO community, retired government officials, and people from business, including from the extractives.

My primary mission today speaking on behalf of Transparency International Canada is to urge the adoption of Bill S-14. In our view, it is a very good thing that the Canadian government is responding to criticisms of the Corruption of Foreign Public Officials Act that have mounted over the years.

Passage of the bill will allow the Canadian struggle against corruption abroad to move on to other fronts. The bill addresses issues that have been pointed to by many over the years, both from within Canada, including from Transparency International Canada, and from outside our country, as I'm sure you well know.

I'm going to be very brief here and just mention the provisions of the bill that have been of special interest to Transparency International Canada. One is the addition of nationality jurisdiction. It needs to be added. Bill S-14 would add it, and we're very pleased to see this.

On the more serious penalties that the earlier speaker from the Canadian Bar Association alluded to, in our view, increasing the penalties sends the message that Canada is truly serious about the struggle against corruption. Many people believe that only when individuals realize they could go to jail for a significant period of time will more people resist what they see as the corrupt, easy way to do business. I think it's probably more important that enforcement of the law be vigorous and consistent than to have the possibility of long jail sentences, but generally speaking, we are pleased to see that the penalties are being increased.

What about facilitation payments? We have debated this internally in TI Canada and within the course of public events that we've put on several times over the last few years. We understand the complex and, with some of them, subtle issues here, but we are supportive of eliminating the current exemption for facilitation payments.

In our view, the addition of the books and records offence that's created by Bill S-14constitutes a very important start in the area of books and records. We also need a civil books and records provision, but we are fully aware of the constitutional limitations on the federal government in this area. In our view, adding a criminal books and records offence, which Bill S-14 does, will be of tangible assistance to the struggle against corruption.

Just briefly, we also spent a fair bit of time at TI Canada talking about the change to the definition of “business”, eliminating the words “for profit”, and we believe that too is an appropriate measure and are glad to see it in Bill S-14.

I want to conclude my very brief remarks by expressing appreciation to those in the Department of Foreign Affairs and International Trade who organized a two-day workshop in early January 2012 to examine many of the issues now addressed by Bill S-14. It was an excellent effort that was well prepared for, well conducted, and well followed up on. Several government agencies were represented, and TI Canada was pleased to have had a number of its directors and our administrative consultant involved in that process.

It was an open and honest discussion. We felt we were heard, and we probably would have had a whole lot more to say about Bill S-14 had we not been involved so far up front in this process.

Thank you for the opportunity to make this statement, and I welcome questions later.

● (1125)

The Chair: Thank you.

To our witnesses, thank you again.

We'll suspend the meeting until after the votes. When we come back, Mr. Dewar will lead us off with questions.

The meeting is suspended.

● (1125)

(Pause)

● (1210)

The Chair: If we could have the members back to the table, we will continue. Once again, my thanks to all our witnesses for their patience as we exercise our right in democracy to vote and all those other committee things.

We're going to start off with Mr. Dewar. I think we can probably get a couple of rounds in, and then we'll maybe go clause by clause.

Mr. Dewar.

Mr. Paul Dewar (Ottawa Centre, NDP): Thank you, Chair, and my thanks to our witnesses for their patience and their interventions.

I want to start with you, Mr. Osborne. You had some concerns about the changes in the legislation with regard to maximum sentences. The changes would move us from five to fourteen years. Can you confirm what this might do to judicial discretion, and how that relates to absolute or conditional discharges?

You mentioned this as having an effect on the application of law. I think it's important. On the surface, one might think it's great—it goes from five to fourteen. Why not?

Tell us how this would affect judicial discretion and conditional sentences. We have seen this in other applications of other laws that have been changed—the possibility of unintended consequences. You might look at the law and say, “Oh, this is pretty heavy. We might not apply it to the extent that we would have before if we'd had more leeway.” So please touch on that.

Mr. Michael Osborne: There is no minimum here. We're talking 14 years. A judge can impose a sentence from a few days up to the maximum of 14 years. But some of the outcomes that are currently available in the Criminal Code would not be possible after this new maximum comes into force. What would not be available are absolute or conditional discharges.

The effect of that is as follows. You might have someone who is, say, a first-time offender, and the offence is relatively small. But for some reason, the decision has been made to prosecute this offender. Perhaps he has cooperated. There are lots of mitigating factors. What you will sometimes see is that the crown and the accused will agree on a joint submission for an absolute or conditional discharge. That is technically not a conviction. If you go and plead guilty, and you are discharged, you are not convicted. You don't have a criminal record. It's effectively a “go and sin no more” outcome from the judge. It's an exceptional remedy for those cases where the offence needs to be recognized but doesn't rise to a very serious level. This would not be available anymore, because there are provisions in the Criminal Code that make it not available for offences that carry a maximum of 14 years.

The same goes for conditional sentences. Sentences served in the community or, as people like to put it, house arrest would no longer be available. Probation would be available, so the judge could order it. Therefore it's not automatic that someone is going to jail. However, if this is passed, it is more likely that people would go to real jail as opposed to a discharge or a sentence in the community.

● (1215)

Mr. Paul Dewar: I have one other question with regard to section 2 of the present act. There is an amendment to remove the words “for profit“, meaning that not-for-profit organizations would fall under this act. We've seen the application go a bit differently in the United States. I'm trying to get an appreciation of what effect that would have on NGOs and charities operating in foreign countries, particularly those dealing with humanitarian assistance.

How would removing “for profit” and bringing into the act not-for-profits affect charities and NGOs?

Mr. Michael Osborne: If an NGO is engaged in business, then it will no longer be exempt under this act. It doesn't mean that NGOs or charities will always be subject to the act; they will only be subject to the extent that they are involved in business. Business is defined in the bill as "any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere". What's coming out is "for profit". If they are carrying on a business, profession, trade, calling, manufacture, then they would be subject to the act. As to mere delivery of aid, it is questionable whether or not that would constitute a business under the act. My instinct tells me it would not, but I don't know for sure.

Mr. Paul Dewar: One final thing that you touched on as well is the whole issue of facilitation payments and the fact that bringing into force the decision to repeal facilitation payments is placed with cabinet rather than Parliament. I listened carefully to what you were saying, but I want you to tell us more about this. If it is done within cabinet, that is obviously a less transparent instrument for dealing with this. If it is done within Parliament, there is more opportunity to have full daylight, if you will.

Could you illustrate a scenario whereby its remaining within cabinet could pose a problem, as opposed to having it rest with Parliament?

Mr. Michael Osborne: It doesn't create a legal problem. The ultimate effect is the same: it will be repealed, and the repeal will be brought into force when the Governor in Council decrees. It's really a question of what the optimal way of passing legislation is. From the standpoint of having the issues aired fully, it is more optimal to do it by way of a debate in the House of Commons.

I don't want to be taken as coming out too strongly on this point, because it is after all the MPs who are the guardians of the process; nevertheless, as lawyers, when we go to court we like to see a good record in the House, in committees, in appearances such as this, in which the minister or representatives of the government department come and explain the bill. These things are helpful in understanding what legislation means. To the extent that these things are not addressed, it can create problem.

But we're addressing it now, so I don't want to be taken as holding too extreme a position on that point.

● (1220)

The Chair: Thank you, Mr. Dewar.

Now we're going to turn it over to Mr. Van Kesteren for seven minutes.

Mr. Dave Van Kesteren (Chatham-Kent—Essex, CPC): Thank you all for being here this morning.

I have a question for Ms. Keeping, and for you, Mr. Ingram.

Yesterday in London, the Government of Canada committed to improving transparency and accountability in the extractive sector. Prime Minister Harper announced that Canada will be establishing new mandatory reporting standards for Canadian extractive companies with a view to enhancing transparency of the payments they make to governments. The new reporting regime will be established with a view to improving transparency, ensuring that Canada's framework is consistent with existing international standards and aligned with those of other G-8 countries, ensuring a level playing field for companies operating domestically and abroad, enhancing investment certainty, helping reinforce the integrity of Canadian extractive companies, and helping to ensure that citizens around the world benefit from the natural resources in their country.

My question for whoever wants to go first is first of all, are you happy with this announcement, and do you have any suggestions that you would give to the government as it formulates this regime?

Ms. Janet Keeping: Would you like me to start?

Mr. Joseph K. Ingram: Why don't you go, and I'll jump in after you, if that's okay with the chairman?

The Chair: Ms. Keeping.

Ms. Janet Keeping: Let me just say that TI Canada is very pleased by this announcement. We've been watching the development of the current towards this result and are very pleased to have heard the announcement.

One issue that people have pointed to in the past with these sorts of reporting requirements is the question as to exactly how the reporting is formulated, and I think the point is this: if what we're after is as much transparency as possible, then what we want to see is reporting that is as intelligible to the people in the country of concern as possible.

One example is that if the reporting is just that this company pays this much to this government overall for its activities in that country, that is not sufficient. It has to be broken down in such a way that citizens of that country can see what is being paid project by project, industry by industry, because only in that way will the information be used and usable in the way anticipated.

The only other comment I'd like to make is that, as you may very well be aware, we hope that some day there will actually be greater transparency domestically. I could expand upon that if you wanted, but I quite understand that this is another matter.

Mr. Dave Van Kesteren: Mr. Ingram.

Mr. Joseph K. Ingram: I agree with Janet's remarks. We do welcome this. We think this is a very important step forward, both the amendments to the bill—with the provisos mentioned by Michael—and this announcement by the Prime Minister.

As I said in my presentation, transparency and accountability are kind of Bobbsey twins: they go together. You have to have the two of them present.

As Janet was suggesting, however, the devil will be in the details in terms of what exactly we mean by mandatory reporting requirements. With regard to what we could do as a government, on the demand side there are issues. And by "demand side", I mean on the side of governments in Africa, for example. We talked about this with Lois at our conference.

Oftentimes they don't have the capacity themselves. They can have very good laws on the books, and even have the political will to enforce those laws, but they don't have the capacity. Finance ministers make decisions based on limited resources. They have to establish priorities. You can have very good legislation, but you can have a ministry of mines and energy, for example, which is supposed to regulate that legislation, that doesn't have the vehicles, doesn't have the computers, and doesn't have the trained people, and the finance minister decides that he would want to spend his scarce resources on something else.

In that kind of situation, it would be helpful if the Canadian government and the development department, the former CIDA, in supporting Canadian private investment—mining companies, for example, working in certain countries in Africa—were to work with the host government and look at the capacity of that government to enforce whatever regulations they have in the books, and to help them build up that capacity.

● (1225)

Mr. Dave Van Kesteren: That raises an important issue. I suppose on the one hand you may have corrupt governments. On the other hand, you may have governments that really want to participate and make this a reality.

Ultimately, first of all, I think corruption has to cease for a number of reasons, but one of the most important reasons, I suppose, is that these countries where development is taking place are able to reap the benefits.

Will this legislation force those governments that possibly aren't too interested in participating in getting on board themselves so that we reach our desired objective?

Mr. Joseph K. Ingram: It may or it may not. I think the absence.... What you don't want is a situation where they can point to Canada, for example, or to other G-8 countries, and say "We're going to follow their example".

In other words, if there is no legislation—and that's why we welcome this legislation—you don't want them to point to a G-8 government and say, "They're not adopting this kind of legislation. They're not prepared to require mandatory reporting requirements. Why should we? Why should we move in that direction?" You don't want that.

To answer more directly your question, the answer is that in some instances, yes, it is a question of political will. I think you hit the nail on the head.

That said, I've worked in countries where the political will is there but there's a lack of resources, and the government is not prepared to finance the building up of that capacity.

Mr. Dave Van Kesteren: Thank you.

The Chair: Thank you very much.

We'll now turn it over to Mr. Rae.

Seven minutes, please, sir.

Hon. Bob Rae (Toronto Centre, Lib.): Thank you very much to our guest who's joining us by video conference.

Previously you described the position of the Government of Canada as only moderately enforcing the existing law. As I understand it, there are different categories that you've described—active, moderate, little, or no.

We're not at the top of the heap in terms of actively enforcing the law, is that right?

Ms. Janet Keeping: Well, historically that's certainly been correct, and that's been noted by the OECD and the other organizations that monitor these things. Of course, the OECD is particularly interested in how we do vis-à-vis the OECD's anti-corruption convention, but yes, in the past, quite frankly, we've been seen as a laggard. There's nothing sensational in saying that. It has been well documented.

But ever since we signed the United Nations Convention against Corruption and the RCMP was mandated to create specialized teams to enforce the Corruption of Foreign Public Officials Act, we've been doing a lot better. I've heard RCMP officers speak several times over the last few years on their involvement in enforcing the CFPOA. They're working hard at it. It's very convincing. I think they're very committed to the objectives.

I'm glad to be asked this question, because I did want to have an opportunity to say that good law on the books is really important and essential, and Transparency International Canada is behind the adoption of Bill S-14. But just as in any other country of the world, legislation is only as good as it is enforced, especially in the criminal law area.

I know that's not the mandate of this committee today—you're looking at a piece of legislation—but keep in mind that we must have the RCMP and the prosecution services adequately resourced to enforce the legislation.

Hon. Bob Rae: I'm glad you said that, because I think that's a critical issue, and you're right, it's not one that we can discuss right now, but it does speak a lot to how we root out these problems. It's not only the culture in a number of countries; it's also the culture in a number of corporations.

We do clearly now have a problem. We have to recognize that we have a problem, and it isn't going to be changed simply by passing new laws. It's going to be changed by how we enforce them—

Ms. Janet Keeping: Yes.

Hon. Bob Rae: —so thank you very much.

I'm also concerned about the discrepancy between the 14-year number and the Canadian number. Again, Ms. Keeping said she was holding back any comments with respect to what else we should be doing on this issue within the country, but it does strike me as really kind of crazy to say that it's only five years if you bribe a Canadian official, but it's 14 years if you bribe somebody overseas.

That's preposterous. Why would we accept that as a standard?

● (1230)

Mr. Michael Osborne: I assume that's directed at me.

Hon. Bob Rae: It's for whoever wants to answer it. Mr. Ingram was nodding, and I'm happy to hear from him, but I'm happy to hear from you, Mr. Osborne.

Mr. Michael Osborne: It is a discrepancy. It could be resolved in one of two ways. One would be to increase the penalty for domestic corruption to 14 years, which would involve the same issues I've described that reduce the discretion of judges in sentencing, or it could be resolved by having some lower number for both sets of offences.

There's a fairly big range of domestic corruption offences in the Criminal Code. I don't propose to go through all of them, but there's a bunch of them, and the sentences are not all the same for each one. For instance, if my memory is correct, corrupting a judge would attract a 14-year sentence, whereas for a lesser government official it would be a lesser maximum.

Hon. Bob Rae: But my concern is that we often do these things and governments even introduce them for largely symbolic reasons, in wanting to say that "it's not just that we don't like this, but we really don't like this". Then we're left with this situation now where we are facing legislation, which I expect all of us will end up supporting, and we have this illogical relationship between this particular set of standards and the standards that we set for ourselves within the country.

I would hesitate to put words in Ms. Keeping's mouth, but in many of the publications of Transparency International, Canada is slowly slipping down in terms of where we stand now compared to other countries on this issue of corruption domestically, as well as how it affects foreign.... We can see from the behaviour of certain companies that the practices they thought were acceptable in other countries, they've imported back into Canada, and we're now watching this disease spread in our own country.

Mr. Ingram, do you have a comment on that?

Ms. Keeping? Go ahead, please.

Ms. Janet Keeping: If I might make a comment there, I'll be frank that at TI Canada we have not paid explicit attention to the fact that there is this discrepancy between what's proposed by way of penalties in Bill S-14 and what we have in our current criminal law.

But I'd have to say that anybody connected with Transparency International wants to see greater attention paid to the problem of corruption. Therefore, if we're going to find consistency, it ought to be consistency at the more serious level...not to think that foreign corruption should be necessarily reduced to the penalties in our Criminal Code, which may indeed be inadequate.

Hon. Bob Rae: The final question, if I may, Mr. Chairman, is on the issue of the so-called facilitation exception that is now being phased out. I'm a lawyer, too. If you're advising clients now, you're in an almost impossible situation. You don't know when the law is going to be changed; you don't know exactly how it's going to be interpreted; you're left with a real sense of uncertainty. You either end facilitation payments, period, or you don't. I'm not quite clear on why this is something that's being phased in. Obviously, it's not being made retroactive. You're not going to go back and say, "Well, something you paid yesterday you're going to have to pay a penalty on", but we now are entering into a cloudy area.

Is that a fair comment, or am I overdoing it?

The Chair: Mr. Osborne, just a quick response, if you could.

Mr. Michael Osborne: Right.

Well, I think it's fair to allow some time to phase in to allow companies to adopt appropriate compliance programs. That aspect of it is fair. But even once it comes into force there will be ambiguities because there's a real issue as to whether or not a facilitation payment fits within the central offence-creating provision in the act at all. It might be that removing the facilitation payments exception doesn't change the law at all. But that's what we lawyers do: we advise our clients. It will make it harder to advise clients.

The Chair: Thank you.

Thank you, Mr. Rae.

We're now going to start our second round. We're going to have time for two quick interventions, Mr. Dechert for five minutes, and then we'll finish with Madame Laverdière for five minutes.

Mr. Dechert.

● (1235)

Mr. Bob Dechert (Mississauga—Erindale, CPC): Thank you, Mr. Chair.

Thank you to each of our guests for being here today.

I'd like to start with a question for both Ms. Keeping and Mr. Osborne.

Ms. Keeping, I just want to start by saying that I thought the conference that Transparency International Canada organized a couple of weeks ago was very good. I thought you had a very broad range of people representing government, academia, NGOs, and business. We heard a wide range of views on these issues with respect to Bill S-14 and, certainly, they were generally very supportive. I commend Transparency International Canada for holding that conference. I thought you did a superb job.

Ms. Janet Keeping: Thank you.

Mr. Bob Dechert: Thank you for that.

I'd like to go directly to the issue of facilitation payments, and we've had a lot of discussion about it here today.

My understanding is that Canada is responding to the OECD report that included interventions by the United States in a peer-reviewed report that pointed out a number of areas of the current Corruption of Foreign Public Officials Act that needed, in their view, to be amended and updated to reflect the OECD convention. One of those criticisms was the fact that our legislation currently does not prohibit facilitation payments.

We all know that there is a provision in Bill S-14 allowing a delay in enforcement to give Canadian companies time to change their policies and procedures to ensure that they don't run afoul of this, which will be a new prohibition on Canadian companies.

There's some misunderstanding as to whether or not American companies are allowed to make these kinds of payments. When I asked that question of our officials—of Mr. Kessel—he pointed out that under the Securities Exchange Act these kinds of payments are in fact illegal and that administrative proceedings can be brought against public companies in the United States that are governed by the Securities Exchange Act.

I wonder if you could, Ms. Keeping, tell us, in your view, is the facilitation payments provision of Bill S-14 a response to the criticisms that were made of Canada by the United States and other countries in the OECD report? Do you think that it puts Canadian companies at any kind of a disadvantage versus American companies in doing business around the world?

Maybe I could ask the same questions of you, Mr. Osborne. Do you agree with Mr. Kessel's view of American provisions that prohibit some American companies from making these kinds of payments?

The Chair: Ms. Keeping.

Ms. Janet Keeping: Speaking on behalf of TI Canada, I'll just say that it is, of course, our understanding, too, that this provision regarding removing the facilitation payments exemption is a response to criticism of us in the past.

I'll have to tell you that the question of how facilitation payments should be treated under the law has been one that has given rise to the most vigorous debates I have heard around the board table in three years at TI Canada, and also in some of our events for the public. I would have to say as well that, on balance, the position of TI Canada is that this is the way of the world. The world is taking corruption more seriously. We encourage that, of course. At the end of the day, facilitation payments are bribes and have to go.

So we are content with what we see in Bill S-14.

Mr. Bob Dechert: Thank you.

Sorry, did you have something else to add, Ms. Keeping?

Ms. Janet Keeping: We reached the conclusion that we did regardless of the question of competitive advantage or disadvantage vis-à-vis American companies.

Mr. Bob Dechert: At your conference, I had a discussion with a well-known legal counsel. I won't name him because he's not here to defend himself. He said that he thought it would put Canadian companies at a disadvantage. At the same conference I met another individual who was a university professor. Again, I won't name him because he's not here to defend himself. He said it's absolutely the right thing to do, and he thought we were on the right track and should continue doing it. I put the two of them together, and they had a bit of a discussion.

Mr. Osborne, we'd like to hear your views.

The Chair: Mr. Osborne, you have about 30 seconds left.

Mr. Michael Osborne: All right. The commentaries to the OECD treaty that are still in force say that small facilitation payments do not fall within the prohibition in the treaty. The most recent guidance—

A voice: [*Inaudible—Editor*]

Mr. Michael Osborne: It's not defined. Paragraph 9 of the 1997 commentaries says “small 'facilitation' payments do not constitute payments to obtain or retain business or other improper advantage”. That is the reason I said earlier that it's not clear whether or not those payments would be prohibited by the central prohibition in the CFPOA. And the OECD guidance as it currently stands is to encourage countries to take measures to encourage companies to ban them.

● (1240)

Mr. Bob Dechert: In terms of the penalties, when a member of the opposition asked the question of Mr. Kessel the other day, about the 5- to 14-year penalties for domestic corruption, his answer was:

> What I can confirm to you is that the sentencing that will be applied now to foreign bribes—Canadians who are bribing foreigners—will be the same as Canadians bribing Canadians. So what we are doing with this legislation is ensuring that there isn't a double standard, that when Canadians go overseas and bribe others, they will be suffering the same penalty as Canadians bribing other Canadians.

Do you disagree with his statement?

Mr. Michael Osborne: Section 121 of the Criminal Code establishes an offence for bribing a broad range of government officials. Subsection 121(3) says that the imprisonment is five years.

Mr. Bob Dechert: So in your view should that Criminal Code provision for the bribing of Canadian officials be amended as well?

The Chair: Sorry, Mr. Dechert. That's all the time we have. We've got to move on.

Madame Laverdière, you have five minutes.

Ms. Hélène Laverdière (Laurier—Sainte-Marie, NDP): Thank you very much.

Thank you for your presentation. I'll try to go rapidly because I think there are quite a lot of issues to discuss.

Mr. Osborne, if I understand you well, bribing an official in Canada carries a five-year max?

Mr. Michael Osborne: In some cases, it's more. Generally, it's five years.

Ms. Hélène Laverdière: So then we would not be talking of the same treatment for bribing abroad as bribing in Canada. Is that what it means?

Mr. Michael Osborne: That's correct. The penalty will be less after this legislation. I don't know what the plans are with the Criminal Code. You'd have to ask....

Ms. Hélène Laverdière: Thank you very much. I think it's a very important comment.

On another issue, just to clarify, when we were comparing the U. S. procedures last Tuesday, we were not comparing procedures for businesses. The issue was for NGOs, because in the U.S., facilitation payments are treated under the Securities Exchange Act and, therefore, presumably non-governmental organizations are not covered by the U.S. regime, if I may say so.

Mr. Michael Osborne: I'm not an American lawyer, but my understanding is, first of all, that the FCPA contains an express facilitation payments exception. Guidance that I downloaded from the U.S. DOJ, I think it was, last night confirms this.

As far as the SEC is concerned, my understanding is that they effectively have a books and records provision that says you can't track a facilitation payment as though it were entertainment. But it doesn't make it unlawful to make a facilitation payment; it simply establishes that you can't falsify it in your books and records. But again, I'm getting it second-hand from people I've consulted. I'm not an American lawyer.

Ms. Hélène Laverdière: Furthermore, it would apply essentially to companies, and it would not apply to non-governmental organizations, whatever the Securities Exchange Act does.

Mr. Michael Osborne: I would assume it would apply to companies publicly listed in the United States, as opposed to private companies or NGOs.

Ms. Hélène Laverdière: Therefore, what we're to implement in Canada is going to be stronger than what is being done in the U.S. I underline that, because I think it's a very important point. We want to make sure that humanitarian organizations are not prevented by this law from delivering urgently needed food or supplies.

You yourself raised this issue. Did you have an opportunity to talk with non-governmental organizations working in humanitarian work?

Mr. Michael Osborne: What happened at the CBA was that our charities law section was given the ability to provide input to other briefs that we prepared. We have not consulted very widely, however. The timelines for this bill were very narrow when it first appeared in the Senate. We did what we could in the time available. The feedback we got was that there were concerns. That's all I can really say. We haven't done....

● (1245)

Ms. Hélène Laverdière: Thank you very much.

I concur with you, with the fact that, unfortunately, we don't have sufficient time, because there are a lot of unanswered questions. We also haven't been able, as a committee, to hear from non-governmental organizations. Given what's at stake, it would have been worth it to have more time to really study this bill in depth.

Mr. Ingram and Ms. Keeping, I have a question for you both. I'd like to come back to Mr. Ingram's comment that we badly need to enhance our brand abroad. You talked about capacity building, providing resources for revenue management and going after income tax and things like that. There's a very good example recently. The U.K. helped Ethiopia with its tax collection system, and the tax revenue in that country multiplied by seven as a result. We often hear the government say that Canadian businesses will bring in taxes, but helping revenue agencies in developing countries is key too.

What the Prime Minister announced yesterday, in terms of transparency, is a good step. What are the next steps that Canada could take to help enhance, reshape our brand a bit?

The Chair: Mr. Ingram, we're over time. So I'll allow you a quick response to it.

Mr. Joseph K. Ingram: Thank you, Mr. Chair.

As I said earlier, with more strategically targeted development assistance, as a byproduct of our supporting revenue- or resource-rich states, we also want to help Canadian investors in mining. I think it's important that we think about the win/win. In other words, we need to ensure that the host government is in a position to mobilize resources that are domestically more effective. Clearly with former CIDA, helping a government develop the capacity to do so was a very positive step, and I would hope that in addition to the Prime Minister's announcement, we would think strategically about how we could best do that.

The downside risk—and we're seeing this with the rise in resource nationalism—is that you have governments now on both sides of the political spectrum, not only in Africa but also in Latin America, that are increasingly renegotiating revenue-sharing agreements. You've got retroactive liability suits being filed. You've got partial nationalizations taking place. You've got changes in fiscal and royalty payments taking place. Those are not good things necessarily.

As I said earlier, if they feel that a particular company is from a country where they're not applying the same standards, then the company might become a target. There's that downside risk as well. Canadian companies could become a target. I think it's important to —

The Chair: Thank you very much. That's all the time we have, as we have to go to clause by clause.

I want to thank our witnesses once again for your flexibility in your schedules over the last couple of days. Thank you very much.

With that, we're going to suspend for a couple of minutes just to bring the officials back to the table and then look into clause by clause.

● (1245)

(Pause)

● (1250)

The Chair: We'll start clause by clause. If you would like to grab your sheet of paper with the orders of the day, we've got the clause by clause that we'll be moving forward with.

Pursuant to Standing Order 75(1), consideration of clause 1, the short title, is postponed. So the chair will call clause 2 to 5.

(Clauses 2 to 5 inclusive agreed to)

The Chair: Shall the short title carry?

Mr. Dewar.

Mr. Paul Dewar: Before we get to that, I just wanted to propose an additional amendment before we get to the.... You're at 6 right now, right?

The Chair: We're on the short title. We just finished clause 5.

Mr. Paul Dewar: I wanted to propose the following. Since we've heard from witnesses a couple of concerns, and they're not major.... We're going to support the bill, and I think people are aware of that, and I think everyone's supportive of the bill, but there are a couple of issues that were brought up during the brief period we had to review this. One of them, which Mr. Dechert brought it up, is with regard to the section that deals with increasing the sentencing to 14 years, and looking at how that could be applied when you're looking at domestic law being different in, say, five years.

The facts around the issue of facilitation payments and how this might touch on or affect charitable organizations were valid concerns that were brought up. I'm wondering if the government would be open to having a provision for review put into the bill, so that after five years, the government would commit to reviewing the legislation.

I say that, Mr. Chair, for the aforementioned reasons. As I said, I think everyone around this table is in support of the bill, but given the concerns around applications and at least two things that I just mentioned, including in terms of the maximum penalty, a concern that Mr. Dechert shares, could we consider putting into the bill a review after five years of the legislation coming into force? I'm just wondering if we could have a discussion about an amendment on a five-year review.

The Chair: Mr. Dechert.

Mr. Bob Dechert: Mr. Chair, my understanding of the legislation is that we are raising the bar here. What I believe we heard from the officials and from the Canadian Bar Association is that under domestic law there is a range of offences and the penalties, from 5 to 14 years, depending on the offence. Bribing a judge is 14 years.

Under this legislation, there is no minimum penalty, which is usually the objection raised by the opposition. The judge can impose any sentence from a day to 14 years. There is also the opportunity for probation. We heard from Transparency International Canada, an organization that is directly involved in these issues. It is a non-governmental organization and it represents the entire range of views in Canada. There was extensive consultation done with Transparency International. We heard from Ms. Keeping that they think this penalty clause is appropriate. They think Canada should send a strong message to Canadian businesses that these types of bribes are not tolerable. We hope this will be in line with what other countries are doing.

With respect to facilitation payments, we know, because this is something new, that Canadian companies need time to adjust their policies and processes and procedures. That's why there is a provision in Bill S-14 providing for implementation at a later date. It would not be required to go back to Parliament, which would be a long and involved process. Of course, the opposition and any other Canadian can put pressure on the government, both through Parliament and outside of Parliament, to bring those provisions into force, which they can then do with the stroke of a pen. That is actually a fairly effective way of dealing with it.

With respect to the point about NGOs, the Canadian Bar Association pointed out that only organizations that carry on a business, a profession, or a calling would be caught by these prohibitions. Clearly, the Red Cross or Doctors Without Borders is not a business, profession, or calling. If the Red Cross had to pay some small facilitation payment to get food or medical supplies into an affected country, it's hard to see that there would be any risk of prosecution under Bill S-14, since the Red Cross is not a business, profession, or calling. That's pretty clear. I also think you have to rely on prosecutorial discretion not to lay a charge in what is essentially a *de minimis* situation.

For all those reasons, I don't think we need to add another provision to this bill. I also think what we're doing here is raising the bar. This is a modern statute with modern language. There may be an argument that the Criminal Code provision should be revisited, and such an argument could be taken up at a later date.

Therefore, I would suggest we leave the legislation as drafted, and pass it accordingly.

Thank you.

● (1255)

The Chair: Mr. Dewar.

Mr. Paul Dewar: I thank my colleague for that.

Just to be clear, what we're saying is that we should have a review after five years. I was pointing out some of the concerns that were raised. Mr. Dechert is well aware that the application of domestic law is such that it will be different from the way this legislation is written. That was a point you raised, and other people had concerns about that. It's something we've done in legislation before, when concerns were raised. I think it goes without saying.

I have a question based on Mr. Dechert's understanding of the terms. I want to get from the officials their understanding of the humanitarian sector. Would they define it as a profession or a calling? Could we get their feedback on that?

Mr. Marcus Davies (Legal Officer, Criminal, Security and Diplomatic Law Division, Department of Foreign Affairs and International Trade): Thank you very much.

This issue has come up a number of times. It's important to remember that the legislation applies to business transactions to retain or gain an advantage; it's not simply any bribe. If you have a payment where someone's in a situation in which they're under duress and they feel they have to pay it, then it's likely not going to be covered by the CFPOA. That's the answer to the question.

I think what you would also like to know is how we deal with it in a scenario.

TI, Transparency International, which is supported by a number of NGOs in humanitarian situations, has guidelines they have put out for how you deal with corruptions in humanitarian scenarios. They have a number of guidelines and best principles. Those guidelines and best principles emphasize monitoring; evaluation; preparation up front to avoid risky environments, such as scenarios where you're going for visas and issues like that; transparency of an organization; reporting up to management; and engagement with law enforcement. Then it refers to scenarios where you may be forced, under duress, to pay. But if you're under duress to pay, you don't have the intent of securing a business advantage.

So our view of the CFPOA and this legislation is that it's not going to affect humanitarian interventions. The support from the major civil society dealing with corruption has been to eliminate bribery. Under the Paris Declaration on Aid Effectiveness, the principle is for us to eliminate bribery, and in the most recent U.N. report in chapter 10 on their commitments to sustainable development for 2015, eliminating bribery is one of the key issues.

Our view is the legislation will not affect humanitarian intervention, and further, the measures proposed are supported by what is going on internationally by civil society and by government.

● (1300)

Mr. Paul Dewar: Thank you for that.

I just want to note that there's a little bit of grey here from what we've just heard—and fair enough, because we're talking about how law can be interpreted and applied. It remains a concern. It's a bit different from what we heard Mr. Dechert say on the humanitarian sector: it's not as black and white as Mr. Dechert suggested.

We're wanting to put forward an amendment to have a review in five years. I gather the government is not willing to accept that amendment.

Mr. Bob Dechert: No.

Mr. Paul Dewar: Okay.

An. hon. member: So we can vote, if you like.

The Chair: All right. Then I'll proceed.

Shall the short title carry?

Some hon. members: Agreed.

The Chair: Shall the title carry?

Some hon. members: Agreed.

The Chair: Shall the bill carry?

Some hon. members: Agreed.

The Chair: Shall the chair report the bill to the House?

Some hon. members: Agreed.

The Chair: Thank you very much.

We will meet on Tuesday to discuss the Jewish refugee report and the OAS report.

Thank you very much to our officials from DFAIT.

With that the meeting is adjourned.