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Chair

Mr. David Sweet

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● (1615)

[*English*]

The Chair (Mr. David Sweet (Ancaster—Dundas—Flamborough—Westdale, CPC)): Good afternoon, ladies and gentlemen.

Welcome to the 71st meeting of the Standing Committee on Industry, Science and Technology.

We have before us a number of witnesses, and you'll notice we have them in person as well as by teleconference. I'll briefly introduce them.

From the Canadian Council of Chief Executives, we have Ailish Campbell, vice-president, policy, international and fiscal issues. From the Canadian Bar Association, we have Brian A. Facey, chair, national competition law section, together with Joshua Krane, member, foreign investment review committee of the national competition law section. These are the witnesses who are in front of us.

Now I will introduce the witnesses who are appearing before you by teleconference. We have Dany H. Assaf, partner, Torys LLP. From the United Steelworkers, we have Mark Rowlinson, assistant to the national director. And from the National Automobile, Aerospace, Transportation and General Workers Union of Canada, we have Jim Stanford, economist.

We'll follow the agenda in front of us and begin with the Canadian Council of Chief Executives and Ailish Campbell.

Witnesses, I know the clerk has told you to keep your remarks to six or seven minutes. It is one of our responsibilities to vote in the House and we need to go there, so our time is even more limited. If you could keep your remarks as brief as possible, that would be great.

Ms. Campbell, please go right ahead.

Ms. Ailish Campbell (Vice-President, Policy, International and Fiscal Issues, Canadian Council of Chief Executives): Thank you.

Mr. Chair, committee members, thank you for the invitation to appear before the committee concerning amendments to the Investment Canada Act in Bill C-60.

Before I begin my comments, let me briefly introduce my organization, the Canadian Council of Chief Executives.

[*Translation*]

The Canadian Council of Chief Executives is a not-for-profit, non-partisan organization composed of 150 CEOs of Canada's leading businesses. We engage in an active program of public policy research, consultation and advocacy. The CCCE is a source of thoughtful, informed comment from a business point of view on issues of national importance to the economic and social fabric of Canada.

[*English*]

The Canadian Council of Chief Executives represents 150 chief executives and leading entrepreneurs in all sectors and regions of the country. Our members lead companies that collectively administer $4.5 trillion in assets, employ more than a million Canadians, and are responsible for the majority of Canada's exports.

The topic before your committee today is an important and highly complex one. Changes to the Investment Canada Act and the federal government's policies cannot be viewed in isolation but as part of a history of experience with the review of foreign investment in Canada. The changes that form the subject of your deliberations were announced in December 2012, when the government approved two significant acquisitions of Canadian firms by foreign state-owned enterprises under the existing ICA, the Investment Canada Act.

It is our view that the decision to approve the acquisitions of Nexen and Progress Energy Resources was the right one. Canada's population is small relative to those of other major advanced economies, and we have a tremendous need for capital to develop our industrial base and to achieve our potential as a leading exporter of energy and advanced energy technologies. At the same time, companies looking to invest in Canada must play by our rules, respect our values, and adhere to Canadian laws as well as our regulations and environmental and labour standards. Canada wants and needs foreign investment, but not all and not any.

Of significant importance, the government did not change the rules during the reviews of these two transactions, recognizing that to do so would have significantly lowered investor confidence. Canada has one of the strongest traditions of the rule of law in the world. We are clear in our purpose and our willingness to act as circumstances demand. Such fortitude requires a constant assessment of our rules, and on occasion their amendment.

In examining the changes to the ICA before us today as part of Bill C-60, there are three comments I wish to table.

The first is that the Canadian Council of Chief Executives supports the government in its efforts to promote foreign direct investment in Canada. The CCCE also supports the government in its efforts to articulate its intent to assess the commercial interests of investors making significant acquisitions in Canada, and this of course includes state-owned enterprises. Foreign direct investment in Canada is critical. Our history, from the fur trade to resource development, is the story of effectively harnessing foreign capital to improve our standard of living. Foreign investment brings a wealth of management expertise, innovation, and new business opportunities, not only capital. Canada needs foreign investment to realize our potential.

The CCCE fully supports actions to ensure Canada's openness to investment and to provide comfort to Canadians that the government is reviewing and monitoring transactions to ensure they are undertaken on a commercial basis, they demonstrate good corporate governance, and they adhere to Canadian law. The guidelines for SOEs introduced in December recognize the essential role of private enterprise and free market principles in driving economic growth and prosperity. They will, in our view, safeguard the national interest while ensuring that Canadians continue to reap the benefits of a welcoming approach to foreign investment.

Canada is, of course, not alone in its efforts to understand and assess the impact of investments by state-owned enterprises. Our experience must be shared and developed alongside other advanced market economies to make sure our regime is internationally competitive, and indeed, why not the best in the world? The Minister of Industry and his or her officials must continue to implement the act in a way that does not impede the overall flow of investment, which provides us with our high standard of living.

The Canadian Council of Chief Executives also notes that the legislative amendments will provide some flexibility for the government to extend time periods under the national security review, also under the ICA. We support these insofar as a balance is struck between clear timelines and procedures for commercial transactions and the need for sufficient opportunity to ensure a thorough security review.

● (1620)

We call on the government to ensure an effective and constant dialogue between ministers and officials responsible for economic and security aspects of any possible future national security review.

The second key point is that the Canadian Council of Chief Executives supports the legislative amendments insofar as the law will continue to require that the government consider each investment on its own singular merits. As experience with the legislation and SOE guidelines evolve, we would encourage the government to consider advance rulings on whether a specific entity would be treated as an SOE under the act so as to provide clarity to investors.

There is no one-size-fits-all policy for state-owned enterprises. They are highly diverse in structure, public reporting, their behaviour, and their national country of origin. The diversity and complexity of business operations indicates that each specific investment must be reviewed on its own merits.

Not all state-owned enterprises are created equal. We know that state-owned enterprises can be responsible corporate citizens held to the same standards as public or privately owned enterprises. We also know that state-owned enterprises can engage in behaviour that is motivated by non-commercial interests. Further, not all targets of acquisition will be of equal commercial significance.

These amendments proposed will allow the government to continue to assess each transaction on the basis of its unique and specific characteristics.

We encourage the application of rules here in Canada that we would be pleased to see pertain to Canadian firms and sovereign wealth funds when they act abroad. As a major investor, as well as an investee, we want to project Canada's belief in sensible, thoughtful, and predictable standards, both in principle and in execution.

Finally, the Canadian Council of Chief Executives and the Canadian business community remain actively involved in the evolving nature of investment inflows and outflows. We welcome an ongoing dialogue with provincial and federal governments, regulators, and the public on the implementation of investment and business framework policies.

Our markets and our businesses evolve and so must our rules. We must also strive to encourage Canadian firms to get to the size and scale of the state-owned enterprises we are discussing so that Canadian firms can take leadership positions in developing our resources and invest globally.

The Canadian Council of Chief Executives is pleased to have had an almost 40-year history of engagement on these issues. Both our organization and our member firms and CEOs remain ready to contribute their business experiences to the development of policies that develop and advance Canada's economy in a global context.

Thank you.

The Chair: Thank you, Ms. Campbell.

Now on to Mr. Facey.

Mr. Brian Facey (Chair, National Competition Law Section, Canadian Bar Association): Thank you, Mr. Chairman and honourable members.

You introduced me at the beginning. My name is Brian Facey, and I'm the chair of the Canadian Bar Association's national competition law section and co-chair of Blake, Cassels & Graydon's competition and foreign investment group. I speak to you from a lawyer's perspective as to how the legislation will work, having done this in these kinds of transactions over a 20-year period.

I'm also the co-author of *Investment Canada Act: Commentary and Annotation 2014*, and I appear before you today with my co-author, Joshua Krane.

I'll make two very brief points, and I'll be followed by Mr. Krane, who will make two additional points. So we'll present together, if that suits you, and may save a bit of time.

You should have my letter from the Canadian Bar Association dated May 17. I'm not going to summarize it or go into it in detail, in light of the time, but I will leave it with you.

The two main points I want to make are the following. The first point is that the amendments create some additional uncertainty, not just for business investors but also for Canadian businesses and their advisers who may be seeking financing and looking to partner with foreign enterprises, some of which clearly may be state-owned enterprises, some of which may not be so clearly state-owned enterprises under the new rules.

My second point will be to emphasize the need for transparency, predictability, and timely review of these kinds of investments.

Let me unpack those two points very quickly. On the first point about uncertainty, there are a number of phrases in the legislation: control, control in fact, influence, direction. These are undefined concepts as yet, and in our submission remove a little of the bright line tests about Investment Canada and foreign investments in place of more discretionary tests. What's important in framework legislation like this is that sort of movement can be helpful to have additional guidance in the form of guidelines and other instruments. I'll return to that in a moment.

Secondly, this legislation now puts minority investments and joint ventures with respect to state-owned enterprises into a field of discretion. Without getting too technical, subsection 28(6.1) does confer broad discretion on the minister to deem an investment to be a state-owned enterprise investment and a controlling fact. In my experience, the issue there is that businesses and our clients like to have.... They're not worried about tough news, but they don't like to have a lot of surprises.

That comes to my second point: predictability, transparency, and timely review. In this regard, I thought it would be helpful to briefly review two passages from the *Compete to Win* report of June 2008, two passages that I think are even more important today. The first passage, and it's on page 33, is as follows. It says that:

> As such, we believe that a key objective of the changes to the ICA should be to improve the transparency, predictability and timeliness of decision making in the review process.

Further down on the same page it says:

> The research finding that it generally takes longer to obtain a binding ministerial opinion than to conduct a complete review of a foreign investment proposal is perverse. Therefore, the procedures and timelines for issuing compliance instruments under the ICA need to be streamlined.

Then the recommendations are the exact recommendations that we've made in our letter today. Remember, this report was issued in 2008 before the global financial crisis. In our submission, it's even more important today to have clarity on these issues.

The recommendation is the following, which is:

> In administering the ICA, the ministers of Industry and Canadian Heritage should act expeditiously and give appropriate weight to the realities of the global marketplace and, in appropriate cases, the ministers should provide binding opinions and other less formal advice to parties concerning prospective transactions on a timely basis to ensure compliance with the ICA.

I emphasize “binding opinions and other less formal advice”. I raise that for two reasons.

● (1625)

If one looks at the legislation that's before you, clause 145 of the bill, which is subsection 37(2) of the legislation, provides that the minister “may provide” an applicant with guidance if they ask for it. In our submission, it would be more helpful to business if the minister “shall provide” that information. People would be more comfortable knowing that if they go for an opinion they're going to get one.

If that route is not available, or not chosen, a second route is this —and it echos what Ailish had to say in her submission. It's something the Competition Bureau does, which is the ability to offer non-binding advice in the form of a comfort letter or “no action” letter. These kinds of letters can be issued in a non-binding way, which gives the minister comfort that it's not going to be something that's binding forever, but it gives the parties the comfort that they can proceed with their transaction knowing that at least they share the same view as the minister at the time of issuing it. Many multibillion-dollar transactions close in the competition world based on that kind of non-binding advice.

Those are my submissions.

Mr. Krane has one or two points to make, subject to any questions you may have, sir.

The Chair: Mr. Krane, time has almost exhausted, so would you make those two points very quickly?

Mr. Joshua Krane (Member, Foreign Investment Review Committee of the National Competition Law Section, Canadian Bar Association): Thank you, Mr. Chair and honourable members. I only have two brief points to add to Mr. Facey's submissions, which I base on my experience of applying the Investment Canada Act in my practice.

In the past we could give advice to a state-owned enterprise investor that its proposed investment of a 20% interest in a Canadian business could proceed unconditionally under the Investment Canada Act. If the amendments become law, those same facts give rise to a far more complicated legal question. Investors in Canadian businesses will now need to consider whether that same investment will result in an acquisition of control in fact, which may require them to consider a whole host of factors, including the distribution of voting interests, the types of votes that attach to those interests, shareholders' agreements, financing arrangements, and other factors.

The amendments will make giving advice to investors, and Canadian businesses seeking to do business with those investors, a far more difficult exercise as a matter of practice.

My second point relates to timing. If the amendments become law, the minister may make a control-in-fact determination either before closing or well after closing. Again, a state-owned enterprise investor could make a 20% investment in a Canadian business and two years later the minister could decide to inquire whether that transaction was an acquisition of control in fact or even decide to review the investment on net benefit grounds.

These points underscore the views of the CBA of the need for additional guidelines and timely opinions to allow for greater predictability in the application of the Investment Canada Act.

Those are my submissions, subject to any questions.

● (1630)

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

We'll move on to our witnesses who are appearing by teleconference.

Mr. Assaf, please go ahead with your remarks, again as briefly as possible, please.

Mr. Dany Assaf (Partner, Torys LLP, As an Individual): Thank you, Mr. Chair and honourable members. Thank you for inviting me. I'm happy to appear before you today.

I hope to keep my remarks very short, as many great points have already been made and I don't want to repeat them.

I come as a senior partner of the law firm of Torys and a practitioner in foreign investment law. I will not make any remarks on the technical implications of the amendments, as the CBA has ably dealt with this. I want to come at this from a different perspective, as a lawyer who has counselled clients on the technicalities of compliance with the Investment Canada Act, and also as a lawyer who has worked in the United Arab Emirates, for example—even today—with major Canadian institutions that are actively seeking capital and partnerships internationally.

It's also relevant that I have recently published a study with the Institute for Research on Public Policy, which you may or may not have seen, called "Foreign Direct Investment and the National Interest: A Way Forward". As I look at these amendments, I see them against a background of what it is we're trying to accomplish with foreign investment in Canada. This should inform how we are amending our act and our policies as we try to balance these two key objectives: furthering the national interest—which others have spoken to—in seeking capital, and ensuring that we have competition for capital in Canada.

While we may not need money from all of the sources around the world, we want to ensure that Canadians have the fullest competition to obtain capital. We want low-cost capital as well as competitive and enduring businesses, both for the sake of business owners and those who work in those businesses, which propel our economy. We want investment that is going to be of benefit to our country. That's something we shouldn't be shy about. We should insist on that, and our act should work in a way that continues to seek those objectives. Specifically, for example, in this case we want to, rightly, in many instances, scrutinize and carefully review acquisitions from state-owned enterprises.

There are a couple of points I would like to emphasize. First, related to my earlier point, the reality in the modern world, which I see on a daily basis with clients, is that we need access to capital pools that are in the hands of what we would term unfamiliar players and new institutions. These include countries we haven't traditionally done business in and institutions such as state-owned enterprises. That is a matter of fact. We need to be very careful of how we craft the rules for ensuring our access to that capital and competition for that capital in our country.

We also have another dynamic, which is something to be proud of: for the first time in a long time, or maybe ever, we have a group of very significant Canadian institutions, such as our pension funds and others, that have now grown to be meaningful players internationally. When we craft our rules, we need to think about how they project out into the world to ensure that we get reciprocal treatment and that we continue to be leaders in promoting free and open capital markets for our own benefit. When we look at how we are going to craft our rules on state-owned enterprises, and we have words like "indirect" or "influence", we need to make sure we're precise. What we don't want to do is set a precedent globally for someone to say, for example, that our pension funds are these types of state-owned enterprises that people should be wary of because they have indirect relations with our governments and public institutions.

● (1635)

This idea of reciprocity is something that's very important today, and we need to look at it both from a defensive perspective and from an offensive perspective, and ensure we get the full benefit of foreign investment rules in our country.

In addition, another point, a general point that relates to the amendments on national security—and just to echo some of the previous comments—is that clarity is important. International, sophisticated players can understand a "no" or a prohibition. What's very difficult is when there is a lack of clarity. A lack of clarity, in the modern world, goes to timing. It's not just relating to whether, substantively, your transaction would pass a certain test. If it will take an indeterminate period of time, again, those markets may not tolerate that type of indefinite timeline. It's in our interest to ensure there is certainty on that front.

I look forward to your questions. I won't elaborate any further.

Finally, we just want to ensure that we understand that in the modern world today, what we say, our actions, and what we project do have a magnifying impact when you're viewing it from the outside in. You can have things that create a greater chilling effect in investment than are necessarily in our national interest.

Thank you.

The Chair: Thank you, Mr. Assaf.

Now, ladies and gentlemen, we'll move to the bottom of the screen.

Mr. Rowlinson, go ahead with your remarks as briefly as possible as well, please.

[*Translation*]

Mr. Mark Rowlinson (Assistant to the National Director, United Steelworkers): Thank you very much for having me.

As it was mentioned, I am the Assistant to the National Director of United Steelworkers.

United Steelworkers is among the largest private sector unions in North America. We represent over 200,000 members in Canada and over 800,000 members across the continent. United Steelworkers is the most diverse union in Canada. It represents women and men working in all sectors of the economy.

Our union has long believed that the provisions of the Investment Canada Act and its enforcement mechanisms are not enough to make foreign investments in Canada beneficial for our members and for all Canadians.

The recent experiences involving Vale Inco, U.S. Steel, Rio Tinto and other major foreign investors add more urgency to those amendments.

● (1640)

[*English*]

I want to talk briefly with you about some of our experiences with foreign investment under the Investment Canada Act, and particularly about U.S. Steel. As you may know, U.S. Steel purchased the former Stelco out of insolvency in 2007. That purchase was, of course, approved under the Investment Canada Act, and U.S. Steel made certain undertakings under the act. Within two years of that investment, U.S. Steel promptly locked out 1,000 of our members at Lake Erie in an ultimately successful effort to get them to give up on their defined benefit pension plan.

To its credit, the Government of Canada ultimately launched a lawsuit against U.S. Steel for its failure to live up to its undertakings under the Investment Canada Act, a lawsuit in which we participated. During the time of that lawsuit, U.S. Steel also locked out our members in Hamilton for a full year, from 2010 until 2011, again in an effort to attack our defined benefit pension plan. That lockout was settled in October of 2011. In December of 2011, the lawsuit was also settled by the Government of Canada, with no notice to us whatsoever, and for relatively trivial further undertakings by U.S. Steel that, to my knowledge, it has yet to live up to.

The dénouement of this story is that less than a month ago, U.S. Steel locked out our members in Nanticoke, Ontario, again seeking further concessions.

The long and short of it is that U.S. Steel has never lived up to its commitments under the Investment Canada Act. The government has never enforced those commitments. And we've seen that pattern repeat itself over the last decade over and over again.

We saw that pattern with Vale, which purchased, of course, the former Inco. Since then we have experienced a strike of one year and a strike of 18 months in Labrador, again as the company has sought further concessions from its workers.

We saw that pattern with Rio Tinto, the second largest mining company in the world, which purchased Alcan and promptly locked out our members in December 2012 for six months in an effort to contract out much of the work our members were performing.

Our experience has been that the “net benefit to Canada test” that has been applied by the federal government has lacked any kind of transparency and has been completely insufficient to protect our workers, our members, and the communities in which these businesses have been operating.

I want to make a couple of quick comments about the amendments that are now being proposed and then make a few final observations.

We understand that there are obviously particular issues with respect to investments by state-owned enterprises, but we don't think the amendments that are currently being proposed are going to have any effect on the kinds of investments that I have just outlined for you and that have been extremely difficult for our members. If anything, we are especially troubled by the increase in the review threshold to $1 billion from the current $300,000, I think, which will mean that large foreign investments can be made without any review whatsoever under the Investment Canada Act.

I would note, for example, that the U.S. Steel takeover of Stelco was only a $1.1 billion takeover. Under these current rules, large takeovers could occur by foreign investors with no review whatsoever, as I understand the amendments.

[*Translation*]

I want to conclude by recommending certain changes we feel are essential.

First, the public, the community and the workers should participate in the review of public investments.

Second, the commitments made by foreign investors should be part of a transparent process.

Third, new approval criteria should be introduced to ensure that each community can make progress and to take into account the interests of current and retired workers of the companies affected by the investments.

[*English*]

Thank you very much.

I look forward to your questions.

The Chair: Thank you, Mr. Rowlinson.

Now we'll move to Mr. Stanford, and again, be as brief as possible, sir.

Mr. Jim Stanford (Economist, National Automobile, Aerospace, Transportation and General Workers Union of Canada): Thank you, Chair and members of the committee.

I work as an economist with the Canadian Auto Workers union, which also represents about 200,000 members in about 16 different sectors of our economy, including manufacturing, resources, transportation, and services.

Our union welcomes foreign investment to Canada if it enhances Canada's capabilities, adds to our productive capacity, creates jobs, and accumulates real capital assets or technical knowledge. Many of our most important industries, such as the auto sector, are largely or entirely foreign-owned. They have added immensely to our economic development and prosperity.

But not all of the effects of foreign investment are positive. There are inherent risks and costs with any foreign takeover, including the loss of decision-making control to non-residents, the long-run payout of interests, profit, and dividends to foreign owners, and the risk that foreign investment will qualitatively shape Canada's economy in ways that we do not want.

One trend in this regard that is especially concerning to us has been the role of incoming foreign investment in enhancing Canada's dependence on the extraction and export of raw minerals and resources. Foreign direct investment into the resource sector has been an important mediating factor in the exchange rate over appreciation that has damaged many other Canadian export industries over the last decade.

As an economist, I question the general statement that Canada inherently needs more foreign capital for the future development of our economy. Even in the resource sector, Canada is not short of capital in any real economic sense. In fact, we export capital. Canadian companies invest more FDI abroad than foreign companies invest here. Canadian companies have access to enormous liquidity to finance their real investments here, both through their internal assets, which include over $600 billion in cash and short-term financial assets—the so-called dead money today—and through the operation of a banking system that is one of the strongest in the world. The debt-equity ratio of Canadian non-financial businesses is lower than it has been in decades.

In the resource sector, in particular, there's no indication that our capacities are also constrained by a lack of know-how—that is, by a shortage of proprietary intellectual capital or technology. To the contrary, recent takeovers of Canadian resource firms, including the CNOOC-Nexen transaction, were in fact motivated by foreign desire to purchase our know-how.

In some sectors, such as manufacturing or some specialized services, a case could be made that incoming FDI provides proprietary technology, engineering and design advantages, global marketing opportunities, or other benefits. But it's hard to see those tangible benefits in the case of foreign takeovers of resource-producing assets. Those takeovers seem to constitute a straight transfer of control over a non-renewable asset. The investors are not building something in Canada; they are buying something that they hope will generate large rents in the future. In my judgment, foreign resource takeovers that add no value to our actual productive capacity should normally be refused on net benefit grounds.

We described our views on the costs and benefits of FDI in more detail in our submission to the 2008 competition policy review panel that Mr. Facey mentioned earlier. I will forward a copy of our full submission to the committee for your deliberations.

Regarding the Investment Canada Act, the principle of a net benefit test is a valid one, in our view. It recognizes that there are costs as well as benefits to any foreign direct investment. Those two must be evaluated and net benefits should be maximized as a goal of policy. But the operation of that test within the current Investment Canada Act is vague, opaque, largely unenforceable, and the whole process is secretive, arbitrary, and hence politicized. In our view, the Investment Canada system should be fundamentally overhauled.

Since 1985, under the ICA, there have been over 15,000 acquisitions of Canadian companies by foreign firms. Of those, barely one in ten were even reviewed by Investment Canada, and of those, all but two were approved. The two that were rejected, MDA and Potash, had become political hot potatoes for the governments of the day. While I'm glad that both of those takeovers were turned down, our system for regulating foreign investment should not depend on public opinion at any point in time.

● (1645)

The president of the CAW, Ken Lewenza, wrote to Industry Minister Paradis last year after the closure of the locomotive plant in London, Ontario, by the Caterpillar company, which had purchased that plant from former owners only months earlier. That terrible chain of events revealed deep flaws in the Investment Canada system. Mr. Lewenza's letter outlined five key changes to the ICA that our union proposed, and I will also forward that letter to your committee for reference. To list the five changes, they are: one, improved transparency; two, stakeholder input; three, tightening up loopholes in the act, including a lower threshold for review, and the review of indirect acquisitions; four, a clearer system for defining and measuring Canadian costs and benefits; and five, the ability to impose and enforce commitments and conditions.

In contrast, the changes to the Investment Canada system that are proposed in this legislation before you do not satisfactorily address any of those issues. Bill C-60 establishes a differential process for foreign state-owned corporations, including a lower threshold for their review and broad and arbitrary provisions regarding how foreign state-owned enterprises are identified and how effective control is determined.

This approach is rooted in an assumption, unjustified in my view, that privately held foreign companies will act in ways that are fundamentally more compatible with the Canadian public interest. I do not think Canadians should trust a foreign privately held corporation to act in line with our interests any more than a foreign state-owned company. The threshold should not be raised for any of the acquiring companies.

The arbitrary focus on state-owned enterprises contained in this legislation misses the bigger problems with the existing Investment Canada system. These provisions will clearly give the minister more flexibility and authority to reject future takeovers from SOEs, but in ways that are even more opaque and arbitrary than the current system.

Finally, in concluding, given the important and lasting effect of these measures and the complexity of their effects, as we've already heard in this hearing today, in my view it may not be appropriate to consider these measures within the context of the broader budget implementation bill. That is how the last set of changes to the Investment Canada Act were considered and implemented in 2009, and we already know that those changes were not adequate to the task. I believe we would be better served by a more thorough and careful consideration of the costs and benefits of foreign direct investment through a focused, stand-alone legislative initiative.

With that, I thank you, and I look forward to our discussion.

Thank you.

● (1650)

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

Members, with a little bit of calculating we'll have this first round and that will be it. We'll excuse the witnesses and go to our final conversation. I just wanted to advise you of that so you can parcel out your time as best as possible.

Mr. Lake, for seven minutes.

Hon. Mike Lake (Edmonton—Mill Woods—Beaumont, CPC): Thank you, Mr. Chair.

I thank the witnesses for coming here today.

I'm going to start with Ms. Campbell, if I could.

I'll start with just a little bit of context. Many commentators around the world have talked about the strength of the investment climate in Canada and the strength of the economy in Canada. I think *Forbes* magazine ranked us the number one country in which to invest. Tom Donohue, president of the U.S. Chamber of Commerce, was quoted as saying, "The great Canadian miracle is something we should follow." Other commentators have said similar things.

What is it about the climate here versus those of other developed countries? What factors have led to this relative economic success compared to other developed countries as we've gone through a pretty difficult global time over the last several years?

Ms. Ailish Campbell: I would just say a few things very briefly. The Canadian economy is, of course, a living and breathing entity, so as I commend, first and foremost, our bank regulators and officials at the Bank of Canada, as well as those in our supervisory organizations that oversee financial institutions—we obviously can be very thankful that we're not here today talking about taxpayer dollars that need to go to recapitalize banks and financial institutions. There are also, obviously, the strong financial underpinnings of our economy. We are open to foreign direct investment, which from the very inception of our country has been part of our development. I would point to strong framework legislation on the part of the government, our dynamic labour markets and educational institutions, and a labour force that is able to move to opportunities and retrain itself. We have one of the lowest unemployment rates of the advanced economies. We should be very pleased about that.

We should also, of course, look to our business leaders who have grown and developed Canadian firms. As Mr. Stanford pointed out, some of the most successful firms in Canada are, of course, multinationals. This is an important part of our dynamic economy, but I'd commend to this committee that we can't rest on our laurels. Canada is a relatively small economy in the global context and we must maintain, I would argue, not just one of the best regimes in the world, but the best. Why not want to be the best environment in which to do business? I would say that considerations such as the ones you have in front of you today are incredibly important to continuing our economic health, which of course ultimately leads to jobs for Canadians and to prosperity.

● (1655)

Hon. Mike Lake: I have a follow-up question to that, but I'll first say that in regard to Mr. Stanford, the first time I met Mr. Stanford was I think in 2008 when we were going through the committee hearings regarding the auto sector. I think members from all parties actually worked together fairly well at that time to get an understanding about what challenges were faced. We heard a lot about the important investment in the auto sector at the time. I think the government investment that was made at that time served us very well.

When you were talking, the theme I heard was stewardship, in a sense, in all of those things. Over the last six or seven years, we have made some changes to the Investment Canada Act. We introduced the national security provisions, very incremental changes with regard to state-owned enterprises, and obviously with regard to the accountability and transparency provisions most recently, and then with regard to what we're dealing with today.

Will the Investment Canada Act be better because of the changes we're making today?

Ms. Ailish Campbell: I think my colleague Mr. Facey made an important point, which is that every time you change a piece of framework legislation it attracts international attention. It's one thing for me to sit here today in 2013 and say that my advice would be, in an ideal world, to change the Investment Canada Act rarely and with very careful consideration. In an ideal world, we may not have changed it in 2009, 2012, and 2013, but rather have done it a single time.

That being said, I would argue that over the last five years we've experienced incredibly unique global economic circumstances. The financial crisis is one that we hadn't experienced in almost 100 years. There are new forms of global capitalism that are looking to gain majority stakes in, and indeed own, Canadian businesses, which is again something new.

All this is to say that I think the government is reacting and looking forward. I think we'll get the best answer to that question when we look at the foreign investment stocks in Canada, and the ability of our firms, both large, such as our members, and small, such as junior mining plays, that wish to attract capital to Canada.

I think it's too early to say if it's better. I think we can all agree that the government's intention is certainly to make this a better system. I do trust in that intention, but the proof will be in how the act and the SOE guidelines are actually executed. In that regard, I would again underscore my point that, given the broad definition of SOEs before you today in Bill C-60, the government also consider advanced rulings so that entities that don't consider themselves to be SOEs but wonder if they'll be treated as SOEs under this legislation can come in and get some kind of guidance about that. I think that is critical in order to create investor confidence.

The proof is in the pudding. The proof is in the numbers. The stock of investment outflows and inflows is very healthy, and I hope it will continue to be, again with the proper execution of the Investment Canada Act.

Hon. Mike Lake: Fifteen seconds is not going to be enough to get the next answer in.

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

Madame LeBlanc.

Ms. Hélène LeBlanc (LaSalle—Émard, NDP): Thank you very much. I will go right to the question.

Mr. Stanford, I was very interested in your comments. You mentioned the resource sector and how it seems to be highly dependent on foreign direct investment. Could you elaborate on the provision in Bill C-60 regarding the Investment Canada Act? Will it change that course or not? How will it affect the resource sector regarding foreign investment?

● (1700)

Mr. Jim Stanford: My actual point there is not so much that the resource sector is dependent on incoming capital, in the sense that we actually need that capital, otherwise the sector couldn't be developed. To the contrary, my point is that it's become dominated by incoming foreign capital, which has been interested more in purchasing control of the asset rather than in actually building, investing in new capital, new productive capacity, new jobs, and so on. In the oilsands, for example, the majority of the production is now attributed to foreign-owned shares of companies.

I don't think the provisions contemplated in Bill C-60 would affect that. I know that when the government announced its intentions in December, it did indicate that, in general, state-owned enterprise takeovers, in the oilsands sector in particular, would not pass a net-benefit test except under extraordinary circumstances.

Now, I'm not a lawyer, so I'm not an expert on the actual language, but in my review of the proposed amendments, I don't see how that is going to be affected through these amendments. It sounds like it will be more affected through the decision-making of the industry minister on any future oilsands-related transaction. At any rate, I think the focus, again, just on the oilsands itself is arbitrary. I don't know why we would put a fence around that particular resource industry, recognizing that it is, obviously, a uniquely important one, but all of our commodity-based resource sectors have important direct and indirect effects. And if we're concerned about the intended and unintended consequences, if you like, of foreign investment in resource-based sectors, I think we need a more general and transparent approach than what we would see through these amendments.

Ms. Hélène LeBlanc: Thank you.

Mr. Brian Masse (Windsor West, NDP): Mr. Facey, this is just a really quick question. Does this legislation as it stands right now need amendments?

Mr. Brian Facey: Thank you for your question.

I think it would benefit from an amendment to section 37, where we talk about the minister being able to give an advisory opinion. It would be better if the minister was required to do so, or the alternative amendment is to provide for a non-binding advisory opinion. I think that would be helpful.

Mr. Brian Masse: Thank you.

This is quickly to Mr. Rowlinson. Sudbury has been affected by massive amounts of foreign takeovers over the last number of years. How is it related to employment in Sudbury? Have they actually increased employment with the loss of Canadian mining companies now to the foreign takeovers?

Mr. Mark Rowlinson: Employment levels at Vale facilities in Sudbury have been dropping steadily since they purchased the operation, both before and after the year-long strike that was provoked by the company. I don't have the exact employment levels, but roughly a thousand or so people have lost their jobs, and the community has certainly not benefited from the foreign investment from Vale.

Mr. Brian Masse: Go ahead.

Mr. Dan Harris (Scarborough Southwest, NDP): We're tagging in.

Ms. Campbell, you just mentioned that you believe the Investment Canada Act should be changed rarely and with careful consideration. Do you believe that one public meeting with one round of witnesses would constitute careful consideration?

Ms. Ailish Campbell: I would invite parliamentarians to answer that question.

Mr. Dan Harris: That was a very political answer.

Now, Mr. Rowlinson, thank you for proposing some amendments, but are you aware that this committee actually has no ability to make any amendments to this bill?

Mr. Mark Rowlinson: I am now.

What we're proposing is a broad review of the Investment Canada Act. If I can echo what Jim Stanford has said, we don't disagree that the test for foreign investments should ultimately be of the net benefit to Canada and to Canadian communities. The problem we have is with the manner in which that has been enforced and the lack of transparency with respect to the process. What needs to happen, in our view, is a broad review of the operation and implementation of the Investment Canada Act. Clearly, that is not what is contemplated by the very modest amendments found in this legislation.

● (1705)

Mr. Dan Harris: Thank you very much.

Mr. Stanford, you mentioned the takeover of Electro-Motive Diesel by Caterpillar. Caterpillar has also recently shut down a tunnel-boring manufacturer in Toronto, Lovat, one of the world leaders. That's really a move to take away the intellectual property that exists and to move the production elsewhere.

I want to go back to MacDonald Dettwiler, the one instance where a sale was blocked. We have a problem in Canada where anytime a company is getting to a sufficient size, oftentimes that's when it gets taken over. The sale of MDA was blocked. A few years later, MDA actually went and bought a U.S. company, Space Systems/Loral.

Perhaps you could comment about the positive impact for Canadian businesses when they remain Canadian and are given the chance to actually grow and succeed.

The Chair: Please make that comment very briefly.

Mr. Jim Stanford: I agree, sir, that we have a structural problem in our ability to nurture companies beyond the start-up phase through to the medium and larger size of firm, which is so important in order to reach export markets, invest in innovation, and so on. I think the ease of foreign takeovers—especially of the smaller firm, which now under these regulations is under a billion dollars, and that is quite a significant firm—is one of the factors in why Canada has a dearth of globally oriented, successful, medium-sized exporters.

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

We'll now go on to Mr. Carmichael for seven minutes.

Mr. John Carmichael (Don Valley West, CPC): Thank you, Chair.

Thank you to our witnesses.

Clearly, to your comments, the day we live in is much different from the day of 2008, prior to the recession. We would all agree that much has changed.

To the CBA, I appreciate the thoughtfulness of your letter and your presentation. I'd like to ask questions on all three of your points, but I don't have time.

Let me address the first one, Mr. Facey, and I'll read it for the record:

> The definition of state-owned enterprise (SOE) is unclear and, in conjunction with new powers that allow the Minister to deem an entity an SOE, make it difficult to ascertain whether an entity will be treated as an SOE under the ICA. As drafted, even Canadian companies could be subject to the SOE review provisions. The broad reach of the SOE definition engenders uncertainty for all investors.

I wonder if you could speak to your point on the broad range of the definitions. We've heard previous testimony that would suggest that the definition is fairly tight. Just discuss the uncertainty portion of that and how you feel that impacts our thoughts.

Mr. Brian Facey: Thank you, sir. That's an excellent question. I appreciate your comments on the CBA letter.

I think the key point on uncertainty is that there are a number of new phrases introduced. Whether a company is influenced or directed by a foreign state is a new concept; it's not defined. I think that means there is just a little bit more uncertainty. I can tell you that we get calls from foreign investors, and from Canadian investors who would like to partner with foreign investors, asking what it will mean for them, if the transaction is going to be okay. I think that's where we get back to the point that it would be helpful if there were some way of getting certainty from the investment review division of Industry Canada.

The downside of it is not huge, in my submission. The fact is that there are just a few of these transactions that do get blocked, but there is a very large number of these transactions that we get questions about and that investment bankers get questions about.

The short answer to your question is that it would be helpful if there were even a non-binding mechanism, which would not require an amendment, to provide that kind of certainty in a transaction.

Mr. John Carmichael: I'm going to move on from those. I may come back to them if we have time.

Recently we heard testimony that suggested transactions can be structured to circumvent the guidelines. Obviously, we want to do the best we can in making our recommendations.

In a bloomberg.com article on May 9, a lawyer with a Toronto law firm suggested, “People can structure things in a very clever fashion to make them look like a minority, but really they're not...”, and the quote went on.

Could you talk about—and maybe Ms. Campbell could jump in on this as well—what we mean about “in a clever fashion”? Can you give us some examples of how we can use our opportunity here to recommend to the minister and to the act how we can best qualify some of these opportunities?

● (1710)

Mr. Brian Facey: I won't give away all the company secrets about how to restructure transactions.

You're quite right. Every time there's a law, there's always a host of lawyers trying to figure out ways to structure things, whether it's tax, competition, investment, different kinds of laws.

This law is pretty difficult to get around. There's actually an anti-avoidance provision in the Investment Canada Act, so it's very hard to structure things around the legislation and the intent of it.

The new provision makes that tougher. It is harder to structure around something if you have the control-in-fact test, because it's not simply looking at a structural basis. This does move the law and make it tougher to structure around the application of the law. I think this amendment does that.

Mr. John Carmichael: Do you have nothing else you want to give away today?

Mr. Brian Facey: No. I usually charge for that.

Voices: Oh, oh!

Mr. John Carmichael: Ms. Campbell, did you want to jump in on that?

Ms. Ailish Campbell: I think you've just heard...speaking as an economist, economists are smart, but lawyers are clever.

Voices: Oh, oh!

Ms. Ailish Campbell: The key provision is this control in fact, which is unclear because it's a new facet to the Investment Canada Act. What you're hearing is that businesses want predictability and clarity. I think it's fair enough to say there are always surprises in life, but people don't want to be shocked.

Some work to help perhaps this idea of guidance or opinions, non-binding ones, could help flesh out some of this stuff. So those of us who are only smart and not terribly clever could have the benefit of the Minister of Industry's guidance.

Mr. John Carmichael: I have a follow-up to that. Do you think the proposed amendments protect the integrity of the policy statement that was made on December 7, 2012? In order to maintain the integrity of the policy intent, would these amendments be necessary? Otherwise there is a deficiency in the legislation that allows for loopholes or ways to circumvent the policy.

Mr. Brian Facey: I'm not so sure the law, as it was, created a whole lot of loopholes.

As I said, there is this anti-avoidance section that prevents you from structuring around the entire act. I do think this amendment makes that even more clear. In that sense, I do think it makes it more difficult.

I would only say that I don't think I've ever had a client who wanted to buy a Canadian business to shut it down. Generally, people are coming into Canada to invest. It's quite a process to negotiate undertakings. You have to commit the capital expenditures, commit to employment levels. You have to do all sorts of things—share technology from global operations with Canada. Those transactions are usually motivated by quite good intentions.

Mr. John Carmichael: Thank you.

What's my time, Chair?

The Chair: You have 20 seconds.

Mr. John Carmichael: I'll end there. Thank you very much.

The Chair: Thank you, Mr. Carmichael.

Mr. Regan, you have the last questions.

Hon. Geoff Regan (Halifax West, Lib.): Thank you very much, Mr. Chair.

I want to begin by polling the witnesses. If you don't mind, I'm going to say your name and ask you if you were consulted by the government with respect to the proposed changes to the Investment Canada Act.

Ms. Campbell.

Ms. Ailish Campbell: No.

Hon. Geoff Regan: Mr. Facey.

Mr. Brian Facey: No.

Hon. Geoff Regan: Mr. Krane.

Mr. Joshua Krane: No.

Hon. Geoff Regan: Mr. Assaf.

Mr. Dany Assaf: No.

Hon. Geoff Regan: Mr. Rowlinson.

Mr. Mark Rowlinson: No.

Hon. Geoff Regan: Mr. Stanford.

Mr. Jim Stanford: No, I wasn't.

Hon. Geoff Regan: Thank you very much.

We heard from my friend, Mr. Carmichael, who mentioned previous testimony. The testimony we've had so far has only been from officials from Industry Canada a couple of days ago. One thing they testified to, amazingly, was that Industry Canada did not conduct any analysis to examine the question of whether or not the proposed amendments would actually restrict global economic interest in investing in Canada because of the difficulties that are presented by these amendments, and the uncertainty.

I'd like to begin by asking Mr. Assaf, what do you think of that response? Also, why do you believe the ambiguity around foreign direct investment is creating uncertainty among foreign investors?

● (1715)

Mr. Dany Assaf: I think we do carry some risk by not undertaking an analysis of where the capital resides in today's world. This plays into one of the comments I made in my introduction, and which Mr. Stanford also talked about, as to whether or not we have enough capital in this country.

It is not about just having capital in this country. Again, it's about competition for capital. Wherever we don't see competition in Canada itself.... Canadians are not going to provide one another with capital or with capital on great terms just because we share a passport or residency. We have allegations in many industries in Canada—some are protected by foreign takeover—where we feel the cost to the consumer is too high.

We need to think about where we are in today's economy and about the shift of capital and markets from west to east. We need to be poised when we look at our history and what it is that we're able to look forward to in continuing to maintain our economic growth and our standard of living in a world of 7 billion people. It's a question of math, to a great extent, of understanding where Canadian companies are going to do business and where Canadian companies are going to get their capital.

That is why an analysis of where those markets and that capital reside in the 21st century is very important, as is also understanding precisely the message we're giving to the rest of the world when we make changes to our act that create uncertainty or an impression that we are not as open for foreign investment as we previously were.

Hon. Geoff Regan: The government has been criticized for failing to appreciate the potential chilling effect of significantly changing our foreign investment rules several times in the past year as it was making controversial decisions.

The government has actually denied that there has been a decline in merger and acquisition activity, although we saw that in the first quarter of this year, as we saw reported this week in the *Globe and Mail*. or they're saying that it's due to global economic conditions.

Would you care to comment, Mr. Facey or Mr. Krane?

Mr. Brian Facey: Yes, I think there has been a bit of a slowdown in terms of the M and A activity. I don't think it's a result of changes in our foreign investment law that have come out, or our perspective, or the decisions that were made in December. I think it's probably reflective more of the global economic climate.

I would say this. I think the fundamental thing about the changes before you is that, number one, there is more uncertainty. We said that in our letter. There is a question: am I a state-owned enterprise? That kind of uncertainty does provide a bit of a chill. We get asked a lot of questions, such as, “Can we do this investment, or are we going to be mired down in six months of unpleasant publicity and problems?”

We're comfortable giving advice on it, but clients would like to know with some certainty whether the government agrees with that advice. That's why what we've said is that to the extent there's more uncertainty, it would be helpful to have some sort of process, some sort of protocol, to have an advance ruling on that, which I think is the same thing my colleague Ailish has mentioned as well.

Hon. Geoff Regan: There's been no indication from the government that it will actually provide that. Is that right?

Mr. Brian Facey: I haven't sought that from the government and I don't believe we've seen that, although there has been an increased use of guidelines, I'd say in the last 12 months, from investment review.

Hon. Geoff Regan: Mr. Krane, let me ask you what you think of this process. It provides us with...well, actually, it turns out that it's supposed to be two hours of hearing from any witnesses other than officials from Industry Canada as we consider the provisions in Bill C-60.

I guess finally, along with that, what should the committee recommend to the finance committee on these provisions?

Mr. Joshua Krane: I'm going to keep my response brief to say that an hour and a half does not do justice to the proposed amendments to the Investment Canada Act. There are still a number of questions that need to be considered regarding the drafting of the provisions, including the scope of the definition of “state-owned enterprise” and the potential retroactive application of the control-in-fact test.

On those two bases alone, I think this committee should consider further study of the changes to the Investment Canada Act. That would be my recommendation.

● (1720)

Hon. Geoff Regan: Mr. Assaf, would you like to comment on that?

Mr. Dany Assaf: There is a disconnect today between what our national interest is in terms of foreign direct investment, and where and what I think a large portion of the Canadian population sees that trade-off.

What we're seeing also is that iteratively we are getting more strict and tougher. Each decision, each policy recommendation, each amendment to the act, over recent times primarily, has restricted something or made it a little more prohibitive. Each one has an internal logic that does make sense, but I think we do need to take another, more sober look at what foreign investment means in the modern world, in the 21st century, and looking ahead for this generation, and in addition to that, the transparency that is being conveyed, both to foreign investors to prevent this chill and overshooting the mark, and also to Canadians, to understand why it is that we are open to foreign investment and what it is specifically we wish to benefit from that. I think this broader discussion needs to be undertaken.

The Chair: Thank you, Mr. Assaf.

On behalf of the committee, I want to thank you. I know you're all very busy and your time is precious, so we want to thank you very much for your testimony.

We'll be suspending for two minutes, and we'll be going in camera to deal with the business at hand.

Thank you very much.

[*Proceedings continue in camera*]