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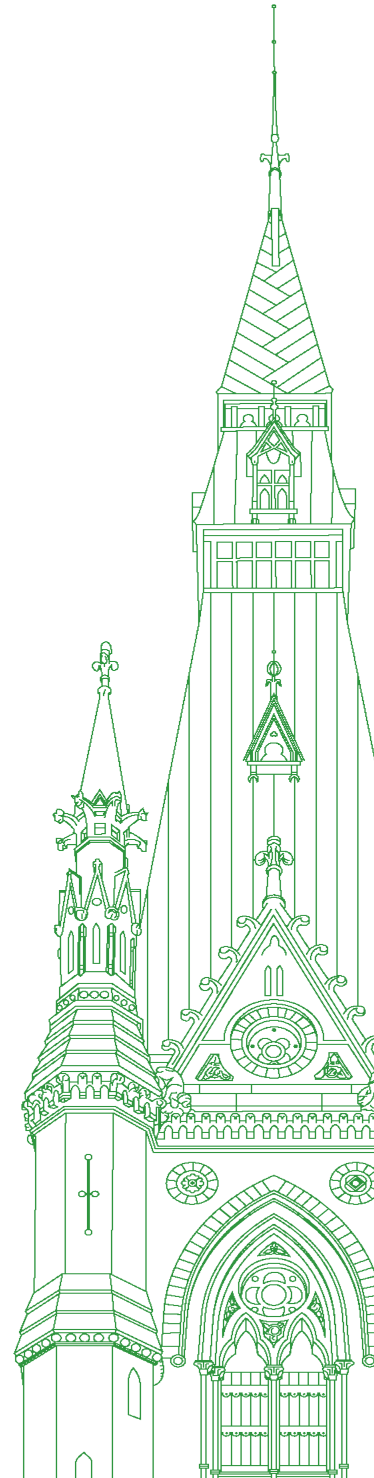

Chair: The Honourable Judy A. Sgro

Standing Committee on International Trade

Friday, March 26, 2021

● (1310)

[*English*]

The Chair (Hon. Judy A. Sgro (Humber River—Black Creek, Lib.)): Good afternoon, everyone.

I call this meeting to order. Welcome to meeting number 21 of the House of Commons Standing Committee on International Trade.

Today's meeting is webcast and is taking place in a hybrid format, pursuant to the House order of January 25, 2021.

Pursuant to Standing Order 108 and the motion adopted by the committee on October 23, 2020, the committee will proceed with its study of the investor-state dispute settlement mechanisms.

I would like to welcome our terrific group of witnesses we have here today, a very high-level panel, to provide us with sufficient information on the ISDS and for the debate that will follow.

I could take all afternoon to list all of the contributions of this group of witnesses. I don't want to take away that time from their presentations and from our committee, so I'm going to just welcome the Honourable Yves Fortier from Cabinet Yves Fortier; Barry Appleton, professor at New York Law School; Charles-Emmanuel Côté, professor at Université Laval; Armand de Mestral, emeritus professor of law at McGill University; and Patrick Leblond, associate professor at the University of Ottawa.

Welcome, and thank you to all of you for sharing your expertise and your time with us today.

Mr. Fortier, you have the floor, please.

[*Translation*]

Hon. Yves Fortier (Cabinet Yves Fortier, As an Individual): Thank you.

Good afternoon, Madam Chair, distinguished members of the committee and fellow guests.

I'd like to begin by thanking the committee for inviting me to give evidence today in my capacity as an arbitrator and as a lawyer who specializes in international arbitration.

I'm here today to report on how highly successful the ISDS investor-state dispute settlement mechanism has been.

The one message I would really like to get across to you today is that ISDS works. Canada should continue to advocate this option in its bilateral and multilateral treaties.

[*English*]

Mr. Chandra Arya (Nepean, Lib.): Madam Chair.

The Chair: I'm sorry, Mr. Fortier. Could you just hold on for one second?

Yes, Mr. Arya.

Mr. Chandra Arya: I can barely hear the translation. The French language is dominant and the English language is a bit muted.

The Chair: Okay, just give us a second.

Mr. Sukh Dhaliwal (Surrey—Newton, Lib.): On my end, it's fine.

The Chair: Mine is working. How about the others?

Mr. Ziad Aboultaif (Edmonton Manning, CPC): It's working here.

Mr. Sukh Dhaliwal: It works here too, Judy.

The Chair: Okay.

Christine, have you mentioned it to the translators?

The Clerk of the Committee (Ms. Christine Lafrance): IT is in the room and he's looking after that.

Mr. Chandra Arya: Okay, let's not hold.... Please continue.

The Chair: Okay.

Mr. Fortier, let's continue, please.

Hon. Yves Fortier: You don't want me to start from the beginning, do you?

The Chair: No. Your time with us is very valuable, so please continue.

Hon. Yves Fortier: Very well.

[*Translation*]

ISDS, as you know, gives foreign investors protection against the actions of states in which they have invested. Treaties that promote and protect investments provide foreign investors with protection against illegal expropriation, as well as fair and equitable treatment. They require states to offer the same conditions to foreign investors as to their own nationals. In short, they provide a dynamic and welcoming environment for foreign investors.

Canada's policy on promoting and protecting foreign investment, since the introduction of NAFTA in 1994, has been extremely successful. I believe that it's essential for Canada to continue to provide foreign investors with ISDS protection to maintain Canada's international economic appeal and reputation.

Canada's recent trade agreements are comprehensive, modern and detailed. Removing ISDS from the agreements might suggest that Canada is not a reliable and serious partner.

I spoke on this very topic at American University Washington College of Law in October 2019, before the pandemic.

[*English*]

The debate about the merits of arbitration is not new. International arbitration has long been the object of hostility and hyperbole. The World Bank's own International Centre for Settlement of Investment Disputes has often been a lightning rod for criticism. Detractors have accused the institution of bias in favour of corporations and lamented its prohibitive costs and lack of an appeal mechanism.

In my humble view, most of these critics are unfamiliar with the world of international arbitration. They call for ISDS eradication. They claim that ISDS lacks "the normal safeguards of a serious legal system". Despite the consistently verified fact that states win more investment cases than they lose, they insist on the old canard that the system is biased against states and encourage states "to actively explore the termination of ISDS provisions".

These critics usually propose no alternative to ISDS. Some envision a multilateral investment court with permanent members and an appellate mechanism. In its submission to UNCITRAL working group III, the European Union recently stressed three main categories of "concern" with ISDS: one, "Lack of consistency, coherence, predictability and correctness of arbitral Decisions by [arbitral] tribunals"; two, concerns pertaining to "Arbitrators and decision makers"; and three, "Cost and duration of ISDS cases".

This standing court would resemble the promised but yet to be delivered CETA investment court system. The European Union proposes a permanent body comprised of two levels, which are a first-instance tribunal and then an appellate tribunal, staffed with full-time adjudicators held to strict ethical and diversity requirements.

● (1315)

[*Translation*]

I'll be referring in my evidence to the European proposal, in order to underscore the advantages of ISDS, and also talk about existing reform proposals.

[*English*]

In Washington at the end of 2019, I said that for decades international arbitration has developed and improved, achieving success in new markets and on an ever-increasing scale. In 2018, parties registered a record 56 cases at ICSID, which was a record. The year 2018 was also a record-breaking year for the London Court of International Arbitration and the ICC International Court of Arbitration.

I stress that the same year, in a wide-ranging study of practitioners, academics, judges, third party funders and government officials, 97% responded that international arbitration is their preferred method of resolving cross-border dispute.

Yet, for decades, we've been told that arbitration must be stopped. Recently, the death chants have intensified. You've heard some of them recently. Investor-state dispute settlement, ISDS, "should be dismantled and either discarded or rebuilt from scratch".

[*Translation*]

Debate on the merits of arbitration is nothing new, and extends beyond Canada's borders. It is a heated subject of debate. The most virulent criticisms condemn an unfair system that always rules in favour of the multinationals and makes contradictory decisions at prohibitive cost. Very often, these criticisms come, at least in part, from those who don't benefit from the system's strengths. The reality is much more nuanced.

I believe that Canada needs to keep ISDS in its agreements. I'll go over what I said in Washington once again.

● (1320)

[*English*]

The popularity of arbitration is not circumstantial. It stems from advantages inherent to arbitration as a process for settling disputes. International arbitration has outlasted, and will outlast, its critics because it functions well.

Fortunately, in recent years, many members of the international arbitration community have reacted vigorously to this contestation. Gary Born, an eminent U.S. international arbitrator, recently said that to "ensure [our own] survival", we must stress "the five Es" of arbitration: "efficiency, expedition, expertise, evenhandedness, and enforceability."

[*Translation*]

I'd like to briefly describe the advantages of ISDS and, at the same time, the reasons why I believe that this mechanism should continue to be part of Canada's trade and foreign policy arsenal.

As you all know, arbitration is a mechanism based on consent. It allows for the selection of a neutral and respected arbitrator to settle conflicts definitively. Giving the parties the opportunity to choose their own arbitrator, generally a specialist in the field, is a fundamental component of arbitration. Once the final ruling is made, it can receive recognition from the vast majority of countries under the New York Convention.

[*English*]

Again, I quote from my conference in Washington. These fundamental characteristics at the heart of arbitration have been scapegoated for perceived problems with arbitration. Most notably, critics submit that ad hoc party appointees may be biased. Resolving disputes definitely without an appellate process may force parties to live with flawed decisions. Now, in my view, such criticism mistakes advantages for disadvantages. These characteristics are the hallmarks of arbitration that make the process successful; they are not flaws that need correction.

I commence with the appointment of arbitrators. The European Union’s proposal refers to arbitrator bias, procedural delays and gender disparity, caused, the European Union says, by the fact that parties select their own arbitrator. Well, yes, this is of course a principal difference between arbitration and litigation. Each party to an arbitration selects one of his adjudicators.

Proponents of a standing body claim that it would improve ISDS’s perceived lack of impartiality. Their reasoning, in my view, is somewhat suspect and myopic. A standing body would supposedly “insulate decision-makers from 'powerful private interest'” and eliminate the pressure to deliver awards that will encourage parties to reappoint them. Whether a standing body of arbitrators is more independent than arbitrators appointed by the parties depends on one’s perspective.

Are we prepared to deny disputing the right of parties associated with arbitration to select decision-makers with the expertise, experience and overall DNA they consider essential for the fair resolution of their dispute, and substitute women and men of a quasi-judicial institution endowed with general, as opposed to specific, qualifications? I don’t think so. The system as it exists today works. Eliminating the appointment by parties of their adjudicators is not a guarantee that the system would be improved.

[*Translation*]

I will now very briefly address the second aspect of the ISDS that is frequently criticized, which is the absence of an appeal process. This has been condemned as a weakness of the mechanism, but I feel that it is instead one of its greatest strengths. Indeed, the fact that decisions are definitive and avoid the inherent delays of the judicial process is essential to the mechanism.

[*English*]

In the arbitration system as we know it, it should not be assumed that inconsistency between awards is necessarily problematic. It is a truism that different results may stem from the arbitrators’ different backgrounds, experience, or expertise. Factual matrices may be different. Every dispute is unique, and what may be seen as a mistake today may be found tomorrow to be justified as a valid distinction that fits the unique factual matrix of a case.

● (1325)

[*Translation*]

Although many continue to fuel arguments over the purported failings of arbitration, the speed at which the system has developed and continues to do so beyond Canadian borders is remarkable. In Asia, whether in Hong Kong, Singapore or China, all the recent statistics show record numbers of cases registered with arbitration bodies.

Its popularity is also evidenced by the inclusion of ISDS in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, and in China's new Silk Road project called the Belt and Road Initiative. China has said that it will create an international tribunal for disputes related to the project. China's confirmed interest in arbitration is a further argument for keeping ISDS.

To conclude, I'd like to make a few comments about recent geopolitical developments that should convince you of the need to continue to include ISDS in Canadian treaties. As parliamentarians, you are no doubt very well informed about the situation.

A number of countries have recently said that they were against international trade, as evidenced by Trumpism and the imposition of tariffs. Arbitration thus becomes even more attractive as the allure of domestic courts declines. Brexit and trade tensions between the United States and China will have little or no effect on arbitration.

[*English*]

I read recently a statement by Eric Tuchmann: “In an unruly world, international arbitration offers a safe haven for business disputes”. Any perception that certain jurisdictions are unfriendly to foreign businesses will simply encourage those businesses to take their capital elsewhere or to avoid domestic courts and seek out neutral forums where they can settle disputes with the assistance of impartial and skilled facilitators.

Arbitration's success is not circumstantial. Its popularity has grown, despite the criticism it faces, because it is a proven and effective method for settling complex disputes that do not lend themselves well to adjudication in domestic courts. Given its track record for success, as well as the increasing uncertainty and risk on our fragile planet, arbitration's success should continue.

[*Translation*]

I believe that Canada should continue to include ISDS in its bilateral and multilateral agreements.

Thank you, Madam Chair and members of the committee.

[*English*]

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

We'll go on to Mr. Appleton, please.

The Clerk: Mr. Appleton just came in. Can we go to the next witness, please?

The Chair: We'll hold Mr. Appleton for a minute until he gets settled.

Go ahead, Mr. Côté, please.

[*Translation*]

Mr. Charles-Emmanuel Côté (Professor, As an Individual): Thank you, Madam Chair.

I too would like to thank the members of the committee for their invitation to appear this afternoon to discuss ISDS. I'm honoured to share this forum with others I have had the pleasure of encountering in the course of my career, namely Mr. Fortier, Mr. de Mestral and Mr. Leblond.

My perspective is that of an academic who has had an interest in ISDS for some 20 years. I would like to step back and put a number of ISDS issues into perspective. I'd like to begin by saying that I'm generally in agreement with Mr. Fortier.

It's important to remember that foreign investment existed before, that it still exists today and that it will continue to exist whether or not there is an ISDS mechanism. The ISDS is one of several considerations to be weighed in making investment decisions. If ISDS is were to disappear, foreign investment would not disappear. Foreign investment will always continue, just as foreign investment disputes will continue, whether or not ISDS exists. The disappearance of ISDS would not cause such disputes to disappear. Basically, ISDS is a tool or instrument for the settlement of the kinds of disputes that have always existed and that will in any event continue to exist.

Another factor that needs to be given consideration is the relative size of the amounts at issue—the amount of the claims being made under ISDS, the actual amount of damages eventually awarded, and the value of foreign investment stocks in a particular state. When these figures are put in perspective, it can be seen that apart from a number of fairly well-known exceptions, damages awarded amount to only a tiny fraction of the capital invested in states, which they need to grow their economies.

I'd also like to discuss Canada's changing stance towards ISDS, and particularly its overall position on foreign investment.

Until the 1990s, Canada was essentially a net importer of foreign capital. Since then, Canada has been a net exporter of foreign capital. Canada belatedly joined the shift towards investment agreements and ISDS. It took until the late 1980s for it to sign its first such agreements. However, it caught up quickly, in practice, because although ISDS had been included in treaties in the early 1960s, it really only gathered momentum in the 1990s. Canada was therefore one of the pioneers in the use of ISDS. I am referring here to the use of ISDS against Canada, because there were numerous claims from American investors.

I was looking at the numbers again yesterday. Of the countries most frequently sued under ISDS, Canada is ranked seventh. A total of 30 claims were made against Canada, 29 of which were from American investors. They did not always win, and we can return to this later. Canadian investors also ranked fifth in terms of most frequent users of ISDS globally. This must not be forgotten in reviewing Canada's stance towards ISDS. Thus far, 55 claims have been made by Canadian investors abroad.

I'd like to comment briefly on the origins of the ISDS mechanism.

As I was saying earlier, foreign investment disputes will continue to exist, whether or not there is an ISDS mechanism. All states around the world are bound by the international custom that provides minimal standards for dealing with foreign individuals and goods. In the absence of an investment agreement that spells out the protections included and an ISDS mechanism providing arbitration for investors that have been harmed and the state that harmed them, the system of international law works as follows: the foreign investor's state of nationality or state of origin must make an international claim against the state that wronged the foreign investor. This is what is called diplomatic protection. It's a system that has been around for a long time.

● (1330)

The downside of the system is that a dispute between a private investor and foreign state turns into a dispute between two sovereign states. Historically, this has contributed to deteriorating international relations. There have also been all kinds of diplomatic protection abuses, mainly before, but also in, the 20th century.

States therefore sought to avoid this politicization of investment dispute settlements. Hence the emergence of the idea of establishing direct joint international remedies between the wronged investor and the state in which the investor invested, rather than involving the investor's state of nationality. Several bodies were established, like joint arbitration commissions and joint tribunals, until investment agreements began to include provisions for the ISDS system.

When all is said and done, I cannot stress too strongly that beyond its technical advantages, ISDS primarily provides a political advantage by helping to depoliticize the settlement of investment disputes. It means that a state is not required to get involved in problems being experienced by its investors abroad. It prevents the souring of relations between investors' state of residence and the foreign states in which they invest.

For example, many Canadian investors brought claims against Venezuela for all kinds of reasons. All of these were dealt with by the ISDS process and Canada, as a state, did not have to trigger an avalanche of international claims against Venezuela. Each of these disputes remained limited matters between the company that was wronged and the state in question, in this instance, Venezuela.

Another example is the high-profile Keystone XL pipeline. For the time being, it's still possible to bring a claim under former NAFTA Chapter 11. However, if a situation like this one were to occur in a framework where there was no longer an ISDS mechanism, once the internal remedies had been exhausted, on the assumption that there are such remedies in the United States, Canada would be subject to political pressure and would have to decide whether or not to bring a claim against the United States, whether diplomatically or in court. A company's problem would accordingly become Canada's problem. It's important to keep this aspect in mind.

Problems with ISDS were brought up frequently and I will therefore not address these here. We can return to them in the discussion, if required.

I'd now like to mention a number of options and recommendations for Canada.

First of all, it would be a good idea for Canada to develop a foreign legal policy that is more in tune with ISDS. Canada has in fact embraced just about all of the scenarios being talked about in connection with ISDS. The first suggestion was to completely abandon ISDS in the Canada-United States-Mexico Agreement. Then, there was an in-depth reform of the system put forward by the European Union, which proposed establishing an investment tribunal and an appeal court. And finally, in its bilateral agreements and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Canada maintained the status quo, merely making some ad hoc improvements to the existing system.

It is therefore difficult at this time to ascertain the underlying mindset for all these decisions. It seems to me that Canada should have a more considered and systematic approach. What should this approach be? In my view, it's imperative to begin by identifying the needs of Canadian investors abroad. It's impossible to come up with an approach without being aware of the needs of Canadian businesses investing abroad. It's also essential to establish whether Ottawa wants the responsibility of settling disputes on behalf of all Canadian companies abroad if the decision is made to abandon ISDS. It's important to keep this in mind.

● (1335)

Should our approach be matched to our trading partner's level of development? That's more or less what we appear to be doing, without actually saying so. If that's what we want, it seems to me that our decision should be based on analysis, rather than simply on what the negotiating partner wants. A well-thought-out and consistent policy seems to be lacking in this area.

I believe that some fundamentals need to be dealt with.

One of the problems stemming from Canada's rather kaleidoscopic approach is that there are still some loose ends that need to be tied up. For example, even though Canada is a member of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, it still has some bilateral agreements, including an ISDS mechanism, with some states that are also its CPTTP partners. This peculiar approach means having sets of coexisting treaties with different obligations. It allows investors to choose the most recent treaty, or the oldest, depending on what they want.

Other states, like Australia, systematically abrogate previous treaties when they sign a multilateral treaty that includes the same parties. It's surprising that Canada hasn't done the same.

Canada did so, however, with the European Union. Hence, if the CETA chapter on investment comes fully into force, then it is expected that the six or seven bilateral treaties that Canada still has with European states will be abrogated.

It's unusual to take two different approaches in this area. Once again, I find Canada's approach inconsistent.

Another problem we have is that Canada still has some old bilateral treaties that are still in effect. They were negotiated at a time when the scope of protections, applicable rules of procedure and process transparency were less carefully defined. These older treaties are still out there and could come back to haunt Canada. It is indeed possible that investors might try to invoke the better protection provided in a treaty with other states, under the most favoured nation clause. We therefore run a real risk of seeing efforts to improve the system through more modern treaties thwarted by the invocation of older treaties.

Many states around the world have begun to modernize older treaties. Canada should begin the task of doing so as well.

To conclude, the end of ISDS does not mean the end of regulating disputes with foreign investors. These disputes will continue to exist, but they will simply have to be dealt with otherwise. In the end, whether or not they are settled mainly by domestic courts, there will be pressure on Canada, and it will have to decide whether it is willing to handle claims made by Canadian companies abroad. This needs to be taken into account if the abandonment of ISDS is being considered.

Canada is not the only country to consider discarding ISDS. China was mentioned a short while ago. China appears to have sidelined ISDS in the recent chapter on investment In the regional comprehensive economic partnership signed by 10 member states of the Association of Southeast Asian Nations. One agreement with the European Union also appears to have dropped ISDS. Some states are therefore moving in this direction. It must not be forgotten, however, that disputes will continue. Removing ISDS may simply lead to a renewed politicization of dispute settlement.

We also need to pay attention to the possibility that foreign investors, through careful business planning, might invest in Canada via subsidiaries located in those states with which Canada has investment agreements. Moreover, it might be relatively effortless for investors to circumvent the abandonment of ISDS. Once again, this provides an illustration of the problem caused by Canada's somewhat inconsistent approach, which does not address the matter systematically. In some circumstances, careful business planning could allow private investors to benefit from ISDS in treaties with other states. I repeat that this may not be possible in all instances, because certain conditions need to be complied with, but it is a possibility.

● (1340)

I'll leave it at that for now. Thank you for your attention.

[*English*]

The Chair: Thank you, Monsieur Côté.

Go ahead, Mr. Appleton, please.

Mr. Barry Appleton (Professor, As an Individual): Thank you very much, Madam Chair.

I'd like to thank you and the committee for the invitation to present today on investor-state dispute settlements.

I've studied and engaged in this area for more than 25 years, and I hope to provide some useful and practical views to the committee, so that will take it a little bit outside of some of the other things.

I had the opportunity to hear some of my esteemed colleagues. We had a slight technical problem, and I heard most, but not all. I'll try not to repeat what they've said, and I'll try to focus on what could be the most practical here.

Let me just tell you a little bit about myself. I'm a Canadian and an American lawyer. I'm the co-director of the New York Law School Center for International Law. I serve as the co-chair of the American Bar Association international arbitration committee of its section on international law. I'm the author of many works on international economic law, including two books on NAFTA, the North American Free Trade Agreement. I serve as the editor of Westlaw's investor-state reports and the Westlaw investment treaty series. I served as an adviser to governments in Canada on NAFTA and the WTO, including on the defence of investor-state cases. I have also acted repeatedly for investors with claims against the Government of Canada under NAFTA as the managing partner of Appleton & Associates International Lawyers LP, based in Toronto.

My remarks today, of course, are only in my personal capacity. They do not reflect any of my associations with those institutions, organizations or clients. They're my comments alone. I take full responsibility for them.

Now that we have that out of the way, I want to point out that investor-state arbitration provides a depoliticized and independent mechanism that allows for the application of the rule of law to disputes between states and investors. That's what Professor Côté was just talking about, and he gave a very good overview with respect to that. As this committee is very well aware, Canadians can and do succeed globally in international business and with investment. Canadians can be competitive. We're innovative, we're resilient and we can deal well with diversity of language, culture and legal systems.

Canada does not have oversized economic, military or political weight, and to succeed, we need to understand how to be clever rather than how to be mighty. We succeed by following the rules. We succeed by developing rules. We succeed by having our businesses provide a better value proposition, and we expect that our companies will win—they will succeed abroad—or they will lose entirely based on the application of the rules in a fair manner. Canada wins by the application of trade rights rather than by the application of trade mights. When it comes to trade might, we just don't have it, so we need to be able to find rules.

Because of the need for a rules-based system, Canada has traditionally long underscored the need for multilateral, rules-based institutions. We support the World Trade Organization and the United Nations. This is the Canadian way. An investor-state dispute settlement is another part of a multilateral rules-based system.

As you heard from Professor Côté and you've heard from other witnesses, we're part of the CPTPP, the CETA, the CUSMA, the NAFTA and many other bilateral investment treaties. As Professor Côté just pointed out, investor-state arbitration prevents the escalation of low-level disputes, international disputes, and in this way, investor-state arbitration is critical because it keeps these disputes compartmentalized and de-escalated. ISDS ensures that determinations of the application of discriminatory, improper, unfair or even corrupt treatment against Canadians can be addressed without Canada as a country having to engage in a diplomatic skirmish, the principle of diplomatic protection that you've heard before this committee.

The majority of ISDS claimants that I've represented are small and medium-sized businesses. They are not the Fortune 100 mega caps. The treaty protections are really more important to the small companies because they don't have access to influence and wealth, and access to justice needs to be available for the small as well as for the mighty.

This committee has heard a great deal about the potential for regulatory chill about ISDS, and I'd like to devote the rest of my comments to ISDS in Canada. I want to focus on some practical things that I think this committee can do with respect to its supervision and review of the issues.

● (1345)

ISDS is integrated into our network of investment and free trade treaties. Basically the deal is a quid pro quo. We ask foreign countries to treat Canadian investors at a high level, and then in return we guarantee that same protection to the foreign investments in Canada. It's really that simple. We obtain benefits from others, but we're required to provide those same benefits ourselves.

We think we're a wonderful country. We have wonderful institutions. We have a robust legal system. It should be easy for us to be able to provide that relief.

Restrictions upon Canadian public policy come from the treaty text, not from the ISDS process. Many ISDS complaints misplace the root of the problem on the tribunal, rather than correctly on what's in the treaty text itself. Our treaties are crafted with broad public policy exceptions. They permit broad public policy regulation. However, our officials need to scrupulously rely on the existing exceptions.

The committee here plays a vital role in the supervision and amendment of the trade treaties, and you may wish to consider in particular the impact of exceptions in the treaties in your future work.

I'd like to turn to some actual examples of things we could do that would be better.

First is that discretion is the better part of valour. What do I mean? Much of Canada's difficulties with ISDS arise from Canada's failure to pick the right fights. Every day a Crown counsel, before the court begins, has to decide which cases to fight and which to settle. Not every case is worth the fight.

In ISDS we fight everything. Perhaps we might want to reconsider how we do that, because states lose when they are defending against poor public policy. They lose the imprimatur of the state, the things that come with being a state. Cases that are based on bad public policy should be settled at an early stage. This would save considerable amounts of taxpayers' money, and there's little public purpose that's served from promoting poor public policy. What we want to do is promote strong public policy.

Canada has actively defended against poor public policy in the past, and it's not surprising that Canada has not been particularly successful when it does that. That's a defect, in my view, in Canada's approach to investor-state disputes. I think it helps to explain why Canada has been the most unsuccessful state with respect to NAFTA in investor-state cases. You need to pick winners. Discretion is the better part of valour.

I'd like to turn to the regulatory chill issue. As a government adviser myself, I never experienced a situation of a government policy constraint because of the risk of an investor-state case. In general, treaties are worded to give a wide ambit for government policy. Nothing prevents governments from protecting their subjects. That's their duty. That's what they do.

However, in every situation where I've been involved—and I've been involved in the creation of a number of situations that needed this type of consideration—I've found that governments would move forward with a policy and then subsequently address potential issues later. This is commonly what the government does with respect to WTO-related concerns on policies, and increasingly what the government is starting to do with concerns about the regulation of digital platforms.

These are all issues that now come into the purview of this committee on international trade. This supervisory power from this committee has been, in my view, constrained by some of the government's own actions.

I'd like to advise the committee on some areas they might want to look at.

The first is that Canada has taken steps that restrict public access and public knowledge of materials in NAFTA cases. For example, Canada does not give public access to declassified evidence from NAFTA tribunals. It's all declassified and all has a process. In my view, Parliament and the public should have full access. Transparency is a very important value that we express internationally, and we need to do it so Parliament can supervise it properly.

In a current NAFTA case where I'm counsel, Tennant Energy v. Canada, there are admissions of internationally wrongful behaviour from public officials that come from a previous NAFTA case. Those admissions, astonishingly, talk about how Canadian public procedures were circumvented to assist governmental friends and supporters by a secret high-level group of officials. This is the evidence. Canada posted a link on the Internet to a video with all of this material. It was quite scandalous.

● (1350)

It was public for five years, but then Canada took steps in the Tennant NAFTA arbitration case to prevent the public and Parliament from actually seeing this material after it was posted for five years on the Internet. Parliament and Canadians have no access because of the government's decision to suppress this information.

Perhaps it may be embarrassing, but this may explain why Canada hasn't done so well. It's not because of the ISDS system. It's because of the decisions that we take along the way. It would seem to me that Canadians have a right to know. I would suggest that the standing committee really should have a right to know what's going on, especially with something that's been posted for five and a half years on the Internet. I simply don't know how it could be confidential.

Another very practical matter that would enhance Canada's success in ISDS would be to engage in meaningful consultations at an early stage. The CUSMA and the NAFTA both have provisions that mandate this, but our consultation process has moved from meaningful consultations to active listening. It would seem to me that we could resolve matters much earlier and much more easily if we could deal with that.

Let me give you an example. I was counsel in an early NAFTA case where Canada was unsuccessful. It was a case called S.D. Myers. In that case, a small business brought a case against Canada. It sought meaningful consultations with Canada. Had Canada engaged in the meaningful consultations, I'm of the view that the case would have settled. The government lost the case and had to pay millions of taxpayers' dollars, but all the company really wanted was to be heard at an early stage and to have an apology for something that they thought was wrong.

It would seem to me that these are all specific things that we could do to be better and to enhance our handling of ISDS. These are specific powers and approaches that I think this committee can do.

These opening remarks provide some practical and specific suggestions as to how Canada could enhance its success with ISDS. I've engaged in a considerable amount of study on the ISDS system, its operation and the new reforms that are under way. While I thank the committee for the opportunity to present today and I'd be delighted to take questions on any of the new ramifications or the new approaches as well as the other ones, I didn't want to miss the opportunity to provide some very specific things that I think this committee could consider to make our process better.

That's something that we can do, but you cannot do that if you don't have the information. You need this information from the government; you need that reporting. All Canadians will be better and you'll have a much better and meaningful process if you're able to obtain that information.

I thank you very much for the opportunity today. I look forward to questions.

● (1355)

The Chair: Thank you, Mr. Appleton.

We move on to Professor de Mestral.

[*Translation*]

Mr. Armand de Mestral (Emeritus professor of Law, As an Individual): Madam Chair and distinguished committee members, thank you for this invitation.

I must say that generally speaking, I agree with my distinguished colleagues.

We heard from Mr. Yves Fortier earlier. I can tell you that he is the most highly respected arbitrator in the world, which is remarkable. We are fortunate to be able to hear his point of view, even though I do not fully agree with him on certain points.

Since my speaking time is very short, I will simply focus on the main question. Does arbitration between an investor and a state work against Canada's interests? Like my colleagues, I would say that my general answer is definitely not. It does not run counter to Canada's interests. Quite the contrary. Although I will mention a number of reservations, I would like to point out that these reservations are already largely built into Canadian practice in recent agreements.

I'd like to begin by addressing the criticisms and responses to them. I will then ask whether there are alternatives to arbitration between an investor and a state? After that, I have a few things to say about the proposed establishment of an international arbitration tribunal.

There have certainly been criticisms, throughout history. There are sometimes complaints about contradictory decisions or poor decisions that have been handed down. As there have been some 700 such decisions, it's not unlikely that this should occur along the way.

There have been questions about the appointment of arbitrators. At the outset, there were questions about whether certain arbitrators might not deal with the process strictly as trade arbitrators, by which I mean they would view disputes as essentially trade decisions. As you can see, trade interests exist alongside public and policy interests. I believe that most arbitrators today understand this.

Who are these arbitrators? At the beginning, arbitrators were mainly Canadians, Americans and Europeans. This was gradually extended to include others, but the developing states' initial trepidation was well-founded. Some claims were said to have been clearly frivolous or politically sensitive. The more fundamental problem, or at least the problem that many academics have studied, is the fact that states can struggle to respond to certain types of claims. For example, in mining disputes, when a company blamed the state for contravening a number of the conditions in a treaty, South American states tended to argue that the company had infringed some fundamental human rights, that it had made things terribly difficult for their indigenous communities, or other similar claims. From the procedural standpoint, it's very difficult for a company to submit a defence of this kind.

Are there answers to these criticisms? I believe that there are, not only with respect to the rules but also the process.

● (1400)

It's true that much has been done in terms of the appointment of arbitrators. There are codes of conduct. Arbitrators are appointed much more carefully. Attempts are gradually being made to appoint women and people in Asia who have thus far never been appointed, and these efforts are beginning to pay off. From this clearly important standpoint, there is now much more diversity in the community of arbitrators. I can tell you that those who in a position to appoint Yves Fortier are very pleased.

From a procedural standpoint, many treaties, including some signed by Canada, the European Union and the United States, now allow certain types of claims to be excluded. This may not make the claimants happy, but claims deemed to be frivolous or clearly unfounded will be excluded under certain treaties, including Canadian treaties. So in terms of procedure, that's one answer.

An examination of bilateral treaties, and the chapters on investment in some of Canada's major trade treaties, shows that procedural reforms have been added. The process is therefore well underway, but certainly not finished.

Are there other options? Some say that the system can be eliminated. My colleague Mr. Côté has given a good explanation of why governments don't want to be responsible for many of these cases. We don't have the gunboats, unfortunately. The gunboat era is over. States prefer to have these disputes dealt with independently in a much less politicized framework.

It is often argued that all cases should be sent to domestic courts, but that's a simplistic solution. In a book that I wrote on this topic, the first chapter goes into considerable detail on how this issue affects Canada. If 80% of cases against Canada were sent to Canadian courts, we would end up dealing with administrative tribunals that render justice formally, but that do not award compensation. For businesses bringing the complaints, this option is therefore thoroughly inadequate.

Were we to return to the situation in which all disputes are sent to domestic courts, there would be 189 different solutions. That's not what we want. The obvious advantage of arbitration in the existing system is that the treaty creates applicable rules on the one hand, and on the other hand, an arbitration tribunal has all the advantages of such tribunals in terms of procedure and sentencing. The system works. But if there were 180 different systems, it wouldn't work. These so-called solutions, unfortunately, really don't cut the mustard.

So some of my views may differ somewhat from those of my colleague Mr. Fortier.

● (1405)

Upon lengthy political debate, the European Union proposed a system, the creation of an international investment arbitration tribunal. The judges on that tribunal would be known and no doubt selected from among the world's leading experts in the field. Rather than abolish the law of the investor state, the tribunal would enforce the treaties. The law would thus always be applied, but by a known tribunal and, let's hope, one whose members would enjoy considerable respect.

Would it be preferable to have a system such as the one we now have, under which the parties appoint their own judges, that is to say, their adjudicators? It's hard to say. First of all, there's a political issue. How many states will follow Canada in emulating the European Union? Some would, but, for now, not many. The tribunal would likely be established, but how many states would expose their investment interests to the tribunal's decisions? It remains to be seen, and this is a solution for certain states, but perhaps not for others.

Let's not forget the Appellate Body of the World Trade Organization, or WTO, which has been so successful that the United States, under the Trump administration, feared it and halted its proceedings. However, it can't be denied that the tribunal has consolidated WTO jurisprudence and made a strictly arbitral system more consistent. Consequently, I'd be inclined to give it a chance, and I understand why Canada has emulated the European Union. I don't think we should fear that system.

The risk, of course, is that we'll have a two-tiered system that both arbitrates and is subject to the decisions of this tribunal as a result of the some 3,000 trade and bilateral investment treaties. This may be the biggest problem left for countries like Canada, which are trying to modernize the system. At least 2,000 treaties will probably not be renewed in the near future.

Thus, in any case, we'll have a system in which most, but not all, treaties will be much more modern, like most Canadian treaties, as Professor Charles-Emmanuel Côté said. Those treaties won't be modernized in many states, and certain provisions will therefore be subject to interpretation and, in some instances, to criticism. We will very likely be living in what, for now, will remain more or less a two-tiered system. In my view, however, Canada would do well to forge ahead and try to clarify rules and procedures. We have an interest in trying to support the international investment arbitration tribunal model.

● (1410)

[*English*]

If I may, just to conclude, you don't throw the baby out with the bath water. You try to ensure that the heat of the bath water is right for the baby. What's right for one baby might not be right for another.

There are serious issues out there, but personally I have a lot of respect for the way the Canadian government has tried to modernize as far as it can go. It modernized its own treaties, it modernized the system and it encouraged modernization. That is the way that I would hope to see the system advancing.

Thank you very much.

The Chair: Thank you very much, Professor.

We move on to Professor Leblond, please. The floor is yours.

[*Translation*]

Mr. Patrick Leblond (Associate Professor, Public and International Affairs, Faculty of Social Sciences, University of Ottawa, As an Individual): Thank you, Madam Chair.

It is an honour and a pleasure for me to address the members of the committee today.

My remarks this afternoon will focus on the logic of the investor-state dispute settlement mechanisms, or ISDS, and on the choice you members of the committee face as part of this study. I should therefore remind you that the objective of investor-state dispute settlement mechanisms is to reassure businesses, that is to say, investors, when they do business abroad.

Those mechanisms, which are set forth in the free trade and foreign investment protection agreements, are designed to provide a neutral—meaning non-politicized and impartial—and efficient conflict resolution framework for determining situations where an investor has suffered a loss of assets, as in an expropriation, or a loss of asset value as a result of discriminatory action by a government against that investor and the investor's investment.

In exchange for a more predictable business environment in which foreign investment is afforded greater protection, foreign businesses are expected to invest more. The purpose of these agreements is to encourage investment in the hope that it will contribute to economic growth. This therefore means, at least in principle, that there is no reason for such a mechanism if a country provides this kind of protective national framework for foreign investment. In other words, if businesses operating internationally can rely on national tribunals, and if those tribunals are effective and impartial, then, in principle, they should not need to rely on international agreements to protect them or on an investor-state dispute settlement mechanism.

As Professor de Mestral mentioned, the issue of compensation arises in certain cases, but this mechanism logically exists because foreign businesses often operate in countries where tribunals are not very reliable. They therefore prefer this kind of supranational protection, as it were.

We in Canada can theoretically offer foreign investors this kind of framework, notwithstanding the factors that Professor de Mestral cited. In fact, the problem is not with us. The question you members of the committee must consider is whether you want to protect the interests—meaning assets—of Canadians and Canadian businesses investing abroad.

If the answer is yes, then we need agreements including ISDS mechanisms. That of course requires reciprocity among the signatory parties. If we ask others to participate in this kind of mechanism, they will in turn ask us to participate in it as a state. We must also offer these protective mechanisms to foreign investors who come to Canada. This is the world we live in. There is this concept of reciprocity. We want to protect the foreign assets of our businesses, and, in exchange, we naturally request that foreign businesses do the same when we negotiate and sign foreign investment protection agreements.

If the answer is no, Canadian businesses will then face greater uncertainty when they operate abroad, but that's one transaction cost among many. Professor de Mestral said they would be dealing with 189 different rules, one for each country. That's true, but the reality is that, every day, companies engaged in international business face rules, procedures and legal and cultural systems that differ from one country to the next.

Businesses operating internationally would theoretically have one more decision to make if there were no investor-state dispute settlement mechanism. They would have to consider how that would affect their sales, production costs and, in some instances, access to inputs, markets and so on.

However, if the foreign assets of Canadian businesses were not protected as well as those of their competitors in other countries, because those of their competitors would be protected by the ISDS mechanisms negotiated by their governments, then those Canadian businesses would be put at a disadvantage.

● (1415)

If we decide to let the market operate and leave businesses to their own devices, because we can protect foreign investors that come to Canada and Canadian businesses operating abroad, then it's up to them to address this additional risk in their business decisions. That's the way it is.

The problem in this case is that, since other countries may protect their businesses by means of these dispute settlement mechanisms, our businesses face operating risks, which entail additional costs. They thus become less competitive.

We find ourselves in a situation where we are somewhat affected by this lack of coordination. We are ultimately talking about a lack of coordination among states. If you withdraw Canada from this kind of mechanism, Canadian businesses will then be abandoned and will face much tougher international competition. They will be less competitive in those markets, and even in Canada.

Consequently, assuming world governments are unlikely to agree to eliminate these agreements, then the problem is the reverse. We then need to focus the energies of the Canadian and other governments on improving ISDS mechanisms to make them more transparent, accessible and fair for all Canadian and international businesses.

My distinguished colleagues have naturally suggested a number of ideas for improving those mechanisms and ensuring that Canadian businesses are competitive with their international counterparts.

I'll stop here. That's all I have to say, since the others were much more eloquent than I on the specific challenges associated with these mechanisms.

Thank you, Madam Chair.

● (1420)

[*English*]

The Chair: Thank you very much, Professor Leblond.

We will go on to Mr. Aboultaif, for six minutes, please.

Mr. Ziad Aboultaif: Thank you, Madam Chair.

Thanks to the great witnesses with wonderful testimonies today. We have learned a lot.

Businesses, capital investment and investment in general look for security, for certainty; otherwise, they will not be able to do business. ISDS works because they work in both directions: They work for investment coming our way, and they work for our companies that invest abroad.

We have heard from the witnesses—from Monsieur Fortier, Monsieur Côté, Mr. Appleton and all the great witnesses today—and I would like to say something. In life, we say you don't get what you deserve; you get what you negotiate. With ISDS, we know there are different models that will be tailored to fit the different markets you're targeting or the different agreements you are trying to put together.

I would like to ask the witnesses—I will start with Monsieur Fortier, and then to Monsieur Côté and Mr. Appleton—if they can give us some real-life examples of situations and cases where ISDS was the right solution and having it there was good for Canada and for Canadian companies.

[*Translation*]

Hon. Yves Fortier: Madam Chair, would you like me to begin?

[*English*]

Mr. Ziad Aboultaif: I would like to start with Mr. Fortier, then Mr. Côté and Mr. Appleton, if that's okay.

Hon. Yves Fortier: First of all, thank you for your question.

I would be remiss if I did not acknowledge and thank my friend Professor de Mestral for his generous comments in the course of his excellent presentation. Coming from an authority in the domain, as Armand de Mestral is, it's a great compliment.

[*Translation*]

Thank you, professor.

[*English*]

Mr. Aboultaif, I don't know where to start. I could give you so many instances of cases in which I've been involved, either as a counsel or as an arbitrator, where Canadian corporations have benefited.

I'll give you one, because it's a case in which I'm presently involved as a member of an international tribunal. This is on a no-name basis, obviously, because, as I said, the case is pending. It's a Canadian mining company from British Columbia that has a subsidiary in Poland. It was awarded some exploration concessions a few years ago by a department of the Government of Poland. Its competitor was a Polish mining company. After the decision was issued, the then president of Poland complained and asked why they favoured a Canadian company rather than a Polish company. He was followed by a number of influential people in Poland, and eventually the mining concession was cancelled.

Canada has a bilateral investment treaty with Poland, and the Canadian company shareholder of the Polish company availed itself of a provision of the treaty and gave a notice of arbitration against Poland. The case was argued in Warsaw a couple of years ago, when we could still travel.

We are now deliberating, my colleagues and I, and whatever the result is going to be.... Don't expect me, of course, to speak about the merits of the case. This is a case where the subsidiary of a Canadian company benefited from the existence of a bilateral investment treaty with an arbitration clause and instituted proceedings before an international tribunal. I was appointed by the Canadian company. The chairperson of the tribunal is Swiss, and the arbitrator appointed by Poland is a very eminent German jurist.

That's a short answer, Mr. Aboultaif, to your very important question.

● (1425)

Mr. Ziad Aboultaif: Thank you.

I move to Mr. Côté.

The Chair: I'm so sorry, Mr. Aboultaif. You have 26 seconds left.

Mr. Ziad Aboultaif: Sure.

Hon. Yves Fortier: That's my fault. I'm sorry.

The Chair: It was a terrific answer and valuable information.

We go on to Ms. Bendayan.

[*Translation*]

Ms. Rachel Bendayan (Outremont, Lib.): Thank you, Madam Chair.

I'd also like to thank all the witnesses here today. I'm very proud to see so many Quebec experts here with us to clarify this important matter for us.

I obviously have many questions, but my speaking time is short.

I'll start with Mr. Fortier.

A few minutes ago, Professor Côté said that the disputes we're discussing today should remain limited matters and that it's a good thing that countries and governments don't need to intervene. I must admit I agree with that.

[*English*]

We also heard from Mr. Appleton, who was talking about a greater public disclosure of information and greater involvement of parliamentarians in the dispute resolution process.

I was wondering if we could get your comments on these views and what you think the government's role should be, particularly as we are dealing with.... It is an alternative dispute mechanism process, but it is a dispute resolution process nonetheless, and we need to respect that.

Mr. Fortier.

[*Translation*]

Hon. Yves Fortier: Ms. Bendayan, as you very well know, it's important to be in the right place at the right time. When you practised law at a certain firm with a certain lawyer who is pleased to see you again today, you were in the right place at the right time. That's true again today, because you're the member for Outremont and you sit in Parliament and on this committee, the mandate of which is precisely to provide answers to these many questions.

[*English*]

You have often heard me say that being at the right place at the right time is very important.

[*Translation*]

You've been in the right place both times, and I congratulate you on that.

[*English*]

Ms. Rachel Bendayan: Thank you very much, Mr. Fortier.

I'd also like to take the opportunity, with my limited time, to ask Professor de Mestral a question. Full disclosure, he is also my former professor.

I have read your book *Second Thoughts*, Professor. I certainly recommend to all of my colleagues on committee to do the same.

You mention in your book that, originally, the idea of ISDS was viewed by western countries as a way to bring developing countries in line, but quite soon thereafter, western countries were surprised to be sued by many developing nations.

Could you comment on the idea that ISDS is being used by developing countries and is in fact a tool that we should be looking at in order to level the playing field? I'm also interested in any other comments you may have with respect to the importance of ISDS internationally.

● (1430)

Mr. Armand de Mestral: I think you're right in noting that.... The original treaty, the very first one that's always mentioned, between Germany and Pakistan certainly was designed to protect German investments in Pakistan. There weren't very many in the fifties, sixties and seventies. Things gradually took off, particularly with NAFTA, in fact.

NAFTA was a bit of a wake-up call for Canada. Everybody said that we were going to buy into investor-state arbitration under chapter 11 because we may have to deal with these Mexicans who are a bit unruly. Lo and behold, who got sued first? Canada. Who got sued second? Canada. Then somebody had the good sense to sue the USA and one thing led to another.

In fact, in many ways, in terms of the thinking that went into the lawyership and into the decision-making by arbitrators, NAFTA was certainly an important moment in the development. There was certainly a phenomenon where more developed countries were being sued, but I think over the last 15 to 20 years, we have seen something of a rebalancing. People wondered whether China would ever get into it. Finally they've accepted to be sued and now they're suing other countries themselves. India has been reticent, but Indian investors are out there suing both developing and developed countries.

I think the idea that it is simply some sort of conspiracy to pull down the developing world is no longer true. You have developing country investors, as between each other, and people like Tata in Europe and in Great Britain who have taken cases against European governments.

I think things have rebalanced quite a bit. We have over 700 cases now, and those who are suing really constitute quite a remarkable mix of countries. As Barry Appleton noted, it's not just big corporations, but a great many smaller corporations are using the system as well.

The Chair: Thank you very much, Professor.

Mr. Armand de Mestral: I'll hold my peace, Madam Chair.

Ms. Rachel Bendayan: Thank you very much, Professor.

The Chair: I'm sorry; your time is up.

We're on to Mr. Savard-Tremblay, please.

[*Translation*]

Mr. Simon-Pierre Savard-Tremblay (Saint-Hyacinthe—Bagot, BQ): Thank you, Madam Chair.

Greetings to my colleagues and thanks to the witnesses for being here.

My questions are for Mr. Côté.

Mr. Côté, thank you for your presentation. I've never been a professor, but I was particularly interested in this issue in my former academic life. You provided an overview of the political and legal factors that led to the creation of the investor-state dispute settlement mechanism. However, it seems to me the ideological circumstances in which that mechanism was created can't be overlooked.

When the concept began to spread and the mechanism was introduced under NAFTA, it was a time of neoliberalism and globalization. People talked about the end of states and nations. The purpose of that mechanism was to protect investors and multinationals from certain political decisions. That seems to me a return to the old idea of the invisible hand, according to which the more private interests are freely pursued, the better off a community will be. You can't disregard that now and wonder whether the idea is still relevant.

Earlier you talked about the depoliticization of certain economic decisions and ways of doing things. I think instead that we should go back to politicization. Before NAFTA, we had the Canada-United States Free Trade Agreement, the FTA, under which a business seeking to sue a state had to go through its home state.

Some time ago, I heard you say in the media that the fact this mechanism is no longer included in the CUSMA was good for Canada. I'd like you to comment on that.

My second question is related to the first. You said you were prepared to speak at greater length about the mechanism's flaws during the period of questions. Here's an opportunity for you to do that.

● (1435)

Mr. Charles-Emmanuel Côté: Thank you very much.

I'll try to be concise.

First, I'll address the initial point you raised, which concerned the political context. As it happens, ISDS was expanded around the time the Berlin Wall fell. However, these treaties and the idea of joint arbitration largely preceded all that. For example, the ICSID Convention was adopted in the mid-1960s, when the European bilateral investment treaties were negotiated and signed starting in the late 1950s and in the 1960s and 1970s.

Why was ISDS not implemented? The first case dates back to 1990 and involved Sri Lanka. Then another case concerned Zaire, as it was called at the time, in 1997. Lastly, yet another case was brought against Canada in 1998.

As Mr. Fortier said, the fundamental feature of arbitration is the parties' consent to it. However, one of the characteristics of ISDS is the dissociation of consent. In short, the states give their consent in advance, whereas investors do so when they file a claim.

Until it was tested, it was unclear whether the technique was consistent with the ICSID Convention, for example. Ultimately, the successful resolution of two or three cases showed that it worked and that the state didn't need to grant authorization on a case-by-case basis. So arbitration took off.

More treaties followed. I'm not an economist, but I've read around the topic and studied the matter, and I believe this happened at a time when developing countries were tapping out and genuinely needed foreign capital. They completely changed their approach to foreign investment and began to promote bilateral investment treaties precisely so they could attract the investment they needed in order to develop. That was the economic reality of the time.

As for a return to politicization, I would have liked to discuss it, but my speaking time is limited. Is ISDS suited to all disputes? That's the question. Should certain disputes be resolved at the state level instead? That's a legitimate question. Beyond a certain amount of damages, doesn't a dispute become too big to be resolved that way? It's an open question.

Then there are cases in which decisions aren't enforced. As someone said, decisions are binding. However, if a state doesn't wish to offer compensation, it must have goods that can be seized. Politicization is therefore still possible. If the ISDS system doesn't work, the state of nationality comes back, reappears and may intervene.

Another way in which the process may be repoliticized is through intervention by the state of nationality, which is not a party to the dispute. It may intervene in two ways, either through arbitration proceedings, if it wishes to raise a point of law in treaty interpretation, for example, which regularly occurs. In some instances, it may agree with the state concerned by the claim against its own investor that, for example, “indirect expropriation” does not mean that in such a case. This is a form of repoliticization.

Or else the states may agree....

● (1440)

[*English*]

The Chair: I'm sorry to cut you off, Professor, but the time is up.

We're on to Mr. Blaikie, please.

Mr. Daniel Blaikie (Elmwood—Transcona, NDP): Thank you very much, Madam Chair.

Thank you to our witnesses for appearing today.

I doubt it will come as a surprise—to many on the committee, certainly, and perhaps to our witnesses—that I count myself, and New Democrats have counted themselves, among the strong critics of investor-state dispute settlement chapters over the years in trade agreements.

I am going to resist the urge to offer some of the more polemic articulations of that critique today at committee, because I think it's a good discussion. Canada now finds itself, as was mentioned earlier, in many agreements. These are facts that we have to contend with, even if we don't like them.

I want to address my remarks to Mr. Appleton first, and then perhaps if other witnesses want to jump in, they can.

I thought your comment about some of the criticism of investor-state dispute settlement chapters being more about the other substantive content of the deals that they appear in to be an interesting comment. I think there is a fair point there, but it does seem to me that these things are related and that the advancement of ISDS has gone hand in hand with agreements that prioritize a certain way of looking at international trade, agreements that frankly put the interests of large corporations and investors before the interests of working Canadians. I would certainly argue that view; it is hard to tease those things apart.

I think that if you had investor-state dispute settlement mechanisms—or they might need another name if it was no longer solely about the rights of investors but others as well—that had the same teeth to enforce common environmental standards and common standards in respect of human rights, including collective bargaining, you might see more support for those kinds of enforcement mechanisms. It's hard not to notice that the enforcement mechanism with teeth revolves solely around the rights of investors and not anybody else or any other important policy goals.

When we hear calls, for instance, from the Alberta premier to invoke ISDS in response to the recent decision by the new administration in the U.S. on Keystone XL, I think that highlights some of the frustration that people have with ISDS provisions as well. I would argue that the decision on Keystone XL, whether you agree with it or not, represents an important set of issues that have to do with the environment and with the way not just Canada but, in this case, the United States as well treat their indigenous peoples and relate to their indigenous peoples, and the extent to which they respect their rights as well when it comes to major natural resource projects.

Those are not decisions that ought to be taken at an international trade tribunal. Those are decisions that are important. There are a lot of different kinds of values at play, and in a democracy it's appropriate to deliberate publicly about those things and to make those kinds of decisions in a deliberative fashion, preferably in Parliament, but at the very least by a government that is sensitive to those issues and tries to mediate those disputes in the best possible way. That's not the mandate of an arbitrator in an investor-state proceeding.

I am trying to characterize for you a little bit the way critics from the outside see this. It's very much part of a system designed to protect the rights of investors. In so doing, it cuts off debate and decision-making potential for other very important issues. I would say that citizens in general should be concerned to protect their right to deliberate in those ways and to protect the right of governments to make decisions in those ways. The ISDS system doesn't appropriately balance off what is a legitimate concern for investors, who want to have some security that their investment will be protected. ISDS has really put that on such a pedestal that every other kind of issue isn't really even within the scope of the proceedings.

How do you maintain the appropriate space and authority to make those kinds of decisions when you're signing on to quasi-constitutional documents that are narrowing the scope to a very limited conversation about the rights of investors, when those decisions have very clear and far-reaching implications on other issues?

● (1445)

I realize that's a long question, and it's taken up a lot of my time, but if you could begin to hazard an answer, Mr. Appleton, I would appreciate that.

Mr. Barry Appleton: Mr. Blaikie, I want to thank you because it's a deeply probative question, and I spend a lot my time thinking about exactly these types of issues.

I'm going to try to hit this in bullet points to fit it into your time because I'm worried that we won't have very much time.

On the issue of indigenous peoples.... I'm very committed and focused on indigenous peoples issues. In fact, I want to commend you and all the other residents of Manitoba on the opening of the Qaumajuq at the Winnipeg Art Gallery. It is a new Inuit art centre that was opening today and yesterday.

They're mostly excluded. Canada put very broad exclusions into treaties like the NAFTA, the CUSMA and other treaties like that so that we don't get that conflict.

I would like to focus on labour rights in particular. I've been a strong proponent of labour rights and was actually very concerned when the Government of Canada pushed the NAFTA free trade commission to restrict the meaning of NAFTA article 1105, which gives specific rights to enforce labour rights. I have had detailed discussions with members of the U.S. Congress, as well as many different parliamentarians and legislators in Canada, about my concern of restricting the coverage.

The problem—again, it's still sort of a chicken and egg—is that we have a lot of things we did because we were concerned about cases. I believe that Professor de Mestral mentioned the first two NAFTA cases. I brought them. The first case Canada lost, and the second case, as I said, Canada would never have lost if it had just given an apology or met—

The Chair: Professor Appleton, I'm so sorry.

Mr. Barry Appleton: No problem. Thank you.

The Chair: Possibly you can communicate in writing between yourself and Mr. Blaikie.

We're on to Mrs. Gray, please, for five minutes.

Mrs. Tracy Gray (Kelowna—Lake Country, CPC): Thank you, Madam Chair.

Thank you to all the witnesses for their very informative testimony here today. There really does seem to be a lot of consensus that without ISDS it would politicize trade disputes, so that was really informative.

I have two questions, and I think maybe the easiest way of doing this is to say what both of them are, and then to call on some of the witnesses to answer. If you don't mind expediting your answers, we'll try to get through as many witnesses as we can, if that's all right.

First, we often hear criticism that ISDS measures have cost Canada and that they put our domestic agenda at risk, but we heard testimony on Monday that Canada wins ISDS cases by about a three-to-one margin, and when we lose, it usually relates to fair and equitable treatment or because of processes when municipal or provincial governments may have acted arbitrarily. What are your thoughts on that three-to-one margin?

Second, we know that Canada has started consultations on a potential free trade agreement with Indonesia, which has a significantly lower score on the rule of law index from the World Justice Project compared to Canada. Would you recommend that Canada seek to negotiate some form of ISDS provisions as they're negotiating this agreement?

Maybe we'll start with Professor Côté.

Mr. Charles-Emmanuel Côté: Thank you for your questions. I'll try to be brief.

It is true that on the record Canada has not lost a lot of cases. For the cases that Canada lost, if you look at them carefully, you'll see that there were indeed problems in the situation where Canada was found in breach of the agreement. I don't know of any cases where Canada lost in a way that was absolutely impossible to accept. I think those were cases where Canada was, indeed, in breach of its agreements. And it continues. The latest decisions that were rendered continue.... Canada has not lost recently in cases, and this average of wins and losses is continuing, I would say.

As for Indonesia, it was mentioned that one has to think about ISDS, and one has to think about the substantive provisions. Those are two different things. It's important to continue to have very well-drafted, circumscribed and substantive provisions, possibly with exceptions, as Professor Appleton mentioned, and basically to continue what we have done with CPTPP and with CETA.

As for the ISDS, as I said, we should have a clear and coherent way of handling this, and I think we should continue to have ISDS with Indonesia, definitely. As for which type of ISDS, well, in our bilateral agreements, we have incrementally improved ISDS, and we should continue in that way. So yes, I would continue to basically apply our latest drafting of bilateral agreements with Indonesia.

● (1450)

Mrs. Tracy Gray: That's great. Thank you very much.

I'll ask the same two questions of Professor Appleton.

Mr. Barry Appleton: Thank you very much. I'll be very quick.

The answer to the first question is yes; they all come from regulatory failure.

The answer to the second question is a little bit more detailed. Canada was able to succeed. Canadian companies succeeded when we had treaties, for example, in Venezuela. When we invested in the mining sectors in Venezuela, we didn't know there would be a problem. Later on those were great success stories. Because ISDS was there, Canadians were protected. We would have had massive problems at home.

I would say for sure that I agree that we should be deeply, thoughtfully considering ISDS with any treaty we might enter into in Indonesia.

Mrs. Tracy Gray: That's great. Thank you.

Professor de Mestral.

The Chair: You have 28 seconds left. Perhaps we could get a quick answer, if that's possible on a complex subject.

Mr. Armand de Mestral: It certainly doesn't help to have a Minister of Environment who wants to help Canadians and wants to stop American imports, so yes.

In Indonesia, certainly, I think we should try. We should try very hard. Canadians are there, and I think this is one of the examples where Canadians have a greater interest than Indonesians in Canada, in all likelihood.

The Chair: Thank you very much, Professor.

Now we go to Ms. Bendayan.

Go ahead, please, for five minutes.

[*Translation*]

Ms. Rachel Bendayan: Thank you, Madam Chair.

I would like to ask Mr. Côté a question.

Do you have any statistics on small and medium Canadian enterprises that use our ISDS system? We often sense that multinationals use the system, but it would be interesting for the committee to see your research on the subject.

I'd also like to hear your comments on a point that Mr. Fortier raised earlier.

[*English*]

Mr. Fortier, I believe, was quoting someone with respect to the implication of removing ISDS and how that would possibly take capital elsewhere.

[*Translation*]

We obviously have an interest in keeping our investments in Canada.

Do you have any comments to make on that subject, Mr. Côté?

Mr. Charles-Emmanuel Côté: Thank you very much for your question.

I don't have any specific statistics on SMEs. We would also have to agree on a clear definition of what constitutes an SME. I think that's a problematic unknown in the system right now.

I personally know a very small contractor that has a dispute with Venezuela and simply doesn't have the resources to arbitrate the matter again; the cost to do so would be completely disproportionate to the matter in issue. Since Venezuela offered him no domestic remedy, he turned to Ottawa for some good old diplomatic protection, which was denied him on the ground that there's a treaty in place. Ottawa has washed its hands of the matter. It's a real problem.

The problem has even been noticed by the Court of Justice of the European Union, which issued an opinion on CETA's compliance with the European Union's law to the effect that its law includes a right of access to a tribunal. Access to justice is therefore a guaranteed right. Relying on the guarantees given, the Court of Justice determined that the right of access to arbitration justice would be violated if nothing were done for SMEs. Canada and the European Union have promised in joint declarations to improve access to arbitration Justice.

This is a subject that might be of interest to you. I had planned to discuss it with you but didn't have the time to do so. I think it's really a concern. However, I unfortunately don't have any statistics on the subject.

I'm not an economist, but one thing is certain: Brazil is an excellent example of a country where foreign investments are made despite the absence of a treaty providing for ISDS. Would there be more investment in Brazil if it had a treaty providing for ISDS? No one knows.

I'm one of those people who say that the benefit of ISDS isn't that it attracts foreign capital. I think that's one of the factors that influence a business decision, but the decision to make foreign investments is based on many factors, including an assessment of potential return. ISDS of course reassures investors. However, I don't think Americans will suddenly stop investing in Canada.

I don't think we'll necessarily run into an economic wall if we don't have ISDS. The most important aspect is the depoliticization of dispute settlement.

● (1455)

Ms. Rachel Bendayan: Thank you, Mr. Côté.

In closing, I'm going to ask Mr. de Mestral and Mr. Fortier a question on the same topic.

We've discussed the fact that these disputes often concern highly specialized matters, a fact that requires the parties to ask experts to act as judges or arbitrators. In many cases, the parties may appoint their own arbitrator.

Do you think that's an important element of the system? Could we lose it without ISDS?

Hon. Yves Fortier: The answer is yes…

[*English*]

The Chair: Please give just a very brief answer, sir.

[*Translation*]

Hon. Yves Fortier: The answer is an unqualified and unreserved yes.

[*English*]

Mr. Armand de Mestral: It's just possible that a world court of arbitration would end up being fifty-fifty men and women. That is not the case right now with arbitration, although it is changing. It is changing quite significantly. The arbitral world is definitely open to women, but that is a change that's taking time.

The Chair: Yes, it's taking a lot of time, a little too much time.

Hon. Yves Fortier: I'm sitting on two tribunals at the moment, two three-person tribunals, on which I have two female colleagues, just for the record.

The Chair: We're gradually getting there.

Thank you to this illustrious panel. Thank you so very much for providing the committee with such valuable information and your time today. We can excuse the witnesses.

Just for the information of our committee, and to the clerk, we have approval of our agenda, so on April 12 we will deal with the two draft reports we've received from the analysts, and then we will proceed with Mr. Blaikie's motion on trade and vaccines in Canada.

To everybody, have a very happy Easter. Stay well. Stay safe. Follow all the rules so we can get through all of this together.

The meeting is adjourned.

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