



HOUSE OF COMMONS  
CHAMBRE DES COMMUNES  
CANADA

# **INVESTOR–STATE DISPUTE SETTLEMENT: SOME CONSIDERATIONS FOR CANADA**

**Report of the Standing Committee on International Trade**

**Hon. Judy A. Sgro, Chair**

**JUNE 2021  
43<sup>rd</sup> PARLIAMENT, 2<sup>nd</sup> SESSION**

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## **NOTICE TO READER**

### **Reports from committees presented to the House of Commons**

Presenting a report to the House is the way a committee makes public its findings and recommendations on a particular topic. Substantive reports on a subject-matter study usually contain a synopsis of the testimony heard, the recommendations made by the committee, as well as the reasons for those recommendations.

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# **THE STANDING COMMITTEE ON INTERNATIONAL TRADE**

has the honour to present its

## **EIGHTH REPORT**

Pursuant to its mandate under Standing Order 108(2), the committee has studied Investor-State Dispute Settlement Mechanisms: Selected Impacts and has agreed to report the following:





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# LIST OF RECOMMENDATIONS

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*As a result of their deliberations committees may make recommendations which they include in their reports for the consideration of the House of Commons or the Government. Recommendations related to this study are listed below.*

## **Recommendation 1**

**That the Government of Canada carry out a periodic review of trade and investment agreements signed by Canada and identify needed reforms. .... 14**

## **Recommendation 2**

**That the Government of Canada produce a report on all past and present litigation against the Government of Canada and against the government of a foreign state brought by Canadian businesses under investor–state dispute-settlement mechanisms, including the total amount of damages paid to foreign investors and any other costs to Canada..... 14**





# INVESTOR–STATE DISPUTE SETTLEMENT: SOME CONSIDERATIONS FOR CANADA

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## INTRODUCTION

Provisions in international trade and investment agreements that are designed to protect investments usually include an investor–state dispute-settlement (ISDS) mechanism that gives investors from one signatory to an agreement the right to access binding arbitration to settle a dispute if they believe that the government in another signatory has breached its obligations relating to the protection of investments.

Many of Canada’s trade and investment agreements contain an ISDS mechanism. For example, the trade agreements most recently signed by Canada – including the [Canada–United States–Mexico Agreement](#) (CUSMA), the [Comprehensive and Progressive Agreement for Trans-Pacific Partnership](#) (CPTPP) and the Canada–European Union (EU) [Comprehensive Economic and Trade Agreement](#) (CETA) – have an ISDS mechanism. As well, Canada’s foreign investment promotion and protection agreements that have an ISDS mechanism include the [Canada–Hong Kong Foreign Investment and Protection Agreement](#), the [Canada–China Foreign Investment and Protection Agreement](#), and the [Canada–Ukraine Foreign Investment and Protection Agreement](#).

On 23 October 2020, the House of Commons Standing Committee on International Trade (the Committee) adopted a [motion](#) to undertake a study on the impacts of ISDS mechanisms. During three meetings on this study, the Committee’s witnesses comprised the Minister of Small Business, Export Promotion and International Trade, government officials, a representative of a civil society organization and eight individuals appearing on their own behalf. The Committee also received a brief submitted by the Canadian Centre for Policy Alternatives.

According to the [House of Commons Procedure and Practice](#), “witness selection [for Committee studies] may be carried out in a number of different ways. Generally, witnesses are proposed by individual committee members.” For this study, Committee members submitted the names of proposed witnesses in priority order, and witnesses were invited to appear in a proportion reflecting political parties’ representation in the House of Commons.

This report summarizes the comments made by witnesses in their appearance and in the brief about ISDS mechanisms. In particular, the first section outlines certain elements of



ISDS mechanisms, and identifies some of their advantages and disadvantages, while the second section discusses selected current efforts to reform ISDS mechanisms. Section three describes these mechanisms in Canada’s existing trade and investment agreements, as well as several of their impacts on various groups in Canada, while the fourth section examines Canada’s future approach to ISDS mechanisms in its agreements. The report concludes with the Committee’s thoughts and recommendations.

## **ELEMENTS OF THESE MECHANISMS, AND THEIR ADVANTAGES AND DISADVANTAGES**

The Committee’s witnesses described certain elements of ISDS mechanisms. As well, with most indicating that the mechanisms have more advantages than disadvantages, they identified some advantages – such as promoting the de-politicization and de-escalation of investment disputes, protecting Canadian investments abroad and reducing the diversity of arbitration rules – and selected disadvantages – such as the “regulatory chill” effect and implications for environmental protection.

### **A. Certain Elements**

In the view of Université Laval’s [Charles-Emmanuel Côté](#), who appeared as an individual, the “fundamental feature” of ISDS mechanisms is “the parties’ consent” to use them to settle disputes in a binding manner. According to him, “states give their consent in advance, whereas investors do so when they file a claim.”

Appearing as an individual, the University of Ottawa’s [Patrick Leblond](#) explained that ISDS mechanisms in trade and investment agreements are “designed to provide a neutral—meaning non-politicized and impartial—and efficient conflict resolution framework” for situations in which a government’s discriminatory actions concerning a foreign investor lead assets to be lost or reduced in value. He added that foreign investors in “countries where tribunals are not very reliable” prefer the investment protections that exist with ISDS mechanisms.

According to McGill University’s [Armand de Mestral](#), who appeared as an individual, ISDS mechanisms allow an arbitration tribunal to make enforceable decisions. He also noted that these tribunals have procedural powers that are similar to those of domestic courts.

## B. Some Advantages

Concerning de-politicization and de-escalation, [Charles-Emmanuel Côté](#) said that ISDS mechanisms primarily provide “a political advantage by helping to depoliticize the settlement of investment disputes.” He pointed out that, as a result, there is no need for governments to become involved with their investors’ disputes in foreign jurisdictions. Similarly, [Armand de Mestral](#) noted governments’ preferences “to have these disputes dealt with independently in a much less politicized framework.” MAAW Laws’ [Mark Warner](#), who appeared as an individual, also mentioned that one of the advantages of ISDS is that it brings disputes “down” to the “private level precisely to depoliticize them.”

Appearing as an individual, New York Law School’s [Barry Appleton](#) indicated that ISDS mechanisms allow disputes to be “compartmentalized and de-escalated.” He explained that these mechanisms ensure that decisions about “discriminatory, improper, unfair or even corrupt treatment against Canadian [investors] can be addressed” in foreign jurisdictions without the Government of Canada having to engage diplomatically to protect these investors’ interests.

Regarding protection for Canadian investors abroad, the [Minister of Small Business, Export Promotion and International Trade](#) stressed that “having that careful balance of ISDS provisions for companies to invest confidently while at the same time ensuring that a country continues to retain the right to regulate in the public interest is what [the Government of Canada aims] to do.”

In highlighting that Canada is “now a capital exporter,” [Mark Warner](#) contended that ISDS mechanisms protect Canadian investments abroad. [Charles-Emmanuel Côté](#) mentioned that, “until the 1990s, Canada was essentially a net importer of foreign capital” and that, “since then, Canada has been a net exporter of foreign capital.”

In the view of the [Honourable Yves Fortier](#), who is with Cabinet Yves Fortier and appeared as an individual, recent geopolitical developments – “as evidenced by Trumpism and the imposition of tariffs” – underscore “the need to continue to include ISDS [mechanisms]” in Canada’s trade and investment agreements. According to him, due to a perception that certain jurisdictions “are unfriendly,” foreign investors avoid domestic courts and instead use ISDS mechanisms to resolve disputes. [Charles-Emmanuel Côté](#) commented that ISDS “reassures investors.”

Furthermore, the [Honourable Yves Fortier](#) asserted that one of the “greatest strengths” of ISDS mechanisms is the absence of an appeal process. He underlined that this absence results in arbitral decisions that are “definitive and avoid the inherent delays” associated with the domestic judicial process that could be used as an alternative.





[Charles-Emmanuel Côté](#) suggested that “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.”

Global Affairs Canada [officials](#) said that Canada “get[s] significant benefits out of having” ISDS mechanisms “in economies where [the country's investors have] investments in the mining sector and various other sectors.” Appearing as an individual, Herman and Associates’ [Lawrence Herman](#) noted that ISDS mechanisms are a “benefit to Canadian outbound capital,” and pointed out that “there is [ISDS] arbitration going on beyond the extractive sector where Canadian investors have sought recourse to these provisions” in these mechanisms.

On the topic of the diversity of arbitration rules for foreign investors, [Armand de Mestral](#) stated that, if “all disputes are sent to domestic courts, there would be 189 different solutions.” [Patrick Leblond](#) observed that “Canadian businesses [would] then face greater uncertainty when they operate abroad” and “would be dealing with 189 different rules, one for each country.”

### C. Selected Disadvantages

York University’s [Gus Van Harten](#), who appeared as an individual, commented on the risks of governments changing their regulatory measures as a result of decisions about foreign investors’ claims under ISDS mechanisms. Moreover, [he](#) shared his view that the ability of ISDS arbitrators to “interpret vague language” in trade and investment agreements, and to order governments to pay damages of “potentially billions of dollars,” is “extraordinary.”

In a brief submitted to the Committee, the [Canadian Centre for Policy Alternatives](#) indicated its view that the “worst consequence” of ISDS mechanisms is the right provided to foreign investors “to challenge vital and legitimate public policy measures” before an arbitration tribunal. The [Trade Justice Network](#) pointed out that governments expend “significant energy” in determining whether their proposed regulations would violate ISDS mechanisms, and often decide that “it is too risky to even try,” leading to regulatory “chill.” It contended that ISDS mechanisms are “the clearest embodiment of the ways in which trade deals prioritize corporate rights ... ,” and stated that the Government of Canada should not allow foreign investors to have rights that differ from those of domestic investors.

Concerning the “regulatory chill” that some believe exists with ISDS mechanisms, [Barry Appleton](#) maintained that “restrictions upon Canadian public policy come from the

treaty text, not from the ISDS process.” In his opinion, the “broad public policy exceptions” in trade and investment agreements permit governments to regulate in the public interest, and suggested that government officials should rely on such exceptions to do so.

With a focus on the COVID-19 pandemic, the [Trade Justice Network](#) said that the risk of potential claims and millions of dollars in damages against governments under ISDS mechanisms prevent them from taking actions “that would protect the public health of their people,” such as producing generic vaccines.

In commenting on environmental claims under ISDS mechanisms, the [Trade Justice Network](#) stated that Canadian investors “have used ISDS to disproportionately target environmental policy in developing nations ... ,” which – in its opinion – constitutes a barrier “to climate action” for these nations. The [Canadian Centre for Policy Alternatives](#) characterized Canadian investors – particularly from the mining and energy sectors – as “aggressive users of ISDS against other governments.” Furthermore, [it](#) asserted that Canada’s environmental protection and natural resource management measures “have been a favoured target,” accounting for more than 60% of ISDS claims against the country. According to the Canadian Centre for Policy Alternatives, these claims “undermine environmental protection efforts that benefit the global community.”

## CURRENT EFFORTS TO REFORM THESE MECHANISMS

In their appearance before the Committee, witnesses made general comments about efforts to reform ISDS mechanisms, and focused on selected Canadian and international reform efforts.

### A. General Comments About Reform Efforts

[Gus Van Harten](#) characterized efforts to reform ISDS mechanisms as “scattered, painfully slow, generally flagging or not that promising.” [Patrick Leblond](#) stressed the need to “focus the energies” of governments to make these mechanisms “more transparent, accessible and fair.”

In discussing procedural reforms, [Armand de Mestral](#) said that many trade and investment agreements now exclude certain “types” of ISDS claims, particularly those deemed to be “frivolous or clearly unfounded.” Concerning ISDS arbitrators, [he](#) asserted that they are now “appointed much more carefully” than in the past and must adhere to codes of conduct. He also suggested that “there is now much more diversity in the community of arbitrators.”



## B. Canadian Efforts

From the Canadian perspective, Global Affairs Canada [officials](#) noted that discussions have occurred with “civil society, labour organizations, indigenous partners, business associations, pension funds, legal practitioners, academics, as well as our provinces and territories,” about the ISDS model that exists in the country’s foreign investment promotion and protection agreements. In highlighting that a “lot of analysis” has been done, [they](#) commented that the analysis of that model was the basis for a “comprehensive, new, inclusive and modern” model that – according to [them](#) – the Government of Canada will soon publish. [They](#) also indicated that the Government will provide the “internal analysis” that informed the development of this new model.

[Armand de Mestral](#) supported the “way the Canadian government has tried to modernize [its trade and investment agreements] as far as it can go.” [He](#) observed that “procedural reforms” have been made to some of Canada’s “major” trade and investment agreements, which – in his view – indicates that the ISDS reform process is “well underway, but certainly not finished.”

## C. International Efforts

With a focus on international ISDS reform efforts, the [Honourable Yves Fortier](#) mentioned that the EU has submitted a proposal for a multilateral investment court to the United Nations Commission on International Trade Law’s Working Group III: Investor-State Dispute Settlement Reform. He underscored that the proposed court would be 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.” In sharing [his](#) opinion that it is in Canada’s interest to support the EU’s proposal, [Armand de Mestral](#) speculated that the composition of the proposed court’s arbitrators “would end up being fifty-fifty men and women.”

## THESE MECHANISMS IN CANADA’S EXISTING AGREEMENTS AND THEIR IMPACTS

Witnesses spoke to the Committee about ISDS mechanisms in Canada’s existing trade and investment agreements, and several of their impacts on Canadian investors abroad and other groups in Canada.

## A. Mechanisms in Canada’s Agreements

In asserting that the ISDS mechanisms in Canada’s trade agreements “offer protection for Canadian companies operating abroad,” the [Minister of Small Business, Export Promotion and International Trade](#) suggested that – as a result – Canadian investors can “confidently access those international markets.”

The [Canadian Centre for Policy Alternatives](#) pointed out that, despite CUSMA not having an ISDS mechanism that applies between Canada and the United States, the Government of Canada is “enmeshed in an extensive web of bilateral and regional accords” that contain such mechanisms. It particularly noted the CPTPP and Canada’s “comprehensive” trade agreements with such countries as South Korea, Chile, Colombia and “some other smaller countries.”

[Gus Van Harten](#) contended that including an ISDS mechanism in the CPTPP “was a turn in the wrong direction” because, at that time, Canada and the EU were “changing the ISDS [mechanism in] CETA” and “getting ready to get out of it in NAFTA” by not including such a mechanism between Canada and the United States in CUSMA.

[Lawrence Herman](#) focused on CETA in mentioning that the recent reforms to its ISDS mechanism “require ratification by all of the [EU’s] member states.” He expressed skepticism that this ratification will occur and, accordingly, speculated that “CETA will continue for some time without those [reformed] ISDS provisions.”

[Charles-Emmanuel Côté](#) underscored that, due to Canada’s “somewhat inconsistent approach” to ISDS mechanisms, “it might be relatively effortless for [foreign] investors to circumvent the [country’s potential] abandonment of ISDS” by investing in Canada through subsidiaries located in countries with which Canada has investment agreements.

## B. Several Impacts on Various Groups

In discussing the impacts of ISDS mechanisms on Canadian investors abroad, [Charles-Emmanuel Côté](#) said that Canadian investors “ranked fifth in terms of most frequent users of ISDS [mechanisms] globally” and that, “thus far, 55 claims have been made by Canadian investors abroad.” [Gus Van Harten](#) asserted that Canadian investors abroad would “have some setback” and would not “be as well off” if ISDS mechanisms are removed from Canada’s trade and investment agreements. However, in his view, the Government of Canada would benefit “overall” because not having “to worry about” the possible payment of “billions of dollars” in ISDS claims would enhance both the



Government’s ability to regulate in the public interest and its “capacity to respond in a future crisis.”

[Patrick Leblond](#) argued that, if the objective is to protect Canadian investments abroad, Canada’s trade and investment agreements should have an ISDS mechanism. In [his](#) opinion, Canadian businesses that invest abroad would be “put at a disadvantage” if their investments are not protected by ISDS mechanisms that are at least as effective as those that can be accessed by their competitors from other countries.

[Charles-Emmanuel Côté](#) commented that Canada should have a “more considered and systematic approach” to protecting these investments, and suggested that it is “imperative” to begin by identifying these investors’ needs and “essential” to establish whether the Government of Canada “wants the responsibility of settling disputes on behalf of all Canadian companies abroad” if it decides to pursue removal of ISDS mechanisms from its agreements.

According to [Mark Warner](#), Canadian businesses that want to invest abroad are “going to look for some kind of insurance” if they “can’t get a remedy through something like ISDS.” He maintained that, for these investors, the existence of ISDS mechanisms precludes the need for “some really highly subsidized insurance scheme.” In [his](#) opinion, if Export Development Canada is providing insurance for these foreign investments, then Canadian taxpayers “are the ones that ultimately will be underwriting that risk.” The [Trade Justice Network](#) contended that it is not Canadians’ or the Government of Canada’s “responsibility” to insure Canadian businesses that invest abroad, and commented that the Government should require these businesses to purchase insurance.

Concerning the impacts of ISDS mechanisms on Canadian small and medium-sized businesses that invest abroad, [Gus Van Harten](#) argued that an ISDS mechanism in trade and investment agreements “isn’t going to help [these businesses] because they can’t afford the litigation.” [He](#) said that a “state-to-state mechanism” is needed to protect them. [Barry Appleton](#) provided a different perspective, stating that an ISDS mechanism in such agreements is “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.”

Regarding the impact of ISDS mechanisms on the rights of Indigenous peoples in Canada, the [Trade Justice Network](#) identified a need for “indigenous representation at the bargaining table” when trade agreements are negotiated in order “to fully realize [the United Nations Declaration on the Rights of Indigenous Peoples] and [the] trading rights [of Indigenous peoples].”

## CANADA'S FUTURE APPROACH TO THESE MECHANISMS

In speaking to the Committee about Canada's approach to ISDS mechanisms in its trade and investment agreements, witnesses focused on the removal of such mechanisms from existing agreements and their inclusion in future agreements.

### A. Removal from Existing Agreements

[Gus Van Harten](#) suggested that Canada should not have ISDS mechanisms in its trade and investment agreements, and highlighted the need to retain and to strengthen both the Government of Canada's "capacity and flexibility," and its "domestic institutions based on Canadian law that protects all investors." He urged the Government to: develop a "strategy" for removing these mechanisms from its agreements "however possible"; engage in "quiet determination" as it pursues the removal of these mechanisms; and limit ISDS-related risks to the greatest extent possible. In [his](#) view, the risk of negative impacts from Canada not having ISDS mechanisms in its agreements "would be low," and could be reduced "even lower" if their removal occurs "in a quiet, unprovocative way." In mentioning that this approach would be similar to that followed by South Africa, he said that foreign investors should be assured that other investment protections are available, and advocated the enactment of legislation that would "make those protections more robust." [Lawrence Herman](#) observed that the removal of ISDS mechanisms on a "case-by-case basis" could be a "viable approach."

The [Canadian Centre for Policy Alternatives](#) proposed that the Government of Canada should "phase out" ISDS mechanisms by taking a range of actions: inform foreign investment promotion and protection agreement partners of "Canada's willingness to renegotiate [these agreements] based on a new template that does not include ISDS"; withdraw from these agreements "as soon as possible" if a partner refuses to renegotiate with Canada; and, regarding trade agreements that contain an ISDS mechanism, provide partners with an opportunity to renegotiate the agreement's investment provisions based on a new model that does not include ISDS.

In providing a different perspective, the [Honourable Yves Fortier](#) said that ISDS mechanisms "should continue to be part of Canada's trade and foreign policy arsenal." In [his](#) view, it is "essential for Canada to continue to provide foreign investors with ISDS protection." He maintained that removing ISDS mechanisms from Canada's trade agreements might lead these investors to think that "Canada is not a reliable and serious partner." According to [Lawrence Herman](#), such removals would be "politically, diplomatically and legally very difficult." He speculated that "it's going to be impossible



to change the ISDS system” that is “ingrained” into the country’s trade and investment agreements.

[Charles-Emmanuel Côté](#) identified the existence of an ISDS mechanism as “one of several considerations to be weighed in making investment decisions.” He observed that, if such mechanisms “were to disappear, foreign investment would not disappear.” In his opinion, 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.” He contended that, “apart from a number of fairly well-known exceptions, damages awarded amount to only a tiny fraction of the capital invested in states.”

With a focus on particular trade agreements signed by Canada, [Armand de Mestral](#) described NAFTA as “a bit of a wake-up call for Canada,” noting that the country was involved in the first two claims made under Chapter 11. However, Global Affairs Canada [officials](#) stated that the ISDS cases under that agreement included “very few cases against Canada by foreign investors.”

[Gus Van Harten](#) characterized the absence of an ISDS mechanism between Canada and the United States in CUSMA as a positive outcome, while [Mark Warner](#) commented that the result could be the politicization of every trade and investment dispute between the two countries “all over again.”

As well, [Gus Van Harten](#) mentioned that, because of “side deals” under the CPTPP, an ISDS mechanism does not apply between Australia and New Zealand. In his opinion, Canada could “conclude similar side deals with those countries ... .” [Lawrence Herman](#) agreed with this view, and suggested that Canada could negotiate bilateral side deals with CPTPP signatories “to eliminate ISDS.”

Regarding specific countries, [Barry Appleton](#) argued that ISDS mechanisms protected Canadian businesses when they invested in Venezuela’s mining sector. Global Affairs Canada [officials](#) underlined that Canada receives “significant benefits” from the ISDS mechanisms in its trade and investment agreements with countries where Canadians have invested in the mining and various other sectors.

## **B. Inclusion in Future Agreements**

Concerning the inclusion of ISDS mechanisms in Canada’s future trade and investment agreements, the [Minister of Small Business, Export Promotion and International Trade](#) stated that she has “been working closely with the international community” in seeking



ISDS “protections for Canadian companies abroad while also maintaining [the Government of Canada’s] ability to regulate in the public interest.”

Global Affairs Canada [officials](#) contended that the potential inclusion of an ISDS mechanism in Canada’s future trade agreements “needs to be examined on a case-by-case basis.” They explained that “every market is different,” and commented that including an ISDS mechanism in an agreement could make “perfect sense, particularly if [Canada does not] have much confidence in the domestic court system in a particular country.”

The [Trade Justice Network](#) proposed that Canada should “permanently shift [away] from” including ISDS mechanisms in its trade and investment agreements. In agreeing, the [Canadian Centre for Policy Alternatives](#) also urged Canada not to ratify pending agreements that have such a mechanism.

[Mark Warner](#), [Charles-Emmanuel Côté](#), [Armand de Mestral](#) and [Barry Appleton](#) said that Canada should seek to include an ISDS mechanism in any potential Canada–Indonesia free trade agreement.

## THE COMMITTEE’S CONCLUDING THOUGHTS AND RECOMMENDATIONS

ISDS mechanisms are prevalent in international trade and investment agreements, and there is ongoing debate – and divided views – about their merits and impacts.

One concern relating to ISDS mechanisms is the extent to which they may constrain governments’ ability to make decisions that are in the best interest of the public they serve. The Committee recognizes that the ability to take actions in the interest of all Canadians is perhaps particularly important in times of crisis, such as the pandemic that continues to be uppermost in the minds of many. No provision in Canada’s trade and investment agreements – current or future – should curtail the Government of Canada’s ability to legislate and regulate – promptly, adequately and effectively – in a manner that best serves Canadians. From that perspective, exceptions that permit actions to be taken in the public interest are vitally important.

Foreign investments can contribute to countries’ economic prosperity, and some analysts and commentators assert that ISDS mechanisms provide needed protections for such investments. The Committee acknowledges that investments abroad should be protected, with protections perhaps especially required when investments are made in jurisdictions characterized by unreliable or inadequate domestic legal systems.



Historically, ISDS mechanisms have been among the options available for protecting foreign investments.

The world is constantly changing, with new ways of doing business, undertaking trade and investment, and resolving disputes. To recognize this ongoing change, the Committee notes that periodic review of trade and investment agreements – and needed reforms – should occur. For that reason, the recent review of Canada’s ISDS model, and other ISDS-related domestic and international review and reform efforts, are notable. Enhanced transparency, accessibility and fairness, as well as arbitral objectivity, diversity among arbitrators and reduced litigation costs, should be among the goals of ISDS reform efforts.

In the context of the foregoing, the Committee makes the following recommendations:

**Recommendation 1**

**That the Government of Canada carry out a periodic review of trade and investment agreements signed by Canada and identify needed reforms.**

**Recommendation 2**

**That the Government of Canada produce a report on all past and present litigation against the Government of Canada and against the government of a foreign state brought by Canadian businesses under investor–state dispute-settlement mechanisms, including the total amount of damages paid to foreign investors and any other costs to Canada.**

## APPENDIX A LIST OF WITNESSES

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The following table lists the witnesses who appeared before the committee at its meetings related to this report. Transcripts of all public meetings related to this report are available on the committee’s [webpage for this study](#).

Organizations and Individuals	Date	Meeting
<p><b>As an individual</b></p> <p>Lawrence L. Herman, Counsel Herman and Associates</p> <p>Gus Van Harten, Professor of Law Osgoode Hall Law School, York University</p> <p>Mark Warner, Principal Counsel MAAW Law</p>	2021/03/22	20
<p><b>Trade Justice Network</b></p> <p>Angella MacEwen, Co-Chair</p>	2021/03/22	20
<p><b>As an individual</b></p> <p>Barry Appleton, Professor</p> <p>Charles-Emmanuel Côté, Professor</p> <p>Armand de Mestral, Emeritus professor of Law</p> <p>Yves Fortier Cabinet Yves Fortier</p> <p>Patrick Leblond, Associate Professor Public and International Affairs, Faculty of Social Sciences, University of Ottawa</p>	2021/03/26	21

<b>Organizations and Individuals</b>	<b>Date</b>	<b>Meeting</b>
<b>Department of Foreign Affairs, Trade and Development</b> Bruce Christie, Associate Assistant Deputy Minister Trade Policy and Negotiations John Hannaford, Deputy Minister International Trade Shendra Melia, Acting Director General Services, Intellectual Property and Investment Steve Verheul, Assistant Deputy Minister Trade Policy and Negotiations	2021/04/26	26
<b>House of Commons</b> Hon. Mary Ng, P.C., M.P., Minister of Small Business, Export Promotion and International Trade	2021/04/26	26

## APPENDIX B LIST OF BRIEFS

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The following is an alphabetical list of organizations and individuals who submitted briefs to the committee related to this report. For more information, please consult the committee's [webpage for this study](#).

**Canadian Centre for Policy Alternatives**



## REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the committee requests that the government table a comprehensive response to this Report.

A copy of the relevant *Minutes of Proceedings* (Meetings Nos. [20](#), [21](#), [26](#), [33](#), [35](#)) is tabled.

Respectfully submitted,

Hon. Judy A. Sgro  
Chair





## DISSENTING OPINION OF THE CONSERVATIVE PARTY OF CANADA

The Conservative Party of Canada would like to thank the analysts, clerk, and staff of the Standing Committee on International Trade for their work in preparing this committee report on selected impacts of the investor–state dispute settlement mechanisms. We are also appreciative of the witnesses who appeared to share their testimony and views during the meetings on this topic.

Conservatives recognize the important role investor–state dispute settlement (ISDS) mechanisms can have in the de-politicization of investment disputes not just in Canada but across the globe. We also recognize the need for ISDS mechanisms to provide more certainty for Canadian businesses seeking to invest abroad in states who may not have a fully developed and independent court system.

As we heard from Professor Barry Appleton, ISDS:

*"provides a depoliticized and independent mechanism that allows for the application of the rule of law to disputes between states and investors."*<sup>1</sup>

Professor Charles-Emmanuel Cote also re-iterated this point, stating that:

*"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."*<sup>2</sup>

ISDS mechanisms continue to remain a relevant and critical part of trade agreements. The benefits of de-politicization can not be neglected as the Government of Canada seeks to negotiate new trade agreements, and looks to expand in new markets such as ASEAN and MERCOSUR.

We also express reservations regarding Recommendation #4 of the committee report, which asks that "the Government of Canada produce a report on all past and present litigation against the Government of Canada and against the government of a foreign state brought by Canadian businesses under investor–state dispute settlement mechanisms, including the total amount of damages paid to foreign investors and any other costs to Canada." Conservatives feel that this recommendation seeks to identify narrow and select information in an effort to portray ISDS mechanisms as only have negative consequences. It is important that such a report would produce a comprehensive and well-rounded picture on ISDS.

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<sup>1</sup> <https://www.ourcommons.ca/DocumentViewer/en/43-2/CIIT/meeting-21/evidence#Int-11211304>

<sup>2</sup> <https://www.ourcommons.ca/DocumentViewer/en/43-2/CIIT/meeting-21/evidence#Int-11211141>

Conservatives also ask that the government seek to include a form of ISDS in any potential future trade agreement with Indonesia, which the Government of Canada has begun consultations on. We heard clearly during committee testimony from several witnesses on the importance of including ISDS in this potential agreement, and to provide clarity for Canadian businesses who would look to invest in Indonesia if said agreement is negotiated and signed.

In conclusion, the Conservative Party of Canada would again stress the importance of ISDS mechanisms in our trade agreements to protect Canadian investments abroad as well as ensure a process which is de-politicized and separate from the influence of governments. We list the below recommendations for the consideration of the Government of Canada:

### **Recommendations**

1. That the Government of Canada negotiate the inclusion of an investor–state dispute-settlement mechanism in any potential Canada—Indonesia trade agreement.
2. That, alongside Recommendation #4 in the committee report, that the Government of Canada also include in the produced report the cases won by the Government through all past and present litigation via investor—state dispute-settlement mechanisms, and the total monetary value which was therefore not paid to those claiming damages.
3. That the Government of Canada work with the European Union to expeditiously establish and enact the investor—state dispute-settlement mechanism, via an investment tribunal, which was negotiated in the Comprehensive Economic and Trade Agreement (CETA).

## **SUPPLEMENTARY OPINION OF THE BLOC QUÉBÉCOIS**

### **POLITICAL SOVEREIGNTY VERSUS PROFIT ENTITLEMENT**

#### **Background**

The Bloc Québécois considers social justice, workers' rights, public health and the environment to be its top priorities. As such, it cannot defend systems that are clearly at odds with those priorities.

As a sovereignist party, we cannot support seeing political sovereignty and the right to collectively make our own decisions being threatened by multinationals.

That is why we had the Standing Committee on International Trade study the implications of the investor-state dispute settlement (ISDS) mechanism. Both major Canadian parties are strongly in favour of such mechanisms, so the selection of witnesses reflected the composition of the Committee.

Foreign investor protection clauses have been extremely important to the rise of neo-liberalism in the decade following the end of the Cold War as a legal tool to undermine the state's ability to act by raising the ever-present threat of litigation by foreign companies.

The origins of ISDS may very well lie in the ICSID Convention, which was adopted in the mid-1960s, while European bilateral investment treaties were being negotiated and signed from the late 1950s and into the 1960s and 1970s. However, its proliferation in free trade agreements undeniably follows the implosion of the USSR, when the United States seemed to be the only global power.

The most striking attempt to establish a supranational law, based on the idea of investment free of geographical, temporal and political constraints, is the Multilateral Agreement on Investment (MAI). In 1998, the MAI, the result of secret negotiations by the 29 member countries of the OECD, ultimately failed by a narrow margin, due to the withdrawal of France. The MAI was intended to promote the free movement of capital and required the signatory states to comply with several conditions pertaining to investors, who were defined as asset holders, including all financial investors (speculators, holders of securities and intellectual property rights, etc.), with absolutely no requirement that the investment be necessarily productive, meaning that there would be no requirement to create jobs, build factories or engage in any economic development. Investors were presented in the MAI as simply private individuals, which obscures the weight of multinationals. This meant that capital was restricted solely to obtaining and growing profit. Almost all of the obligations that signatory states had were to investors, as countries were required to avoid any activity that might harm investment. The application of the MAI was subject to a supranational body that took precedence over the legal systems of the signatory countries. States were not directly represented in the arbitral tribunal, nor did they have the power to appoint its members.

The MAI thus challenged national sovereignty by threatening to overturn several laws, including those affecting less developed regions, employment and the environment. But the MAI also allowed the "investor" to sue governments when they engaged in "protectionism." Countries

could also be held liable by a company for any practice that might harm the company's business. Many scholars have expressed concern about the vagueness of this requirement, fearing that it opens the door to all kinds of abuses, believing that the MAI could allow large transnationals to hide behind the impersonal concept of the market to gain significant power. Clearly, the MAI would have provided powerful legitimacy to big business at the expense of the sovereignty of the Westphalian state.

But contrary to initial expectations, the abandonment of the MAI did not do away with foreign investor protections. It soon became apparent that the MAI was simply a proposal to extend part of the North American Free Trade Agreement (NAFTA) to all OECD countries, which was subsequently replicated in almost every treaty. Chapter XI of NAFTA, signed by the United States, Canada and Mexico in 1994, was designed to protect foreign investors from government intervention. Article 1110 provided that "No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment."

The term "tantamount to nationalization" is legally open to various interpretations, suggesting that this definition could conceivably be applied to any democratically enacted legislation, which could mean any disincentive to the pursuit of profit, or even the mere anticipation of one. It has thus become increasingly difficult for a state to legislate on issues related to, for example, social justice, the environment, workers' conditions or public health, if a transnational believes that it has been aggrieved. The dismantling of democratically negotiated standards was underway.

Following NAFTA, various forms of this investor protection mechanism have been included in most free trade agreements and thus applies, albeit in different ways, on a global scale. Some treaty chapters, such as those pertaining to the environment, often have no concrete requirements. The included oversight mechanisms are almost always consultative or non-binding, unlike those that apply to investment, which are, by contrast, extremely binding.

### **Involvement of the courts in economic disputes**

According to a 2013 United Nations Conference on Trade and Development (UNCTAD) report, in this type of legal proceedings, states won in 42% of cases, compared to 31% for companies. The remaining disputes were settled out of court. In 58% of cases, the prosecutors were able to partly or entirely overturn the political will of the states.

This figure, however, overlooks one important factor: the pressure that investor protection clauses put on states, which do not even bother enacting certain policies for fear of being taken to court. In 2014, a report submitted to the EU Directorate-General for External Policies of the Union discussed the deterrent effect of "investor-state" mechanisms on public policy choices.

The following example illustrates our point. In 2001, the tobacco company Philip Morris International tried to prevent the Czech Republic from passing anti-tobacco legislation using an image showing a corpse with a \$1,227 price tag on its foot. The company commissioned a study to quantify the budgetary savings - in health care, pensions and housing - for the death of each smoker. Several years later, the multinational grew impatient and decided to strengthen its

arsenal of persuasion by invoking the “investor-state dispute settlement mechanism.” In 2012, Australia required neutral cigarette packaging, prohibiting the use of logos. Philip Morris, which had also sued Uruguay in 2010 over its tobacco policies, then filed a complaint against Australia based on a treaty between Hong Kong and Australia. The case snowballed and led to a climate of political self-censorship. Fearing that it too would be subject to such legal challenges, New Zealand suspended implementation of the neutral packaging policy. In the United Kingdom, Prime Minister David Cameron postponed debate on the issue, waiting for the verdict in the lawsuit against Australia. Echoing the case, cigarette companies threatened to sue France for \$20 billion for a policy similar to Australia’s. It took three years for neutral packaging to be implemented in France.

The slowdown in multilateral agreements has not changed the fact that more than 3,000 bilateral investment protection treaties have been concluded around the world. It is worth noting that the Trans-Pacific Partnership Agreement (TPP), which was quickly scuttled by President Trump upon taking office, proposed to take arbitration to a new level. The TPP set up a private arbitration system whose decisions could not be appealed and, of the three arbitrators, one was chosen directly by the suing company, the other required the consent of the company, while the third was appointed by the sued state. Two out of three could have easily overturned a government decision.

These aspects of trade treaties serve to put policy on trial before the courts, a phenomenon that has been observed for decades in the West. There is dwindling interest in solving problems through political debate, and a growing interest in leaving them up to legal technicians to solve.

In this case, litigation is a lengthy process - and therefore lucrative for law firms - and has resulted in a real litigation industry. A paper by the non-governmental organizations Corporate Europe Observatory and Transnational Institute shows that large commercial law firms have a vested interest in engaging in lengthy and complex litigation.

This judicial protection is a form of “profit entitlement” that immunizes multinationals from the potential risks of investing overseas. This supranational investor protection is a legal guarantee.

The ability to sue states was removed from the U.S.-Mexico-Canada Agreement (USMCA), which superseded NAFTA. This is, to our knowledge, the first treaty to go against the grain on this issue.

There is another kind of potential abuse. It is actually very easy for domestic companies to pose as foreign investors, through foreign incorporation or the use of subsidiaries. A Canadian example illustrates this. In 2010, paper company AbitibiBowater closed some of its facilities in Newfoundland and laid off hundreds of employees, to which the provincial government responded by repossessing hydroelectric assets. AbitibiBowater fought back and sued for \$500 million. To avoid a lengthy legal battle, Ottawa offered the company \$130 million. How could AbitibiBowater, headquartered in Montreal, pose as a foreign investor aggrieved by Canada? It did so by incorporating in Delaware. In the case of Ethyl Corporation, it is a U.S. company incorporated under the laws of the State of Virginia, but is the sole shareholder of Ethyl Canada Inc. incorporated under the laws of Ontario. It was this foreign registration that,

under NAFTA, allowed the company to sue Canada in 1997 for restricting the import and transfer of the suspected toxic fuel additive MMT. Canada apologized, along with C\$201 million.

### **Bloc Québécois's position: in the interest of democracy**

The Bloc Québécois supports commerce and free trade. We recognize that exports are important to the Quebec economy. However, we do not accept having limitations placed on democracy. Businesses have the right to seek profit, but investors should also obey the laws of the countries in which they operate.

The independence movement has always been concerned about ISDS. In 2001, Jacques Parizeau described the 1997 Ethyl Corporation lawsuit against Canada's restriction on the import of a suspected toxic fuel additive as a "rude awakening" about ISDS. In 2004, the Bloc Québécois called for the renegotiation of Chapter 11 of NAFTA, which gave rise to ISDS.

We consider the removal of ISDS from the USMCA to be a positive development, but we must go further. Given the pandemic, we support a moratorium on the use of the ISDS mechanism for measures related to COVID-19.

If the waiver of intellectual property rights on COVID vaccines is approved, there is nothing to prevent Big Pharma from suing the beneficiary countries for compensation under ISDS. That would be, in our opinion, problematic.

The removal of ISDS from North American free trade makes it difficult, in our view, to justify the return of such a mechanism in future agreements.



## **SUPPLEMENTARY OPINION OF THE NEW DEMOCRATIC PARTY OF CANADA**

The committee heard compelling testimony against Investor-State-Dispute-Settlement (ISDS) clauses, specifically how they not only prioritize the rights of corporations over the rights of people but also dilute government's ability to make decisions in the best interests of citizens. New Democrats are disappointed that the committee did not come to the conclusion that ISDS clauses should not be pursued in future trade agreements and phased out of agreements that currently include them.

### **NDP recommendation:**

1. That the Government of Canada not pursue investor–state dispute-settlement mechanisms as it undertakes negotiations for future international trade and investment agreements. Moreover, as expeditiously as possible, the Government should begin to phase out such mechanisms in existing agreements.

