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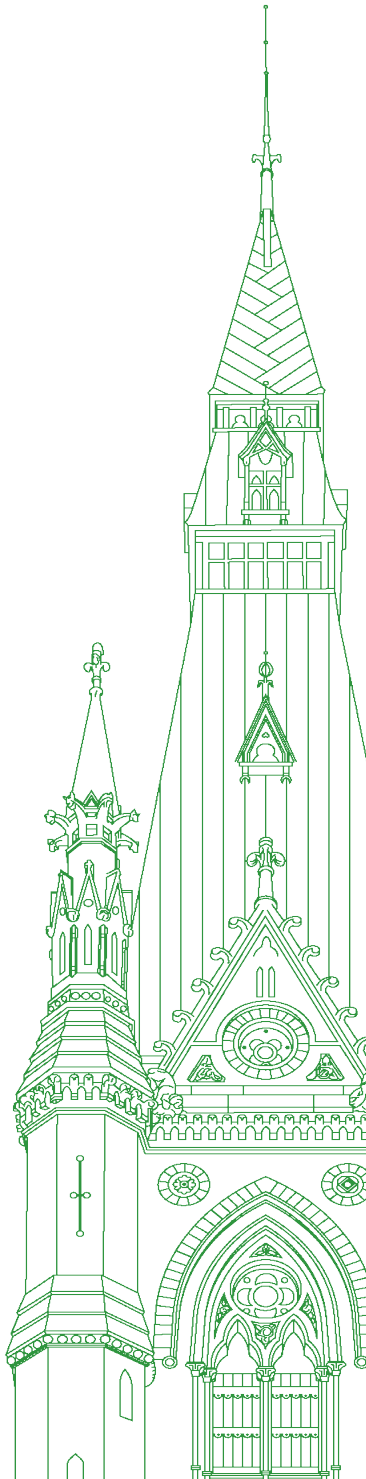

Chair: Mr. Joël Lightbound

Standing Committee on Industry and Technology

Monday, May 29, 2023

● (1605)

[*Translation*]

The Chair (Mr. Joël Lightbound (Louis-Hébert, Lib.)): I call this meeting to order.

Welcome to meeting No. 76 of the House of Commons Standing Committee on Industry and Technology.

Pursuant to the order of reference of Monday, April 17, 2023, we are studying Bill C-34, An Act to amend the Investment Canada Act.

Today's meeting is taking place in a hybrid format, pursuant to the House order of Thursday, June 23, 2022.

I'd like to apologize to the witnesses for today's delay because of votes at the House. Thank you for your patience.

I'd also like to thank the witnesses for being here on a sunny Monday afternoon.

Today, we have with us by videoconference, senior counsel Laura Black, appearing as an individual, Kate McNeece, partner, competition, antitrust and foreign investment at McCarthy Tétrault, and the Honourable Christian Paradis, who is a lawyer and former minister.

With us in Ottawa are Bob Fay, managing director, digital economy at the Centre for International Governance Innovation, and Tim Gilbert, managing partner at Gilbert's LLP. Thank you for coming in person.

Since we have a large group of witnesses, without further ado, I will give the floor to Ms. Black for five minutes.

[*English*]

Ms. Laura Black (Senior Counsel, As an Individual): Good afternoon. I'm honoured to be able to join you today to speak about foreign investment review.

Until October of last year, I was the director of policy and international relations in the office of investment security—that is, CFIUS—at the U.S. Department of the Treasury. As you are probably aware, the Committee on Foreign Investment in the United States, better known as CFIUS, is the inter-agency committee that reviews foreign investment for national security risk. In my prior role, I led the process for drafting and finalizing regulations to implement CFIUS's new authority under a 2018 statute and also led the international engagement function for CFIUS, where Canada was an excellent partner to the United States.

I am currently practising law with Akin Gump Strauss Hauer & Feld in Washington. Today, I am speaking in my personal capacity.

In establishing and implementing a foreign investment review mechanism, countries with open economies are attempting to meet dual objectives: protecting national security while maintaining an open investment environment.

In recent years, governments worldwide have created or strengthened review mechanisms—for example, to require more mandatory filings to ensure they have the opportunity to review higher-risk transactions, and in recognition of the fact that once material non-public technical information is shared, a subsequent divestiture cannot undo the damage to national security. These mechanisms vary by jurisdiction and, of course, each country must determine for itself where to draw various lines.

I understand that committee members have inquired as a point of reference how CFIUS has approached certain issues, and I will offer background on five relevant issues.

The first is mandatory filings. In the U.S., filing is generally voluntary, with parties receiving the benefit of a safe harbour from future review once CFIUS has cleared a transaction. Recent amendments made preclosing filings mandatory in two cases: investments where a foreign government would acquire a “substantial interest” in certain businesses with critical technology, critical infrastructure or sensitive personal data—called TID businesses—and certain investments by private companies into U.S. businesses with “critical technology”.

Although other transactions involving technology are subject to CFIUS's voluntary jurisdiction, the mandatory filing requirement is only triggered with respect to a particular transaction where a government authorization would be required to export the U.S. business's technology to the foreign acquirer or certain of its shareholders. Thus, transactions that are likely to be riskier are the ones that must be filed mandatorily preclosing. Other countries, such as the U.K., Japan and France, have taken a broader sectoral approach to mandatory filings.

Second is regulatory scoping. For CFIUS, the broad contours of jurisdiction are included in the statute, with many key terms defined in regulations, which can be updated more easily. Particularly where filings are mandatory, best practice is to provide as much detail as possible.

Third is interim measures. The 2018 legislation codified CFIUS's authority to impose interim measures while reviewing a transaction. Similar to the rationale for mandating filings, this can prevent harm to national security that cannot be reversed, such as preventing access to technology, though CFIUS has used this sparingly. CFIUS does frequently negotiate mitigation agreements to address identified risk.

Fourth is confidentiality. CFIUS's statute provides an explicit exception to its confidentiality requirements for sharing information with allied governments.

Fifth is excepted foreign states. Here, I will note an area of difference. As in Canada, CFIUS generally applies to investment from all foreign countries, and there is not a prohibited list. However, the 2018 legislation provided discretion for CFIUS to give exceptions for certain investors. Currently, investors with a tight nexus to Five Eyes countries, including Canada, are excepted from CFIUS's jurisdiction over non-controlling investments and all mandatory filing requirements. However, they are still subject to CFIUS's broad jurisdiction over transactions that could result in control.

Finally, I will also note that Congress provided CFIUS with a significant increase in resources concurrently with the expansion of its jurisdiction. Returning to the theme of protecting national security and open investment, this has allowed CFIUS to devote more resources to addressing risks while also more quickly processing benign transactions.

I look forward to your questions. While I'm not an expert on the Canadian process, I am happy to share my experience on investment security issues.

● (1610)

[*Translation*]

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

I will now give the floor to Ms. Kate McNeece for five minutes.

[*English*]

Ms. Kate McNeece (Partner, Competition, Antitrust and Foreign Investment, McCarthy Tétrault LLP, As an Individual): Good afternoon, Mr. Chair and honourable members of the committee.

My name is Kate McNeece, and I'm a partner in the competition, antitrust and foreign investment group at the law firm of McCarthy Tétrault. Thank you very much for inviting me to appear before you today.

Before I begin my statement, I want to note that I am appearing here in my personal capacity. The views expressed today are my own and not those of my law firm or any client of McCarthy Tétrault. However, my submissions today are informed by my experience in assisting both foreign investors—including state-owned enterprises—and Canadian businesses navigate reviews under both the net benefit and the national security provisions of the Investment Canada Act.

I want to keep my remarks today brief, so I'm going to focus on just one aspect of Bill C-34 that I find welcome: the new provision empowering the minister to negotiate binding undertakings with the foreign investor to mitigate national security concerns.

Under the current ICA, the Governor in Council can impose conditions on an investment in the final stage of the review, but in practice this power has not been used since 2017. Empowering the minister to consider and accept binding undertakings during the primary national security review can improve the efficiency of the national security process by resolving matters prior to the final GIC review period. However, I believe the benefit of this provision will be limited if not paired with a greater level of transparency than currently exists.

First, when a national security review is ordered, the investor is customarily provided with very little information about the nature of the national security concern. In my experience, the foreign investor may not be able to discern the precise nature of the national security concern or even which business line or lines of the Canadian business it applies to. This lack of disclosure means that the investor's ability to provide representations to the minister or to propose meaningful and practicable undertakings to address the concern will be limited, undermining the potential benefits of this new process.

Second, the undertakings process will proceed more smoothly if there is sufficient context for the investor to evaluate the minister's requests for mitigation. If the minister cannot provide meaningful feedback to the investor on its proposed undertakings in the national security context, the undertakings negotiation process may move slowly or stall altogether.

Finally, further public disclosure of the undertakings that are agreed to with foreign investors is warranted for reasons of transparency and accountability. There are likely good policy reasons for not disclosing mitigation measures on a case-by-case basis. However, the minister could disclose mitigation measures on an anonymized or summary basis, as CFIUS does in the committee's annual report to Congress.

This disclosure would improve the administration of the Investment Canada Act by providing a remedial road map for investors—not to mention Canadian businesses—trying to assess the national security risk posed by a given investment. It would also demonstrate to potential investors that the undertakings process is not being used as a back door to obtain a net benefit type of undertakings for investments that are not reviewable under part IV of the act, and highlight to the public the steps that the Canadian government is taking to protect national security while ensuring Canada remains a welcome home for appropriate foreign investment.

Of course, there will be information that the government cannot share with the merging parties or with the public due to security reasons. It may be difficult as a practical matter to find the appropriate balance, but by including in Bill C-34 measures to improve transparency—such as an obligation to provide reasons for ordering a national security review, a clear legal standard for national security undertakings and a requirement to include information about mitigation measures in the annual report—Parliament can improve the efficiency of the ICA national security process and highlight its commitment to transparency and the rule of law in its administration.

Thank you very much for the opportunity to present these remarks. I'd be happy to answer any questions.

[*Translation*]

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

I will now give the floor to Mr. Christian Paradis.

Hon. Christian Paradis (Lawyer and Former Minister, As an Individual): Thank you, Mr. Chair.

Good morning, committee members. I would like to emphasize that I am appearing here as an individual.

My name is Christian Paradis, legal counsel and former member of Parliament for the beautiful riding of Mégantic—L'Érable. I also served as a cabinet minister in the Harper government from 2008 until my retirement from politics in 2015.

First, I would like to thank you for inviting me to the committee. Ten years ago already, I myself was Minister of Industry. I'd like to take this opportunity to extend my warmest greetings to the colleagues with whom I had the pleasure and privilege of sitting. I'm also delighted to meet the new members.

The subject currently being addressed by this committee is of the utmost importance. Our country has developed well compared to many other countries, thanks to its values based on a free and democratic society and mainly anchored in the rule of law. The strength of our system and its stability are cited as an example around the world.

Our heritage as an open, trading nation has made us a major economic powerhouse today. Our country is one of the most resource-rich places in the world, making it a popular place for foreign investment. The ever-increasing level of investment also brings its own set of challenges.

As you know, nearly 40 years ago, the federal government passed the Investment Canada Act. But society has come a long way since then, and many things have changed. More specifically, it's fascinating to see geopolitical and socio-economic realities have evolved over the past few years. Significant trends were already apparent in the late 2000s, leading to a growing number of investment reviews on national security grounds. In 2012, guidelines on publishing appeared with regard to the acquisition of Canadian companies by foreign state-owned enterprises. Basic questions of governance and transparency increasingly being raised, the government needed to step in to protect Canadians' interests.

The security upheavals of recent years, indeed months, certainly call for a review of the Investment Canada Act. I have taken note of the comments made by Minister Champagne, who said he wanted to add tools to his toolbox with the main objective of protecting certain sectors, which have yet to be defined.

I took note of the various proposed levers, such as advance notice of investment, interim conditions after consultation with the Minister of Public Safety, the extension or termination of a review, the protection of information in reviews and judicial reviews, the disclosure of confidential information to other foreign states and increased penalties.

As you are all aware, the current context calls for a review of the Investment Canada Act, as the authorities must be able to deal properly with fundamental issues of national security. Given the importance of this issue, I believe the work of this committee is extremely important. Dealing with issues that have international consequences sends out an important message that does not go unnoticed, whether in a positive or negative way. The markets are obviously the first to read these signals, and that's why we will have to move forward carefully and not intervene too heavily, that is, to properly apply and, in particular, frame the levers which will be used.

I agree that the act needs to be reviewed, and the proposed levers seem appropriate at first glance. I believe, however, that a word of caution is in order when it comes to implementation. It will always be important to optimize the transparency of the process, as much as possible, given that we obviously cannot disclose everything, not to mention having a predictable and consistent process. It will therefore be important to carefully calibrate the application of the act by means of the various tools proposed, since legislative rigidity would risk having a chilling effect on the markets, as would directives that change too much over time.

Thank you.

● (1615)

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

I will now give the floor to Mr. Fay for five minutes.

[*English*]

Mr. Bob Fay (Managing Director, Digital Economy, Centre for International Governance Innovation): Chair and honourable members of the committee, thank you very much for the opportunity to present here today.

Please allow me to make three comments related to Bill C-34.

First, intangible assets, particularly data, have changed the nature of economic growth and created new value chains, thus requiring a fresh lens and a renewed focus on the benefits and harms that may come from foreign direct investment. First-mover advantages, economies of scale and scope, network effects and asymmetric information derived from data create greater economic concentration that can leave Canada beholden to foreign firms and also reduce our economic resiliency.

Further, foreign direct investment may be used to capture Canadian intellectual property and data, which can reinforce such impacts. For example, data can not only allow investors to ring-fence a particular market; it could also allow investors to move into other sectors that may be sensitive and not anticipated with the initial investment. In other words, the capture of data can create issues across sectors and not just in a specific market. Thus, one needs to consider how data may be used across the list of sensitive technology areas and outside of them, not just within those specific areas. This can arise from any investment and not just those by state-owned enterprises.

Data is extremely valuable. We have an idea of the aggregate value of data, with experimental estimates from Statistics Canada placing it around $200 billion Canadian, though we need more detailed and updated estimates. Because data is not explicitly valued on balance sheets, monetary thresholds for a review miss the capture of data that may be the reason behind the investment. Data need not only be held in large firms but also smaller ones, so where the investment takes place in the value chain is important.

Second, data creates geopolitical issues that touch upon national security, and Canada needs to be active in setting global rules. Countries and firms are strategically setting rules around the uses of data, particularly personal data, that can give rise to national security concerns and have a direct impact on Canada.

Canada needs to be actively engaged internationally in setting these rules, including standards, since Canada can be held accountable under such rules: for example, adequacy decisions by the European Union for its general data protection regulation. Just as Canada may be judged by its adequacy to rules set in other jurisdictions, Canada should also assess other countries on the prospective uses of our personal data and whether they meet Canadian values. In this regard, it is important that Canada's own governance is up to date with respect to privacy legislation, for example.

Third, data requires a whole-of-government approach, as well as new forms of governance. Although it is important to take a national security perspective to foreign investments, it also requires that other policy areas be taken into consideration, including privacy, data governance, competition and consumer protection, public safety and so on.

There are a few examples. Investment that could lead to greater economic concentration may make our economy less innovative and resilient. This is linked to competition policy. Also, personal data can be combined with other data to reveal patterns of behaviour, which can then be used to create social tensions and undermine our institutions and democracy. This is clearly linked to public safety and national security.

A recent example from the European Union and the United States that links privacy and national security is the so-called Schrems II decision from the Court of Justice of the European Union, which invalidated the EU-U.S. Privacy Shield, which relates to the cross-border transfers of personal data, on account of "invasive U.S. surveillance programs", arguing that it did not provide adequate recourse for individuals whose data may be used by U.S. intelligence agencies.

Our regulatory structures, therefore, need to adapt. As I noted in my submission to the consultations on the Competition Act, digital technologies are challenging all policy frameworks, and broader regulatory and policy-making structures need to be considered. In this context, the interaction of investment review under the ICA and the Competition Act is very important.

● (1620)

I would urge that decisions on investments wait until respective reviews are completed so that the expertise of each area can be drawn together for a broader assessment, given the intricate linkages that may exist.

Thank you.

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

Now we'll move to Mr. Gilbert for five minutes.

Mr. Tim Gilbert (Managing Partner, Gilbert's LLP): Good afternoon. Thank you for the opportunity to address you today.

I'm a litigator by training. I have a firm in Toronto called Gilbert's LLP. We work with innovation-driven clients, particularly those who are dependent upon investment for IP. We also work with indigenous communities, which increasingly are looking to expand their economic footprint. My perspective is one of someone in the field, less at a macro level and more as someone who's a foot soldier out there trying to promote Canada as a great place to be and to invest in and in which economies can grow.

The Investment Canada Act, of course—and I leverage its original foundation—seeks to strike a balance between national security and driving investment in economic activity. I look at these proposed amendments—in particular, we're going to focus on proposed new paragraph 11(c)—with particular concern, which I address in the prepared remarks I handed in. That deals with entities and the notion of what I see as a switch from the original act, which defines a potential investment by a third party entity, a foreign-controlled entity, in a Canadian entity. That's what the Investment Canada Act as currently drafted describes.

As I read it—and I'm just a plain litigator and a business owner out there dealing with these things—the proposed paragraph 11(c) describes an entity. It doesn't tie it to a Canadian entity as defined under the act. What that could lead to, since the definitions currently in the act are disjunctive, is a situation in which you have, for example, a U.S. entity that's going to invest in another U.S. entity, with a small operation here in Canada that wants to hire one employee and set up a place of business that might get material technical information, as described, having to give notice to the Canadian government and wait for an investment to take place.

I think it's a drafting error. I'm not sure it was the intent of the act to do that. I could be misreading it, but certainly from a layperson's perspective, I don't think it would achieve the objectives of this committee or of Parliament by trying to have that long arm's reach into any jurisdiction outside of Canada.

From our perspective, it would be important to clarify the scope and the reach. As the Canadian Bar Association also pointed out, it looks to be overly broad. It should be tightened up, or at least it should delineate to Canadians who try to operate a business here or to foreigners who are operating a business abroad who want to hire a Canadian why we need to go through this process.

Of course, Canada has a lot of skilled people. We are the most highly skilled of all the OECD countries. We're trying to encourage people to hire folks here and we're trying to encourage the placement of businesses here. The concern could be that we've gone almost too far with this act.

There is another concern. I mentioned at the outset that we do work with indigenous communities. That's increased in the last few years, and I don't see any specific addressing of the concerns of indigenous communities in the Investment Canada Act or in the proposed amendments. You could say, “Why is that? We're just concerned about foreign-controlled entities.” The perspective of indigenous communities is that they have been historically affected by the Indian Act and residential schools and they have long suffered under the reserve system, which took them and put them far away from the levers of economic activity. They also have not been involved in nation-to-nation consultations towards economic sovereignty.

The Canadian government did specifically recognize the UN Declaration on the Rights of Indigenous Peoples in June 2021 and is currently undertaking a review of all legislation to see how that commitment needs to be applied. Right now in this committee you're looking at an act that deals with investment. The question is—and I don't know the answer—has there been specific outreach to indigenous communities?

● (1625)

I can't speak directly, as I'm not indigenous, but I do advocate for interests like that, and a seat at the table, economic sovereignty, is what they're seeking. It would be interesting to see if the committee has received that input and would even consider possible exemptions as they lean towards economic sovereignty. I don't know the specifics of how that would work, but I think that conversation should take place, and the committee should look at that carefully in consultation with leaders from first nations and indigenous organizations, as they increasingly try to improve their economies.

I have also read the brief of the Canadian Bar Association and generally support the recommendations. I do think that the definitions need to be tightened up. I agree with the amicus suggestion in judicial reviews and further would consider it a good idea to have safe harbours for start-ups. We have a group within our firm called Slingshot, which helps start-up entities with a subscription model for legal services. We act for a lot of start-ups and small entities that are struggling to get money into their entities.

This country cannot be an island unto itself. We don't have the capital in this country that can be deployed, even that of the big pension funds. I can't tell you how many times I hear people say, “Oh, we'll get the pension funds to do it.” The pension funds need to spread their money across the world, and they can't be an answer for everybody who has an idea. We're in a marketplace that's very competitive, and we need to have access to capital.

That's the balance I leave to you. It's good work that you have, and I'm coming with a particular perspective. I look forward to the session.

● (1630)

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

To start this discussion, we'll go to Mr. Williams for six minutes.

Mr. Ryan Williams (Bay of Quinte, CPC): Mr. Généreux is going to go today.

[*Translation*]

The Chair: You now have the floor, Mr. Généreux.

Mr. Bernard Généreux (Montmagny—L'Islet—Kamouraska—Rivière-du-Loup, CPC): Thank you, Mr. Chair.

Thank you to all the witnesses.

Mr. Paradis, it's a pleasure to see you again today.

[*English*]

Long time no see.

[*Translation*]

I'm glad you accepted the committee's invitation to come and speak to this important bill.

You mentioned the 2012 guidelines. You were Minister of Industry at the time, if I'm not mistaken. As you said, the government at that time made amendments to adapt the Investment Canada Act. Are the amendments you are proposing today very different from those you proposed back then? Is there anything that could potentially be a hindrance?

Mr. Gilbert talks about amendments or definitions that are important. You talked a bit about that, too. Do you have any suggestions for us on how certain parts of the current bill could be defined or redefined?

The question is also for Mr. Gilbert.

Hon. Christian Paradis: First, thank you, Mr. Généreux.

I alluded to 2012 because the situation was more limited. In a context where foreign state-owned enterprises were increasingly coming forward to acquire companies in Canada, the main question was what was happening with governance rules. Canadians were generally greatly concerned. At the same time, it was always important to maintain a balance, that is, to send the markets a positive signal, but not at any price. That is why I took a broader approach to the issue in my presentation and spoke to the values of a free and democratic society. After all, our system is a market-based democracy. When it comes to dealing with economic systems that are more like a dictatorship or where governance is opaque, it's more problematic. That's why, at the time, we established guidelines.

I find the current bill interesting. It addresses the whole issue of personal data as well as technology. Things are evolving rapidly. It is clear that things should be done upstream to protect critical data. I think that's potentially a good thing.

However, I talked about balance, and that's the only thing I'm questioning. I agree with the Canadian Bar Association on this. We're talking about different activity sectors, and that's what we have to focus on. How are we going to define business sectors properly? Which ones do we want to protect? Why are we defining certain sectors in particular? Some have been identified, and they would be the obvious ones. But there are also concerns about casting too wide a net. In the case of certain investments, the message sent to markets might create an unforeseen boomerang effect, whereas otherwise these investments would not be a cause for concern.

That's the point I'm trying to make.

Mr. Bernard Généreux: All right.

Mr. Gilbert, you talked about the Canadian Bar Association and your experience in the field.

I'll come back to the definitions, because I think they're essential. Do you think they are too vague now? Do they need to be changed or clarified?

I'll provide some context. In his appearance before our committee, Mr. Balsillie, formerly of BlackBerry, said that Canada, under the current Investment Canada Act, was far behind other countries, and even that the bill to amend it, which we're studying right now, wasn't moving fast enough and didn't go far enough.

Do you share this opinion?

● (1635)

[*English*]

Mr. Tim Gilbert: Let me just deal with definitions first.

I flagged the concern about the capture of a U.S. entity or foreign entity by a de minimis investment. I think that can be corrected by looking at proposed paragraph 11(c) carefully and just putting the word “Canadian” back into proposed paragraph 11(c), which doesn't exist, before the word “entity”. It would be a “Canadian entity”, and “Canadian” is defined in the act. Then there are other provisions, and people who do more competition law talk about the size. Then there are prescribed activities.

Losing that notion of it being an investment in a Canadian entity—all or part Canadian—I think is something that needs to be addressed at the legislative stage.

[*Translation*]

Mr. Bernard Généreux: You said this was the case in particular for human resources, but it's also true for potential foreign investment. You gave the example of the United States in relation to human resources, but it also applies to potential financial investment.

[*English*]

Mr. Tim Gilbert: Yes, absolutely. It's investments and the location of businesses here, which, again, I think we want to encourage.

The other thing the Canadian Bar Association talks about is what “material non-public technical information” means, and they suggest that should be teased out.

The concern I have, as a practical litigator who deals with trade secret litigation all the time, is that it basically depends on the circumstance of each company. It's not something you can put a catch-all on. It's like a patent. You can get patents on all kinds of things, from zippers to whatever. When you try to define that, you're taking that away from the unique circumstances.

Effectively, it means, in my view, that practically everything is covered. If you're a shareholder and you're putting an investment in, under this legislation you are going to be open to having to submit that. A conservative position for a lawyer would be to say, “You'd better submit.” I'm not going to hang my hat on the definition of “you're not getting any technical information.” How would you even know? It's not even in the lawyer's control. It's back and forth with their client. It's outside of their control, so I would just say submit every time. You're making an investment. You'd better get into Canadian government. Otherwise you could be offside.

Mr. Bernard Généreux: What about Mr. Balsillie's statement about our being behind other countries in this particular kind of law?

Mr. Tim Gilbert: It's interesting. I don't have a comprehensive understanding of all other countries. What I can speak to is the atmosphere in Canada towards investment and the need for more investment, particularly in R and D. It takes an enormous amount of money, with little return and no knowledge that there will be a return. It isn't like saying, "I'm going to buy oil contracts and I already have my customers lined up." That's more of a direct line in terms of how you are going to make money, having the contracts lined up.

In research and development, it is a risk. It is an entirely risky business. At the same time, we tell the world we want to be a knowledge-based economy. We want to move from hewing wood and extracting minerals and metals, which have served the country well, into having a knowledge economy. Then you say, "But I want to disassociate myself from the world capital markets that would allow that to happen."

Given the tension in this act, my suggestion would be either to look at safe harbours or to identify the countries of interest. If you really are concerned about particular countries, then the minister of external affairs could say, "We are now concerned about *x*" whatever country that might be. That might be another way to approach it.

I don't mean to throw a monkey wrench into everything, and I'm not at all an expert on foreign policy. It's just that I am dealing with companies trying to survive and thrive. The way we thrive is to sell our technology and our ideas abroad. That's intellectual property. It doesn't mean you control it just here. It means it's a good idea throughout the world, and we have an expansive view on Canadian industry.

Mr. Bernard Généreux: Thank you very much.

[*Translation*]

The Chair: Thank you very much.

Mr. Van Bynen, you have the floor.

[*English*]

Mr. Tony Van Bynen (Newmarket—Aurora, Lib.): Thank you, Mr. Chair.

I would like to let the witnesses know this has been a very interesting discussion from the beginning. I know the real challenge is finding the balance in creating an environment that will attract investment and at the same time address the risks. Generally speaking, the challenge with legislation is that we tend to put up our guardrails through the rearview mirror. What we need to do is give some consideration to what lies ahead of us. We need to be competitive on a global basis.

My first question would go to Ms. Black.

What are the other jurisdictions doing to address the national security concerns in foreign investment reviews? Does our approach align with those of our international peers, such as the Five Eyes partners? I know you touched on that early on in your presentation, but I would like you to expand on that if you could, please.

● (1640)

Ms. Laura Black: Over the last three years, over 30 countries have taken action either to establish a review mechanism for the first time or to expand it.

Canada, as you know, has one of the oldest investment review mechanisms. Last year, CFIUS, as part of its excepted foreign state analysis, determined that, in the U.S. view, Canada has a strong system. Canada's jurisdiction is expansive.

Where Canada perhaps has less authority than other jurisdictions is in the preclosing mandatory filings so—

[*Translation*]

Mr. Sébastien Lemire (Abitibi—Témiscamingue, BQ): Mr. Chair, the interpreter is saying that the witness needs to lift his microphone a bit so we can hear her better.

[*English*]

Ms. Laura Black: A number of jurisdictions have taken action to strengthen their investment review mechanisms, often to add more authority related to critical technology—

[*Translation*]

Mr. Sébastien Lemire: Mr. Chair, there is no interpretation in French because the witness needs to raise her microphone.

[*English*]

The Chair: Thank you, Mr. Lemire.

Ms. Black, could you raise the boom? Then we will see. I will wait to get confirmation from the interpreters.

Could you say a few words?

Ms. Laura Black: Can you hear me now?

Now that I have taken a bit of time, I will try to be quick to say that Canada does, in the U.S.'s view, have a strong investment review mechanism—

The Chair: I'm sorry, Ms. Black. I think it's still not working properly. You need to raise it even more.

Okay, I think that should be good.

Ms. Laura Black: I will wrap up quickly. I do think Canada has very strong, broad jurisdiction. Where a number of other jurisdictions have taken action is to have more mandatory preclosing filings. The U.S. is on the narrower side of that in what is required, but a number of Five Eyes and G7 partners have taken those actions.

I will say that some jurisdictions have very narrowly scoped authority with respect to, for example, just infrastructure, so in many ways Canada does have stronger jurisdiction than a number of other countries.

Mr. Tony Van Bynen: The last time the ICA was updated was in 2009.

This time I will turn to either Mr. Fay or Mr. Gilbert.

Can you talk to the committee about the implications of the changing geopolitical landscape, the increased threat of foreign interference and how now is the time to make these changes to the national security review act?

Mr. Bob Fay: Thank you for the question.

Exactly. Things have changed tremendously. I know I talked a lot about data, but the ability to harness big data has truly changed everything. Data, as I mentioned, is now a geopolitical tool. You can feed it into various types of AI, if I can use that term, and it can be used to influence behaviour. It can be used to capture markets. It can be used in many different ways. We have seen examples of that.

This is not something that was even thought about in almost any policy 10 years ago. Most of our frameworks really need updating, and this is one of them.

Mr. Tony Van Bynen: One thing about AI is that it is extremely mobile. The one example I reflect on is the Facebook movement of data from the EU to the United States. I think there was a fine of $1.2 billion.

Are our penalties significant enough? When you look an organization the size of Meta or Facebook, $1.2 billion might simply be the cost of doing business. Should there be conditions or are there any conditions attached to erasing that data or sending that data back, so the penalty truly is a penalty and not simply a cost of acquisition?

● (1645)

Mr. Bob Fay: Maybe I'll take the first part.

Once the data has been integrated into the technology, it's done. If there are benefits that come, the benefits are derived; if there are harms, they're already there.

The fine you're referring to is the one I had mentioned related to the Privacy Shield and how the data could be used by intelligence services without recourse for the individual. You do want recourse for the individual, but at the same time, even if you give the data back, the data has already been harnessed by the technology and whoever holds that technology.

Mr. Tony Van Bynen: Are you aware of any organizations that consistently monitor the transfer of data to ensure that these types of events do not occur? What types of regulation and investigation authorities are there?

Mr. Bob Fay: Generally, what we do is rely on other countries to follow their legislation. For example, in a trade agreement, you would say to the other country that you need to have adequate privacy protection over personal data, and then you would rely on that country to enforce those rules. That's why I mentioned that, from a Canadian context, it is important that we also pass updated privacy legislation.

Mr. Tim Gilbert: Perhaps I might address your question of whether things have changed.

Would that be acceptable, Chair?

The Chair: Yes, you can go ahead, Mr. Gilbert.

Mr. Tim Gilbert: Thank you.

I would look at it in three different ways. One, things have changed generally. Foreign interference in elections is obviously very topical. There seems to be much more activity with the United States or here. Two, there are concerns about ownership and scarcity of essential resources. Three, there are subject matter issues, whether it be data or those kinds of things. I will break down each of these. They likely have their own solution that evolves, and tweaking.

Foreign interference can be dealt with, for example, in an agent's registration process. That exists in the United States. I myself was a foreign agent for then Her Majesty the Queen in America and Washington, D.C., and it worked just fine. We did work for Ontario in solving a problem between the United States and Canada. That system has been in place for many years, and it works fine. We just don't have it.

Second, in terms of the scarcity of resources, the Canadian government has addressed particular issues of importance—as have provinces—whether it be land or minerals, key concerns that the government directs its attention to it and signals to the world that it wants to restrict ownership in a certain way or provide a key limit.

The third would be in subject matter, something like data, which likely requires a deeper dive and more consideration than what's possible as a broad brush for every industry. They're industry-specific approaches that likely should be considered as the economy has moved.

Mr. Tony Van Bynen: Thank you.

[*Translation*]

The Chair: Thank you very much.

Mr. Lemire, you have the floor.

Mr. Sébastien Lemire: Thank you, Mr. Chair.

My first question is for Ms. Black.

I'd like to discuss the U.S. approach to a national security review of foreign investments. There was a case recently, on February 5, 2023. Gotion High-Tech, a company that manufactures batteries and provides energy storage solutions in China, signed a memorandum of understanding with InoBat, Europe's leading supplier of high-end batteries for electric vehicles, to explore the possibility of creating a joint venture that would revolutionize electric vehicle battery and energy storage technologies. In particular, the plan is to join forces to set up a mega battery factory with a production capacity of 40 gigawatt hours. Gotion High-Tech will build the plant, which will be considered a real estate acquisition, and not an investment in an American company.

You commented on a recent article on the subject, in which it was mentioned that the Committee on Foreign Investment in the United States may not have all the expertise it requires. Can you elaborate on this situation?

Several joint venture proposals like this are appearing right now, particularly for mining projects, and I wonder if it might have repercussions here, too.

[*English*]

Ms. Laura Black: CFIUS's jurisdiction is primarily over investments into U.S. businesses that are already functioning. CFIUS also has jurisdiction over certain real estate greenfield transactions around identified military facilities. This particular transaction was a greenfield transaction not near one of those identified facilities, although I'll note that since this finding of not having jurisdiction, CFIUS has updated its list to cover it.

I think what you're pointing out here is that in the U.S. greenfield businesses are not generally covered for CFIUS review, whereas I believe they are in Canada. What we're seeing in the U.S. are some proposals to expand CFIUS's jurisdiction, but we're not seeing anything moving in the short term. As noted, CFIUS has regulatory authority to update certain of its definitions, and it has expanded the number of military sites around which real estate is covered.

● (1650)

[*Translation*]

Mr. Sébastien Lemire: In your opinion, has this issue arisen in connection with mining projects involving critical and strategic minerals, in particular? When you think of military projects, you quickly think of critical and strategic mineral reserves. Do you think this has actually happened?

[*English*]

Ms. Laura Black: It would depend on how the transaction is structured. Again, I think that Canada has broader jurisdiction with certain assets, sales or greenfield transactions. If there were an investment into an operating company, which is a pretty low standard, if it had permits or if it had undertaken any development, then it could be covered. If it were a pure asset purchase, CFIUS would likely not have jurisdiction. Again, it's about facts and circumstances. That's the general answer.

[*Translation*]

Mr. Sébastien Lemire: Once established, could this type of partnership or joint venture raise national security issues, if access is given to strategic things such as critical minerals, among others? In terms of exports, for example, ownership of the resource is a basic part of national security. It could happen that, in the case of a joint venture, sensitive information is disclosed to companies that are partners, but which I think could fall through the cracks of the Investment Canada Act and national security.

Do you share this fear?

[*English*]

Ms. Laura Black: I think the approach, as I said, that CFIUS takes is to review functioning businesses, as opposed to start-ups, where a foreign investor has come in. I take the point that it doesn't cover everything. It's one tool.

Maybe I'll just leave it at that.

[*Translation*]

Mr. Sébastien Lemire: Do you think these changes have had repercussions on foreign investment in the United States?

[*English*]

Ms. Laura Black: I'm sorry. Do I think what would have repercussions?

[*Translation*]

Mr. Sébastien Lemire: Has this change had repercussions on investment in the United States or on how investors perceive the U.S.?

[*English*]

Ms. Laura Black: Do you mean if CFIUS were to revise its—

[*Translation*]

Mr. Sébastien Lemire: Could the review, as implemented, affect the reputation of the United States?

[*English*]

Ms. Laura Black: I suppose that expanding CFIUS's jurisdiction would cause more transactions to come under its review.

I guess I'm not exactly sure what the question is. Is the question what view CFIUS has if it doesn't cover these kinds of greenfield transactions?

I suppose on the Hill there are a lot of discussions related to China-specific restrictions. For example, there are a few acts in Congress. There are acts in the state legislatures that would further restrict Chinese investment into real estate or critical minerals, so we may see some of them moving forward.

From what I've seen, the concern is more a domestic concern about control of those supply chains or critical minerals, from what I've heard in talking to counterparts. I spent several years doing an international engagement function for CFIUS, and this wasn't something I was hearing. I was hearing mostly domestic concern about whether there need to be more restrictions or review rather than concern about foreign partners.

[*Translation*]

Mr. Sébastien Lemire: Thank you very much.

The Chair: Thank you, Mr. Lemire.

Mr. Masse, you have the floor for six minutes.

● (1655)

[*English*]

Mr. Brian Masse (Windsor West, NDP): Thank you, Mr. Chair.

Thank you to the witnesses for being here.

I'll start with Ms. Black. Just in continuation with regard to the United States process, how well has it been received by, say, the Five Eyes with regard to security and modernization? Are the other countries also kind of in the same place for a review like this?

Ms. Laura Black: Based on my interactions, the Five Eyes have generally seen risks similarly. I also worked quite a bit with European allies. I'd say that, if you look at five years ago, the U.S., Canada and a handful of other countries were the ones that had broader review mechanisms.

In recent years, there has been a recognition that certain foreign investment does raise national security risks. We sometimes hear from foreign investors—and this is a point Ms. McNeece was making—that CFIUS does share more information. We do sometimes hear that CFIUS should share more information to allow parties to decide when to file and make better decisions on that.

Generally speaking, countries have come more toward Canada's and U.S.'s perspective on investment screening rather than hearing a lot of concerns about going back in this area.

Mr. Brian Masse: Yes. I think things have really changed. For example—and this first came up at the industry committee when I raised it a while ago—it's interesting that Canada used to have its own Petro-Canada, owned as a state gasoline enterprise. In fact, it was divested by Canada at a time when we were letting the Chinese Communist government buy our oil and gas industry. It was okay for the Chinese government to own our oil assets, but not for Canadians. In fact, we ended up losing out significantly when we sold the asset.

If we don't do anything here in Parliament right now, it's not likely to come back in this Parliament. The best-case scenario is that if we pass this bill now and it goes to the Senate, we're looking at probably the fall for them to look at it and then either approve it or amend it and send it back to us. If we don't do that, then we could be out of step for a couple of years.

What do you think it would say about our country with regard to this issue if we stayed status quo for another year or two years?

Ms. Laura Black: As I mentioned before, Canada does have rather broad authority after the fact to review transactions—in Canada, more blocking than mitigation, for reasons that have been discussed today. Canada, I think, was one of the earlier countries to actually take action.

I do think, looking at the U.S. experience, that we closed what we thought was a loophole, particularly with respect to high-risk technology, to be able to review those preclosing. I think it's important to have authority to review at least some of those transactions before the foreign persons of concern actually have the ability to access the technology or the data, but I will say that, as I mentioned before, there's a pretty broad scope in terms of how much is being required preclosing. I think you almost always see dual use in high tech. Some countries include agriculture. Japan has leather goods. You see variations there, but I think some ability to review the transactions before closing is important.

Mr. Brian Masse: I have one last quick question for you. I was just in Washington, and I was fortunate to have Dick Durbin at our lunch table. He was doing the hearings with regard to artificial intelligence. Do you think, given the emergence of that significant issue, that there's a general assumption, or at least an appreciation, that CFIUS is...? You did your updating, and that's going on now. Would it be an even greater concern if you didn't do it and AI is now in the equation under the old rules?

That's one of the things I'm also looking at in terms of the reasons. If we had to go back and deal with this, things could be totally different. We're just starting our AI stuff now. We're not even going to get to it until the fall, if we're lucky. We're even further behind.

Ms. Laura Black: As part of the amendments in 2018, which came into effect in 2020, CFIUS was able to close a jurisdictional gap. Previously, CFIUS had jurisdiction over transactions that could result in control over U.S. business. CFIUS was given authority to cover minority non-controlling investments in companies with critical technologies, such as artificial intelligence. We were seeing that some investors were coming in at lower levels where they didn't have control but they did have access to material non-public technical information. They had substantive decision-making over how that information was stored and cybersecurity protocols that could be violated.

I think for us, having additional jurisdiction to get to certain rights and access, short of control, was important for the U.S.

● (1700)

Mr. Brian Masse: Great. Thank you.

I think that's all my time, Mr. Chair. Am I right?

The Chair: You are correct, Mr. Masse.

I'll now turn to Mr. Fast.

Hon. Ed Fast (Abbotsford, CPC): Thank you, Mr. Chair.

Thank you to all our witnesses. I'll try to ask as many of you questions as I can, but I'll start with my former colleague, Mr. Christian Paradis.

It's nice to see you again, Mr. Paradis. When you were in cabinet and you were the industry minister, you had to address the issue of thresholds and when specific mandatory investment reviews had to take place. In your testimony today, you gave us very little indication, if any, as to whether you feel those thresholds should be reviewed, not only given inflation but given some of the evolving geopolitical risks that our country faces.

Do you have any views on the nature and adequacy of the threshold that we presently have in place within the ICA?

Hon. Christian Paradis: Back in the day, we reviewed the threshold because there were two things we were very concerned about. One was what I described earlier about national security dealing with state-owned enterprise with capacity in terms of governments. At the same time, we were of the opinion that it was time to also review the threshold. It was time to go back, because the thresholds had not been reviewed for a while. Concerning the threshold with markets, we didn't have the right calibrations. We didn't want to look like we're closing the markets. On the contrary, we wanted to send the signal that, on both sides, we're open for business, so we reviewed the threshold, but, at the same time, not at any cost. This is when it was important to review the rules, as we did with the state-owned enterprise.

I don't know if it answers your question, but that was our mind back in the day.

Hon. Ed Fast: Just to understand, do you feel that the thresholds are still adequate today?

Hon. Christian Paradis: I checked the threshold. I see that there was some increase with some breakdowns. I would say that's hard for me; I'm not an expert in the area, but I certainly think that the threshold has to be.... You need to make sure that the other question is still there. Frankly, I cannot give you an expert opinion on that.

Hon. Ed Fast: Thank you.

I have a question for you, Mr. Fay, since you're an expert in governance.

Much of the power is being shifted to the minister from the Governor in Council. The ICA is going to move to greater power vested in the ministry to make certain decisions regarding investments and investment reviews. Do you have any views on whether that's appropriate or whether cabinet should continue to play a significant role in undertaking these reviews?

Hon. Christian Paradis: Yes, this is where I think striking the balance is of the essence. As I said earlier, if the legal framework is too rigid, then you are stuck with some stuff that is difficult to change. On the other hand, if you go with only some directives that can be changed by ministers and their successors, that sends funny signals in the market. You need to find the balance.

This is also why I checked with a lot of attention what the Canadian Bar Association said—that, when it comes to defining what the sectors are, what you want to regulate and why you want to do it, you have to send the appropriate signal and have the appropriate debate. If you want to go with regulations, you can have a larger discussion. If you concentrate everything in the hands of the minister, you will create some uncertainty.

● (1705)

Hon. Ed Fast: Thank you.

Mr. Fay, could I get your views on that?

Mr. Bob Fay: I would say that I'm not necessarily an expert in this particular area, but what I would say is that, clearly, one would want transparency over how decisions are being made. I think that, no matter what mechanism is used to approve a decision, one would want to know how that decision was made and what factors were considered when that decision was made.

If I may go back to your previous question, one of the points that I raised in my testimony was that the value of data is not considered in mergers. I think that's a really important thing to keep in mind. That can be inferred through market caps and stuff like that, but it's not there.

Hon. Ed Fast: Believe me, I took note of that comment. Thank you for pointing that out.

Mr. Gilbert, I'll go very quickly to you. You mentioned safe harbours. I didn't quite understand specifically what you were referring to. Is it about data protection and privacy, or is it a broader application to investment reviews?

Mr. Tim Gilbert: The Canadian Bar Association talked about de minimis investments of up to $5 million or something like that. Certainly, the first million dollars seem hard money for a lot of smaller entities to get. It's not going to move the needle nationally, but those types of investments are critical for smaller entities.

Hon. Ed Fast: Essentially, it's having a reasonable threshold that will continue to act as a magnet for investment from abroad to make sure that our start-ups remain viable and are successful.

Mr. Tim Gilbert: Absolutely.

Hon. Ed Fast: Is that it?

Mr. Tim Gilbert: Yes.

Hon. Ed Fast: Those are my questions.

Thank you.

[*Translation*]

The Chair: Thank you very much.

Mr. Gaheer, you have the floor for five minutes.

[*English*]

Mr. Iqwinder Gaheer (Mississauga—Malton, Lib.): Thank you, Mr. Chair.

Thank you to all the witnesses for making time for the committee and for their testimony.

My questions are also for Ms. Black. It think it's very interesting to compare the Canadian regime with the American one.

In your opening testimony, you mentioned five points. I think a lot of them show that what Bill C-34 proposes, actually, brings the ICA in line with what the U.S. does. For example, Bill C-34 would "authorize the Minister of Industry, after consultation with the Minister of Public Safety...to impose interim conditions [on] investments in order to prevent" a potential national security injury from taking place "during the review". Would you say that that's in line with the interim measures that CFIUS has?

Ms. Laura Black: Yes, I would.

Mr. Iqwinder Gaheer: There's also the improved information sharing among international counterparts. This act would facilitate smoother international co-operation and information exchange so that Canada can consult with allies on potentially common national security threats resulting from transactions that are both in Canada and in other jurisdictions. Would you say that that's in line with the explicit confidentiality exception that you mentioned CFIUS has?

Ms. Laura Black: Yes, it's very similar, although CFIUS uses it quite sparingly and also ensures that if it shares information, it will be protected. However, yes, it's very much in line with the CFIUS provision.

Mr. Iqwinder Gaheer: Thank you.

In your opening testimony, you also mentioned that filing is voluntary in the U.S. unless government authorization is required to export U.S. technology. Then you mentioned that other jurisdictions take a broader approach. Why do you think the U.S. has a more narrow catch?

Ms. Laura Black: I think this is a judgment call in the U.S.

Originally, we had a pilot program for mandatory filings for critical technology, and it was based on export control but on sectors. CFIUS was seeing a significant number of lower-risk transactions from countries that wouldn't cause concern, so there was a decision to focus it on when an authorization would be required for a specific country, to align it more with risk.

CFIUS's view has been that it would rather see fewer mandatory transactions and have broader voluntary jurisdiction. It will devote more resources to those higher-risk transactions and let the majority of transactions flow without filing. We also, at CFIUS, when I was there, set up an office whose function was to look at non-notified transactions to bring in transactions. Perhaps here CFIUS came down a bit more on the open investment side than some other jurisdictions did.

Going back to an earlier point, I'll also say that, with the mandatory filing, we tried to carefully scope that because 30 or 45 days can be quite difficult timing for private equity or venture capital funds. For normal M&A, that may just be part of a longer process with competition filings. We heard a number of concerns from PE funds and VC funds about moving at the speed of business, as well.

● (1710)

Mr. Iqwinder Gaheer: Thank you.

You also mentioned that everyone is subject to CFIUS. Would you be in favour of a potential exception for certain nations where there is no concern? Could that speed up certain transactions, or do you agree that everyone should be subject to it?

Ms. Laura Black: In the United States, we do have the excepted foreign state concept, where certain investors with very tight ties to Five Eyes countries aren't subject to the non-controlling jurisdiction. All countries are still subject to the controlling jurisdiction. When you have mandatory filings, to the extent that you can focus on higher-risk transactions, I think that's the right approach.

I would be reticent to wholesale give up jurisdiction over control for all countries, because one of the things CFIUS is also looking at is third party ties. Perhaps a company comes from a jurisdiction that's not of concern but has extensive ties, for example, to a foreign government. That's something CFIUS could consider. Again, this is some balancing and line drawing.

Mr. Iqwinder Gaheer: That totally makes sense.

You mentioned that you're not entirely familiar with Bill C-34, the ICA. However, in your time at CFIUS looking at the development of foreign investment controls, investment security, and foreign investment review mechanisms, is there anything else that maybe the U.S. isn't doing but other nations are doing and that Canada could learn from?

Ms. Laura Black: I will say one thing. CFIUS is not covering our research contracts with universities that can provide parties of concern access to technology that's being developed. That was a decision in the United States not to subject that to CFIUS, but some other countries, like Denmark and I believe the U.K., are considering that. There are some jurisdictions that are more expansive.

While I have the floor, I'll go back to one of the other questions. One of the questions I was asked was what might happen if the bill doesn't pass. I will note that, in my experience, Canada mitigates transactions less frequently than some other countries, particularly within the G7, and perhaps it could be because it's more difficult. In the U.S., for example, CFIUS uses litigation quite frequently to allow the economic benefit while adding terms to the transaction.

I'll also note with respect to that other question that I think it's an important feature of the bill.

[*Translation*]

The Chair: Thank you very much.

Mr. Lemire, you have the floor.

Mr. Sébastien Lemire: Thank you, Mr. Chair.

My next question is for Ms. McNeece. I particularly liked her testimony and will no doubt go over it again, especially the bit about accountability on the part of the minister and the notion of transparency.

I'd like to hear you explain the benefits that greater transparency on the part of the minister can have in terms of predictability, but also for the ecosystem in which companies will be able to operate.

[*English*]

Ms. Kate McNeece: That's a great question.

I think one of the major advantages of moving this power to the minister is that there is greater flexibility within the timing of the transaction. The existing power to impose conditions on a transaction is in the final period of the review. The GIC review is only 20 days long, and that happens after 180 days or more, when that's already happened.

I know important work is being done behind the scenes to consider the transaction and assess the national security implications. That is all very important, but moving this mitigation process into the main review gives greater flexibility if a solution is identified and can be agreed to more quickly to get that done efficiently and then allow, as Ms. Black said, the economic benefit to start for Canadians more quickly, while preserving national security.

That being said, it's a real black box when you get to this process. By nature, it's secretive, because we're dealing with important and confidential security concerns. There's very little disclosure to the public or to the investment community as to what type of mitigation measures are imposed.

If you contrast this with the net benefit review process, which is very mature.... It's been happening since the eighties, and there is a set landscape of undertakings that you can expect you'll have to give to the minister in order to get a net benefit review if you fall within the very small number of transactions that exceed those thresholds.

What I'd like to see is additional disclosure, so that we can have that tool box identified to investors. They can understand, when proposing an investment in Canada or evaluating an investment in Canada, what measures might be required from them to protect Canada's national security. That sort of transparency and accountability not only are beneficial for Canada's status as a democratic institution and an open investment institution, but can help the process move much more efficiently.

● (1715)

[*Translation*]

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

Mr. Masse, you have the floor.

[*English*]

Mr. Brian Masse: Thank you, Mr. Chair.

To any of the panellists, do you have any financial or clients' interests, either with a foreign government or a non-democratic government? Have you ever represented any of those entities before?

I'll throw that out to the entire panel and see if anybody has any of those.

Mr. Tim Gilbert: [*Inaudible—Editor*]

Ms. Kate McNeece: I've represented state-owned enterprises in respect of the reviews on the Investment Canada Act, yes.

Mr. Brian Masse: Okay.

Are you the only one, Ms. McNeece? I guess the others all.... I'll assume that's it.

With that, Ms. McNeece, if we don't go ahead with some of these changes, what do you think would be the consequence to your clients with regard to uncertainty for the future? I'm wondering whether that factor also plays into it.

Thank you.

Ms. Kate McNeece: One advantage of these amendments would be the institution of the categories of businesses for which preclosing notification will be required. Many of the panellists have discussed in this session and previous sessions the very broad jurisdiction of the ICA to require mandatory filings, but they're not necessarily preclosing.

If you are an investor, perhaps a state-owned enterprise that is aware of the current policy suggesting that investment by state-owned enterprises will receive additional scrutiny, or if you're a private enterprise investing in a Canadian business that may be involved in a potentially sensitive sector, then the calculus for you is that you have to make a filing. It can be made either prior to the closing of the transaction or following the transaction. If you make a filing prior to the transaction, then you have to assess the probability that you'll be called in for a review. You might see a significant delay because the process can be 200-plus days long. It's often this balancing act of the timing for the transaction and the value we're hoping to create for the transaction.

When we're representing Canadian businesses, it's about when they can achieve their return on investment in setting up this company by selling to an investor. Is there going to be a significant delay or potentially a remedy? We enter into this difficult calculus. We all know a filing has to be made and of course that obligation is going to be complied with, but when are we going to make it?

I think setting out a specific number of types of transactions and types of businesses for which that preclosing filing must be made will make that calculus much simpler for a lot of our clients. I think that's one major benefit.

I would observe, though, that this bill doesn't change the jurisdiction or the types of transactions that the minister can ultimately review. It changes the timing and the ease with which the minister can identify those transactions. I think that's a useful change. I don't have the concern that we're suddenly going to be missing a whole category of transactions if this bill doesn't pass. Those will still be covered. It's just about when they come to the attention of the minister and what can be done in that case.

● (1720)

Mr. Brian Masse: Thank you.

Thank you, Mr. Chair.

[*Translation*]

The Chair: Thank you very much.

Mr. Williams, you have the floor.

[*English*]

Mr. Ryan Williams: Thank you very much, Mr. Chair.

Thank you to our witnesses.

I really want to focus and drill down on CFIUS versus the investment review division. Ms. Black, you've spent some time with that. I'm just wondering if you could comment based on two aspects. One would be that CFIUS seems to be multi-agency. In Canada, the investment review division exists only in ISED. Those reviews are handled within ISED only and sometimes with the minister. CFIUS seems to be multi-agency. It's centred from the Department of the Treasury and with the Department of Defense, but it exists across all agencies.

Is that something you'd see as a recommendation for Canada? Can you just comment on the changes between the two?

[*Translation*]

Mr. Sébastien Lemire: Mr. Chair, there was no interpretation for Mr. Williams. We have to make sure the interpretation is working again.

The Chair: Thank you, Mr. Lemire.

Mr. Williams, if you will, I would ask you to repeat your question so we can get the interpretation.

[*English*]

Mr. Ryan Williams: Sure, that's no problem.

Is it working right now?

[*Translation*]

Mr. Sébastien Lemire: Yes, it's working.

Thank you.

[*English*]

Mr. Ryan Williams: Thank you, Mr. Chair.

Ms. Black, we're talking about CFIUS versus the investment review division. The investment review division in Canada exists under ISED. Under ISED, those reviews are handled by one agency. In the U.S., those are handled by multiple agencies. CFIUS is in the treasury department, but then it goes across all agencies. It works with the Department of Defense and others.

Can you please comment on that difference and whether you would recommend changes to the investment review division in Canada? Should it be multi-agency?

Ms. Laura Black: That's correct. In the United States, Treasury chairs CFIUS. There are nine voting members, which are most of the cabinet agencies, including the Department of Defense. For each transaction, Treasury chooses a co-chair who helps lead the review. It operates by consensus of all the member agencies. It often brings in subject matter experts from across the government, which I think is a strength of the system.

My understanding is that ISED does consult inter-agency and bring in subject matter experts when needed, although you may know better than I do. I don't have perfect visibility into that. There are different approaches. It's kind of a hub and spoke. Some jurisdictions are perhaps more similar to Canada, and some are more similar to the U.S.

I don't have a strong opinion on whether they need to be brought in on every transaction, but I do think that kind of consultation ability is important.

Mr. Ryan Williams: This is my last point on this. When it comes to CFIUS versus the investment review division, the investment review division has public input while CFIUS seems to be less transparent. We did have a part of this bill that talked about some parts of the ICA being able to be non-transparent and secretive, with secret evidence and secret judges.

Are there parts of this where you feel CFIUS warrants having a little less transparency, or do you believe that we should find more transparency, as we seem to do with the investment review division?

Ms. Laura Black: Being on the outside now, I always say that as much transparency as possible is preferable. CFIUS's annual report does include information on the types of risks it reviews and the mitigation measures that have been taken. I know that the relatively new assistant secretary has been doing more public engagement to try to educate businesses on what CFIUS sees as the risk.

I'm always in favour of as much transparency as possible. CFIUS does provide due process letters, for example if it may be blocking a transaction, to provide information to that particular party about the risk to the extent that it can be shared. I do understand that some information, when it's classified, can't be shared broadly either with parties or with the general public.

Mr. Ryan Williams: Thank you.

Mr. Paradis, you were involved as a minister in the government in this part. Do you care to comment on seeing the investment review division as being multi-agency? Are there any changes you would make in order to make it more similar to CFIUS?

● (1725)

Hon. Christian Paradis: Frankly, as I said, the part that I worked on was more about reviewing the directives.

I think we need to hit the sweet spot of being very well aware of the things around the national security issues while being open for business. Back in my day, on the net benefit side, the evaluation agency and so on, things were working properly. I don't think it has changed since. Once again, it's always about hitting the sweet spot.

Mr. Ryan Williams: Thank you.

Mr. Fay, you talk about data a lot. It's very important. We've been dealing with Bill C-27 as well and some other bills. It's good timing that they're all being talked about at the same time.

Let's include intangible assets and IP with data. What recommendations can you make for Bill C-34 that would review and protect those assets in Canada?

Mr. Bob Fay: This follows very nicely from your previous question. They have to be considered. You do need that multi-agency structure to allow input, so that perhaps the Competition Bureau wants to come in and say, "Guess what? The takeover of those assets may create concentration issues in particular sectors that can have public safety concerns."

You really do want to bring in different perspectives. Our technology can be used for good purposes and bad purposes. I don't know much about CFIUS, but from what I've heard, it sounds very appropriate.

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

[*Translation*]

Ms. Lapointe, you have the floor for five minutes.

Ms. Viviane Lapointe (Sudbury, Lib.): Thank you, Mr. Chair.

[*English*]

Mr. Gilbert, in one of your responses, you talked about minerals and used them as an example. Do you think this bill and these changes will help mitigate potentially harmful foreign investments in critical minerals?

Mr. Tim Gilbert: I'm not an expert in the oil and gas or minerals fields, so I can't really go too deep on that.

I was just using that as an example of the government having the means available to control specific resources and specific industries right now.

Ms. Viviane Lapointe: Thank you. It's especially important in this era of critical minerals and the demand for them.

I have a question for Mr. Fay and Mr. Gilbert.

I'm realizing more and more now that the reality is that it's very difficult to create legislation today that can keep up with the speed of advancements that we're seeing in technology. How do we create legislation that accounts for this reality? How would you advise the government to be able to do that?

Go ahead, Mr. Fay.

Mr. Bob Fay: Thank you for the question.

One mechanism that we focused on is standard setting. Standard setting can be quite nimble. It can be tailored, obviously, to the technology, and it can embed the values with which we want the technology to be used. We can then embed mechanisms inside regulations so that the regulations take into account the standards and, as the standards evolve, the regulations are modified.

In fact, we have a paper from CIGI coming out on this topic very soon, which I'd be happy to share with the committee.

Mr. Tim Gilbert: From my own perspective [*Technical difficulty—Editor*]. I would be concerned about a Canadian-specific approach in technology and IP. The reason for that is to consider telecommunications.

Do you remember how, with Wi-Fi, it used to be almost impossible to do anything, and then a bunch of entities got together and really put a ton of money—billions and billions of dollars—into figuring out how to make Wi-Fi faster? We're into 5G now. That didn't come from a Canadian-specific standard. It's an international standard. That's how the world is working today.

We need to be open to international standards and not to set Canada-specific criteria. I'm quite different about that. Great ideas are great ideas around the world. The more we're involved in that, the better. If you're concerned about foreign ownership, then address that specifically, but don't limit the world growth of technology and the spread of technology and ideas.

I have a very different perspective. I'm very IP-focused on expansion, and we need to be part of that.

● (1730)

Mr. Bob Fay: Mr. Chair, may I come in?

Actually, I don't disagree with you. I'm not arguing for a Canadian standard per se. I'm saying that standards can be used. It may be that we adopt international standards or, in fact, that Canada can lead on standard setting in certain areas as well.

Ms. Viviane Lapointe: I'd like to provide an opportunity for the other witnesses to comment on my question, if there is time, Mr. Chair.

The Chair: Yes, there is.

Ms. Viviane Lapointe: Ms. Black, go ahead.

Ms. Laura Black: I don't have much to add to what the other panellists shared.

I would say that, for example, when CFIUS conducts its review, although it would look to see if companies follow prescribed standards, in part to determine if they're trustworthy, it can look at issues beyond standards that may be set for different reasons. For example, privacy standards may be to protect individuals as opposed to protecting national security. It may be one thing that CFIUS considers, but certainly, CFIUS looks beyond that.

Ms. Viviane Lapointe: Thank you.

Does anyone else want to comment?

Ms. Kate McNeece: I wouldn't mind commenting, if that's all right.

I think this is a really important question. In my experience, the minister, when reviewing investments, will look at intellectual property and tangible assets. I know that he will consult with other areas of government on that question to get their perspectives. I think that's an important part of the process that will lead to the protection of these types of assets.

On your point about legislating into the future rather than into the past, I think this is one argument for the importance of deciding very carefully which aspects of this process are going to be set out in the legislation and which ones are going to be set out in the regulations that are associated with the legislation—the regulations being a lot easier to update.

Something like the prescribed categories of business, for example, I think is well placed, as some of my colleagues have said in previous committee meetings, in the regulations and the guidelines so that those can be nimble, flexible and updated, both to address new issues that are arising in the complex threat environment that Canada faces and to continue to inform potential investors and Canadian businesses about which areas are of great importance to the Canadian government.

The Chair: Thank you very much, Madame Lapointe.

This concludes our last round of questions.

I want to thank the witnesses with us for taking the time today. This is our last meeting on Bill C-34 before we head to clause-by-clause, so your words will be with us as we go to study the bill in depth and clause by clause.

Thank you very much.

[*Translation*]

With that, the meeting is adjourned.