Public Version

IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE ICSID CONVENTION

BETWEEN:

MOBIL INVESTMENTS CANADA, INC.

Claimant

AND

GOVERNMENT OF CANADA

Respondent

GOVERNMENT OF CANADA

COUNTER-MEMORIAL

June 30, 2016

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I. INTRODUCTION

1. This arbitration arises out of a measure adopted in 2004 by the Canada-Newfoundland & Labrador Offshore Petroleum Board (the "Board" or "CNLOPB"). In that year, pursuant to its statutory authority, the Board adopted the *Guidelines for Research and Development Expenditures* (the "2004 Guidelines") to apply to all oil projects in the Newfoundland offshore area, including the Hibernia and Terra Nova projects in which the Claimant, Mobil Investments Canada, Inc. ("Mobil" or "the Claimant"), has invested.[1]

2. The importance of the offshore oil industry to the Province of Newfoundland and Labrador (the "Province" or "Newfoundland") cannot be overstated. When oil was discovered off its coast in the late 1970s, unemployment in the Province was close to 15% and Gross Domestic Product per capita was barely half of the Canadian average. Newfoundland recognized that because oil is a finite resource, the wealth generated by extraction projects should be used to promote the long-term sustainable development of the Province. By building the knowledge and skills of companies and people in the Province, the economic and social benefits arising from oil development would continue even after those reserves were exhausted.

3. In a landmark agreement between the Canadian federal government and the provincial government in 1985 – the *Memorandum of Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing* (known as the "Atlantic Accord", "Canada-Newfoundland Atlantic Accord" or "the Accord")[2] – Canada and Newfoundland agreed to manage offshore petroleum resources jointly and ensure that companies who wish to develop oil and gas resources in the Newfoundland offshore area provide ongoing benefits to the Province and Canada, including by investing in research and development ("R&D") and education and training ("E&T") in the Province. The Atlantic Accord was implemented through federal legislation called the *Canada-Newfoundland Atlantic Accord Implementation Act* ("Accord Act").[3] The Board was created in 1986 and entrusted with, among other things, overseeing compliance by

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[1] **C-3**, CNLOPB, Guidelines for Research and Development Expenditures (Oct. 2004) ("2004 Guidelines").

[2] **CL-2**, The Atlantic Accord: Memorandum of Agreement Between the Government of Canada and the Government of Newfoundland and Labrador on Offshore Oil and Gas Resource Management and Revenue Sharing (Feb. 11, 1985) ("Atlantic Accord").

[3] **CL-1**, *Canada-Newfoundland Atlantic Accord Implementation Act*, S.C. 1987, c. 3 ("Accord Act").

investors in the offshore area with their obligations under the *Accord Act* to invest in R&D and E&T in Newfoundland. The 2004 Guidelines were and remain an integral part of that mandate.

4. In 2005, the Claimant, along with other investors in the various offshore oil projects, filed a lawsuit challenging the 2004 Guidelines in Canadian courts. Three levels of Canadian courts considered and rejected the challenge, confirming the validity of the 2004 Guidelines and holding that the Board acted within its authority under the *Accord Act* to ensure that oil companies fulfilled their ongoing obligation to invest in R&D and E&T in the Province. The affirmation by the courts that the 2004 Guidelines were a legitimate and reasonable exercise of the Board's regulatory authority over offshore oil projects, including the Hibernia and Terra Nova projects, dispelled any doubts as to the statutory obligations of the Claimant and all other investors in the offshore area: in exchange for the right to exploit oil and gas reserves off the coast of Newfoundland, investors are required to invest in the economic development of the Province. Having agreed to forebear enforcement pending the outcome of the domestic litigation, once the Canadian courts vindicated the 2004 Guidelines and the Claimant's appeal rights were exhausted in February 2009, the Board exercised its statutory authority to ensure that all investors in the Newfoundland offshore area invested in minimum levels of R&D and E&T.

5. While the Canadian litigation was ongoing, the Claimant, along with Murphy Oil Company ("Murphy"), also challenged the 2004 Guidelines under Chapter Eleven of the North American Free Trade Agreement ("NAFTA"). On November 1, 2007, Mobil and Murphy filed a Request for Arbitration alleging that the Board's application of the 2004 Guidelines to the Hibernia and Terra Nova offshore oil projects was a violation of Articles 1105 (Minimum Standard of Treatment) and 1106 (Performance Requirements).[4] Mobil and Murphy alleged damages in "excess of $60 million" across the life spans of the Hibernia project (until 2040) and the Terra Nova project (until 2026) for being required to invest in R&D and E&T in the Province pursuant to the 2004 Guidelines.[5] It is the Claimant's apparent dissatisfaction with the outcome of that NAFTA arbitration (the "Mobil/Murphy arbitration") that has led it to file the current claim before this Tribunal.

[4] **R-1**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Request for Arbitration dated November 1, 2007 ("Mobil/Murphy – Request for Arbitration").

[5] **R-1**, Mobil/Murphy – Request for Arbitration, ¶ 57(b).

6. After several years of proceedings involving extensive pleadings, statements and reports by fact witnesses, subject-area experts and damages experts, and oral hearings, the Mobil/Murphy tribunal issued a Decision on Liability and Principles of Quantum on May 22, 2012 (the "Decision"). The Decision exonerated Canada under NAFTA Article 1105, but found that the 2004 Guidelines were a prohibited performance requirement under Article 1106(1)(c) and, by a 2-1 majority (the "Mobil/Murphy Majority"), were not protected from that provision by Canada's NAFTA Annex I reservation of the *Accord Act*.[6] Another extensive round of pleadings and an oral hearing followed, after which the tribunal issued a final Award on February 20, 2015 (the "Award") awarding Mobil and Murphy CDN $17,294,260 in damages.[7]

7. While Canada respectfully but vigorously disagrees with the flawed reasoning of the Mobil/Murphy Majority that led to the conclusion that the 2004 Guidelines were not protected by Canada's NAFTA reservation of the *Accord Act*, the Award should have marked the end of this dispute. But for an errant statement of the Mobil/Murphy Majority in the Decision, this dispute would have concluded with the Claimant having been compensated for the damages that it was able to prove with reasonable certainty and having received no compensation for those with which it failed to carry its burden of proof. Instead, the Claimant now seeks to rely on a non-binding assumption by the Mobil/Murphy Majority that it can continue to initiate NAFTA arbitrations in perpetuity to recover damages arising from the 2004 Guidelines through the remainder of the Claimant's investments in the Hibernia and Terra Nova projects.

8. The NAFTA and international law require this Tribunal to reject the Claimant's second bite at the cherry. While the final ruling by the Mobil/Murphy Majority that the 2004 Guidelines violate NAFTA Article 1106(1)(c) and are not covered by Canada's Annex I *Accord Act* reservation is binding as between the Claimant and Canada, this does not and cannot *ipso facto* confer jurisdiction on this Tribunal to adjudicate a claim initiated in 2015 relating to a measure

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[6] **C-1**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Decision on Liability and on Principles of Quantum dated May 22, 2012, ¶ 490 ("Mobil/Murphy – Decision"); **CL-5**, NAFTA, Annex I, Schedule of Canada, Annex I-C-25 – I-C-27 (pp. 153-155 of PDF).

[7] **C-2**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Award dated February 20, 2015, ¶ 178 ("Mobil/Murphy – Award"). With interest from July 23, 2012 to February 20, 2015, the total amount awarded to the Claimant and Murphy Oil was CDN $15,258,354.00 and $3,702,324.00, respectively. These amounts have been paid by Canada and the Mobil/Murphy Award has been fully discharged. In this Memorial, all dollar amounts are in Canadian dollars unless otherwise indicated.

adopted in 2004. The NAFTA is explicit that this is not permitted. As Part III of this Counter-Memorial describes, under NAFTA Articles 1116(2) and 1117(2), jurisdiction *rationae temporis* only accrues if the claim for arbitration is filed within three years of when the claimant "first acquired" knowledge of the alleged breach and that it has suffered some cognizable damage or loss. The continuation of a measure does not renew the limitations period. This interpretation of the NAFTA limitations period has been affirmed in a long-line of NAFTA cases and repeatedly endorsed by all three NAFTA Parties.

9. Thus, while the Mobil/Murphy tribunal had jurisdiction *rationae temporis* because the November 1, 2007 Request for Arbitration was filed within three years of the November 5, 2004 Guidelines, this Tribunal does not. This Tribunal owes no deference to the Mobil/Murphy tribunal's unfounded assumption that the Claimant has unlimited opportunity to bring claims based on the same measure – such statements do not carry *res judicata* effect and cannot in any event displace the explicit time bar language of the NAFTA. This Tribunal must make its own independent determination as to its own jurisdiction and, when the NAFTA is applied as written and as interpreted by the NAFTA Parties and past tribunals, it will find that it has no jurisdiction to extend its authority over a claim with respect to a measure more than a decade old.

10. If the Tribunal decides that this claim is not time-barred and that it has jurisdiction under NAFTA Articles 1116(2) and 1117(2), the doctrine of *res judicata* precludes the Claimant from re-litigating its already-tried and already-rejected claim for damages for the period 2012-2015. As described in Part IV below, in the Mobil/Murphy arbitration, the Claimant already sought to recover $27.68 million in damages for 2012-2015 arising out of its investments in the Hibernia and Terra Nova projects. It is not in dispute that the Claimant is again seeking damages in this arbitration for the same time period it unsuccessfully sought to recover for in the Mobil/Murphy arbitration (2012-2015) on the basis of the same measure (the 2004 Guidelines). The Mobil/Murphy tribunal ruled expressly that it had the jurisdiction to award the Claimant damages for this period, but then rejected the claim because the Claimant had failed to carry its burden of proving those damages. Responsibility for this failure lies solely with the Claimant: by its own design, it proposed a single damages model which was so speculative and overreaching that the Mobil/Murphy tribunal had no choice but to reject the claim for the damages that the Claimant now wants a second-chance to recover.

11. The doctrine of *res judicata* cuts both ways: the Mobil/Murphy tribunal made dispositive rulings concerning its jurisdiction to award these damages and with respect to the Claimant's failure to prove them with reasonable certainty and in accordance with international legal principles of compensation. The Claimant cannot on the one hand use the doctrine of *res judicata* as a sword but on the other hand deny that it also serves as a shield for Canada. Under international law, the Claimant cannot re-litigate the same claim for damages that it already tried and failed.

12. Should the Tribunal decide to seize jurisdiction and disagree with Canada that *res judicata* does not bar the Claimant from seeking damages for the 2012-2015 period (which it should not do), it will find that the Claimant has, just as it did in the Mobil/Murphy arbitration, grossly exaggerated and misrepresented the damages it seeks to recover.

13. The Claimant is wrongly seeking millions of dollars in compensation for R&D and E&T expenditures that it was not obliged to spend under the 2004 Guidelines. It is unacceptable for the Claimant to present to the Tribunal a misleading claim for almost $21 million when nearly half that amount was not even required to be spent pursuant to the Claimant's expenditure obligations for the Hibernia and Terra Nova projects. At Terra Nova, the Claimant's own estimate as to "ordinary course" R&D and E&T spending during 2012-2015 [redacted] was in excess of what it was obliged to spend under the 2004 Guidelines ($5.541 million), and yet it demands $1.770 million in damages from Canada for surplus spending above and beyond what the 2004 Guidelines required. At Hibernia, the Claimant also demands $18.723 million in damages, but a substantial portion of that spending also exceeded its expenditure obligations.

14. This is untenable. Excess spending above and beyond what the 2004 Guidelines require is legally not recoverable against Canada. Accordingly, the Claimant's investment in the Terra Nova Project has suffered zero loss as a result of the 2004 Guidelines and the Claimant is entitled to zero damages. For the Hibernia project, taking into account only what the Claimant was actually required to spend under the 2004 Guidelines for 2012-2015 and the significant tax savings the Claimant enjoys from such expenditures (which the Claimant agrees should be deducted), the maximum possible compensable amount arising from the Claimant's compliance with the 2004 Guidelines between 2012-2015 at the Hibernia project is [redacted]

15. But this maximum ceiling amount is far in excess of what this Tribunal may award against Canada for the impairment of the Claimant's investment in the Hibernia project. First, the Claimant has generally failed to prove that the individual R&D and E&T projects for which it seeks damages are in fact compensable. The Claimant relies almost exclusively on unsupported after-the-fact speculation and hearsay that its claimed expenditures were "incremental" and would not have been made in the "ordinary course of business" (i.e., in the absence of the 2004 Guidelines). However, internal documents prove that many of the expenditures the Claimant's witnesses say are "incremental" are in fact targeted at creating significant value for the Claimant and its operations (such as the Gas Utilization Study that is intended to significantly enhance Hibernia's oil recovery). Second, the Claimant claims as damages R&D and E&T expenditures that it has engaged in support of its other projects in the Newfoundland offshore area and even worldwide. Canada is not liable to pay for the Claimant's cross-fertilization of its own R&D and E&T projects. Third, the Claimant has failed to deduct the significant royalty payment savings it enjoys from the R&D and E&T expenditures that comprise its damages claim (approximately [redacted] for all claimed expenditures).

16. The Claimant must do more than simply affix an "incremental" label to its R&D and E&T expenditures and demand that Canada pay for it. While Canada maintains that the Tribunal has no jurisdiction or authority to award damages at all, should it rule otherwise, for the reasons described in Part V of this Counter-Memorial and in the accompanying expert report of Mr. Richard (Rory) E. Walck of Global Financial Analytics LLC, the Claimant is entitled to zero damages for its investment in the Terra Nova project and has failed to prove with reasonable certainty that its investment in the Hibernia project has suffered anything other than *de minimis* loss.

II. FACTUAL BACKGROUND

17. In this Section II, Canada provides a summary of background facts essential for the Tribunal to understand the context of the current dispute and to correct mischaracterizations by the Claimant in its Memorial.[8]

A. The Atlantic Accord and The Accord Act Set the Framework for the Development of Oil in the Newfoundland Offshore Area and the Obligation to Invest in R&D and E&T in the Province

1. The Discovery of Oil and the Signing of the Atlantic Accord Between the Government of Canada and the Province of Newfoundland & Labrador

18. The discovery of oil in the Newfoundland offshore area in the late 1970s provided an excellent opportunity to promote sustainable economic and social development in the Province.[9]

19. The Government of Newfoundland recognized that while revenue from the projects was important, it was equally critical to develop the skills and expertise of people working in the oil and gas industry in the Province over the long-term through ongoing R&D and E&T investments by oil companies.[10] As early as 1977, a government task force emphasized that "[i]t is imperative that the Province become involved in this new industry at the highest possible technical level, thus the provision for compulsory education and training and research and development expenditures in the Province."[11] As a result, the Province enacted the *Newfoundland and Labrador Petroleum*

[8] Further detail on the history of the Accord Act, the 2004 Guidelines and the Hibernia and Terra Nova Benefits Plans are described in Canada's Counter-Memorial in the Mobil/Murphy arbitration. **R-2**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Canada's Counter-Memorial dated December 1, 2009, ¶¶ 24-103 ("Mobil/Murphy – Canada's Counter-Memorial").

[9] In the late 1970s, unemployment in Newfoundland was 15%, nearly double the national average. GDP per capita was barely half the national rate and the Province relied on federal government transfers for nearly half of its revenue. See **R-3**, Statistics Canada, Labour Force Survey, Labour Force Historical Review (1976-2008); **R-4**, Statistics Canada, GDP - Provincial Economic Accounts, Population Demography Division: "GDP at Market Prices NL and Canada and Population NL and Canada" (1971-2008); **R-5**, Statistics Canada, Provincial Economic Accounts, No. 13-213 Annual (1987), p. 62.

[10] See e.g., **R-6**, A Consultative Document on Petroleum Related Education & Training and Research and Development Programs under the Newfoundland and Labrador Petroleum Regulations, 1977, issued under the authority of A. Brian Peckford, Minister of Mines and Energy (Nov. 9, 1977), p. 2: ("[I]if we do not prepare ourselves from a technological point of view and if we, in this province, are not in the forefront of the development of the skills and expertise needed to develop the province's offshore oil and gas resources then our benefit will be commensurately smaller").

[11] **R-7**, A White Paper Respecting the Administration and Disposition of Petroleum Belonging to Her Majesty in Right of the Province of Newfoundland, Issued under the Authority of A. Brian Peckford, Minister of Mines and Energy (May, 1977), p. 47.

Regulations in 1977 and required oil companies applying for a permit or lease to invest in R&D and E&T in Newfoundland.[12]

20. In 1985, the Government of Newfoundland established a task force to advise on how best to ensure economic development from increased R&D and E&T in the Province. The Terms of Reference for the task force noted:

> It is the desire of the Province of Newfoundland that offshore oil and gas resources be developed in a manner which will facilitate long term economic prosperity and social enhancement. One element deemed crucial to ensuring that long term prosperity is establishment of strategic (i.e. marine) "Centres of Excellence" with a strong technological/scientific orientation. A strong research and development base with a bias toward development is fundamental to the establishment and maintenance of these "Centres of Excellence".[13]

21. To reach these goals, the task force advised that:

> We should be very aware of the context of existing R&D support programs and how we can work to complement the efforts of researchers (both within and outside the Province), so that their current funding can be supplemented and made more productive.
>
> Given the expertise which can be developed in the context of studying a specific local problem, we would then have a good opportunity to develop the kind of "world class" levels of analytical capability and general expertise which are saleable in export markets
>
> [...]
>
> <u>Our task, first and foremost</u>, is to become a significant contributor of technology on our own continental shelf and in northern and arctic waters generally...
>
> […]

[12] **R-8**, *Newfoundland and Labrador Petroleum Regulations,* Nfld., Reg. 233/77, s. 120(I).

[13] **R-9**, Report of the Task Force on Oil-Related Research and Development to the Honourable Hal Barrett, Minister of Development and Tourism (Dec. 23, 1985), Attachment A.

> The strength of the existing R&D base in Newfoundland, as elsewhere, lies first, in its human resources and, second, in its physical plant; in both respects, we have an excellent foundation on which to build.[14]

22. The task force concluded that the Province had "an excellent chance of becoming a major world centre of excellence in marine-related research and development with all the potential for economic growth and spin-off industries implicit in such world class capability."[15] According to the task force, a "tremendous opportunity awaits us – with hard work and adequate funding, marine-related education and research can make a very substantial contribution in improving the economic and social life of Newfoundland and Labrador."[16]

23. Also in 1985, as noted above, Newfoundland signed the Atlantic Accord with the Canadian federal government.[17] This agreement formalized an understanding between the federal and provincial governments regarding the joint management of petroleum resources off the coast of Newfoundland and the promotion of economic development in the Province. The Atlantic Accord "recognize[d] the right of Newfoundland and Labrador to be the principal beneficiary of the oil and gas resources off its shores".[18] The Atlantic Accord also stated that "[i]t is the objective of both governments to ensure that the offshore area is managed in a manner which will promote economic growth and development in order to optimize benefits accruing to Newfoundland in particular and to Canada as a whole."[19]

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[14] **R-9**, Report of the Task Force on Oil-Related Research and Development to the Honourable Hal Barrett, Minister of Development and Tourism (Dec. 23, 1985), p. 6, emphasis in original.

[15] **R-9**, Report of the Task Force on Oil-Related Research and Development to the Honourable Hal Barrett, Minister of Development and Tourism (Dec. 23, 1985), p. 24.

[16] **R-9**, Report of the Task Force on Oil-Related Research and Development to the Honourable Hal Barrett, Minister of Development and Tourism (Dec. 23, 1985), p. 26.

[17] **CL-2**, Atlantic Accord.

[18] **CL-2**, Atlantic Accord, s. 2(c).

[19] **CL-2**, Atlantic Accord, s. 50.

24. To optimize these benefits to Newfoundland, the Atlantic Accord provided that investors in proposed offshore oil projects will be required to invest in the economic development of the Province. [20] The commitment by investors to invest in R&D and E&T would be made in a "Benefits Plan" as expressly described in the Atlantic Accord:

> Benefits plans submitted pursuant to clause 51 shall provide for expenditures to be made on research and development, and education and training, to be conducted within the province. <u>Expenditures made by companies active in the offshore pursuant to this requirement shall be approved by the Board</u>.[21]

25. The Canada-Newfoundland Offshore Petroleum Board was created in 1986 to administer the legislation that would regulate oil and gas projects off the coast of Newfoundland to safeguard the economic development of the Province by industry.[22] The Board was mandated to approve investors' plans to invest in R&D and E&T in and maximize benefits to the Province, to monitor the implementation of the plans on an annual basis, and to approve individual expenditures.[23]

2. The Accord Act Requires Benefits Plans Which Ensure Investment in R&D and E&T in the Province

26. The Atlantic Accord was implemented through federal legislation called the *Canada-Newfoundland Atlantic Accord Implementation Act* ("Accord Act").[24] Section 45(3)(c) of the Act states:

> 3) A Canada-Newfoundland Benefits Plan shall contain provisions intended to ensure that: …

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[20] **CL-2**, Atlantic Accord, s. 51.

[21] **CL-2**, Atlantic Accord, s. 55 (emphasis added).

[22] **CL-2**, Atlantic Accord, s. 3.

[23] The Atlantic Accord provides that: "[e]xpenditures made by companies active in the offshore pursuant to this requirement *shall be approved by the Board*" (**CL-2**, Atlantic Accord, s. 55, emphasis added). When referring to section 55 of the Accord, the Newfoundland Court of Appeal stated that "the Accord expressly and clearly provides that expenditures made by companies on research and development shall be approved by the Board." **C-153**, *Hibernia and Petro-Canada v. C-NOPB*, Supreme Court of Newfoundland and Labrador Court of Appeal, 2008 NLCA 46 (Sept. 4, 2008), ¶ 120 ("Court of Appeal Decision").

[24] **CL-1**, Accord Act. The equivalent provincial legislation was the *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act* (**CL-3**).

> c) expenditures shall be made for research and development to be carried out in the Province and for education and training to be provided in the Province;

27. Thus, consistent with the Atlantic Accord, the Accord Act was drafted to ensure that oil projects invest in R&D and E&T in the Province.

3. The Accord Act Gives the Board Authority to Issue Guidelines Concerning the Application of the R&D and E&T Requirement

28. The Accord Act gives the Board the authority to issue guidelines with respect to the application and administration of the Accord Act. Section 151.1(1) of the Act states that "[t]he Board may issue and publish, in such manner as the Board deems appropriate, guidelines and interpretation notes with respect to the application and administration of Sections 45, 138 and 139 or any regulations made under Section 149."[25]

29. Section 151.1(1) is an integral part of how the Board exercises its authority, which it has used to issue over twenty guidelines on a variety of different issues including exploration and production, industrial benefits, safety, resource conservation and environmental protection.[26] Section 151.1(1) empowers the Board to issue guidelines to ensure that investors invest in R&D and E&T in the Province under Section 45(3)(c). For example, in 1987, the Board issued the

[25] **CL-1**, Accord Act, s. 151.1(1).

[26] For example, the Board issued the *Offshore Waste Treatment Guidelines* to describe standards which it will apply "in making decisions related to waste treatment, disposal and monitoring". (**R-10**, CNLOPB, Offshore Waste Treatment Guidelines (Aug. 2002), p. 1). Similarly, the Board issued the Safety Plans Guidelines to clarify the content of required safety plans for each project (**R-11**, CNLOPB, Safety Plans Guidelines (Mar. 31, 2011)). See also **R-12**, CNLOPB website excerpt: Guidelines and Interpretation Notes (Joint Guidelines Regarding Applications for Significant or Commercial Discovery Declarations (May 2003); Guidelines for Research and Development Expenditures (Oct. 2004); Development Plan Guidelines (Feb. 2006); Offshore Physical Environmental Guidelines (Sep. 2008); Guidelines Respecting Monthly Production Reporting for Producing Fields (Sep. 2011); Newfoundland and Labrador Offshore Area Registration System Guidelines (Jan. 1994); Offshore Chemical Selection Guidelines for Drilling & Production Activities on Frontier Lands (Apr. 2009); Transboundary Crewing Guidance; Exploration Benefits Plan Guidance; Incident Reporting and Investigation Guidelines (Nov. 30, 2012); Benefits Plan Guidelines (Feb. 2006); Compensation Guidelines Respecting Damages Relating to Offshore Petroleum Activity (Mar. 2002); Guidelines Respecting Financial Requirements (Feb. 2016); Guidance Respecting Reporting Lift Gas Volumes (Jun. 2005); Measurement Guidelines Under Drilling and Production Regulations (Sept. 2011); Geophysical, Geological, Environmental and Geotechnical Program Guidelines (Jan. 2012); Monitoring and Reporting Guidance; Guidelines for Drilling Equipment; Atlantic Canada Standby Vessel Guidelines (Jun. 5, 2015); Cost Recovery Guidelines (Apr. 2016); Drilling and Production Guidelines (Mar. 31, 2011); Environmental Protection Plan Guidelines (Mar. 31, 2011); and Data Acquisition and Reporting Guidelines (Sept. 2011). Available at: http://www.cnlopb.ca/legislation/guidelines.php.

Exploration Benefits Plan Guidelines: Newfoundland Offshore Area ("1987 Exploration Phase Guidelines"), which stated:

> Section 45(3)(c) of the legislation requires that a Benefits Plan contain provisions *intended to ensure expenditures are made* for research and development and education and training in the Province. The company is expected to outline its plans in this regard by describing its program and identifying the expenditure amounts.[27]

30. The 1987 Exploration Phase Guidelines also confirmed the obligation of investors to submit annually a report on R&D and E&T expenditures undertaken by investors in the Province and to include expenditure amounts.[28]

31. In 1988, the Board issued the *Development Application Guidelines: Newfoundland Offshore Area* ("1988 Development Guidelines"), which stated that investors are expected to describe their plans concerning "specific education and training programs, including associated expenditures", as well as their plans concerning "utilization of Newfoundland and other Canadian firms and institutions to undertake offshore-related research and development; and proposed research and development projects, and associated expenditures, to be carried out in the Province pursuant to Sections [sic] 45(3)(c) of the Acts."[29] Under the heading "Consultation, Monitoring and Reporting", the 1988 Development Guidelines stated that:

> Effective monitoring and reporting of procurement decisions and reporting of expenditure and employment levels are necessary to ensure that the principles of the Benefits Plan are being followed and its commitments are being met.
>
> Pursuant to this, the proponent is expected to describe it [sic] plans for monitoring and reporting, on a regular basis, on the efforts of both itself and its contractors in achieving benefits to Canada in general, and to Newfoundland in particular.
>
> It is the Board's intention to [...] require submission, by the proponent, of project expenditure and employment reports on a regular basis. *Details of the*

[27] **C-39**, Exploration Benefits Plan Guidelines: Newfoundland Offshore Area, attached to letter from T. O'Keefe, CNLOPB to W. Abel, Mobil Oil Canada (Apr. 21, 1987), s. 3.5 ("1987 Exploration Phase Guidelines") (emphasis added).

[28] **C-39**, 1987 Exploration Phase Guidelines, s. 4.4.

[29] **C-352**, Development Application Guidelines: Newfoundland Offshore Area (Dec. 1988), ss. 5.2.4, 5.2.5 ("1988 Development Application Guidelines") (emphasis added).

> *Board's monitoring and reporting requirements will be established in consultation with the proponent after submission of the Benefits Plan.*[30]

32. Thus, the 1988 Development Guidelines further confirmed that the Board would monitor expenditures on R&D and E&T "to ensure that [...] commitments are being met" and that more detailed procedures and requirements would follow.[31]

4. The Accord Act Was Reserved in the NAFTA To Ensure Its Exemption from Article 1106 (Performance Requirements) and 1205 (Local Presence)

33. The NAFTA came into force January 1, 1994 as a landmark free trade agreement that sought to balance trade liberalization with the right of each NAFTA Party to make reservations for measures which it wanted to exempt from certain obligations and permitted to continue after ratification.

34. The Accord Act was included in NAFTA Annex I (Reservations for Existing Measures and Liberalization Commitments) as a reservation because of its critical importance to both Canada and Newfoundland.[32] At the time the NAFTA was negotiated, there was no guidance as to how Article 1106 might be interpreted by future tribunals. The Accord Act reservation was accordingly drafted to include the entirety of Section 45(3) of the Accord Act, including Section 45(3)(c)'s requirement that "expenditures shall be made for research and development…and for education and training", so that if any requirement under Section 45(3) was one day challenged in a NAFTA arbitration, it would be shielded from Article 1106 (and Article 1205, which governs local presence of service providers) by Canada's Annex I reservation. No commitment to liberalize the measure was made by Canada.[33] As discussed below, the interpretation of this Annex I reservation was in dispute in the Mobil/Murphy arbitration.

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[30] **C-352**, 1988 Development Application Guidelines, s. 5.5.2 (emphasis added).

[31] **C-352**, 1988 Development Application Guidelines, s. 5.5.2.

[32] **CL-5**, NAFTA, Annex I, Schedule of Canada, Annex I-C-25 – I-C-27 (pp. 153-155 of PDF). NAFTA Article 1108(1)(a)(i) states: ("Articles 1102, 1103, 1106 and 1107 do not apply to: (a) any existing non-conforming measure that is maintained by (i) a Party at the federal level, as set out in its Schedule to Annex I or III.").

[33] **CL-5**, NAFTA, Annex I, Schedule of Canada, Annex I-C-25 – I-C-27 (pp. 153-155 of PDF). It states with respect to liberalizing obligations: "Phase-Out: None". See also, Annex I, s. 2(h) which states, "Phase-Out sets out commitments, if any, for liberalization after the date of entry into force of this Agreement."

B. Consistent with the Requirements of the Accord Act, Investors Committed to Invest in R&D and E&T in the Province in Exchange for the Right to Extract Oil

35. There are currently four active projects off the coast of Newfoundland: Hibernia, Terra Nova, White Rose and Hebron. The Hibernia, Terra Nova and White Rose projects are currently in their production phases. The Hebron project is expected to be in production by the end of 2017.[34] The CNLOPB estimates a total of 3,259 million barrels (MMbbls) of oil reserves and resources for these four projects combined.[35] In exchange for these resources and corresponding revenues, each project committed to invest in R&D and E&T in the Province in order to meet its statutory obligations under the Accord Act.

1. Hibernia Project

36. The Hibernia project is owned by the following investors: Mobil (33.125%), Chevron Canada Resources (26.875%), Suncor Energy Inc. (20%), Canada Hibernia Holding Corporation (8.5%), Murphy Oil (6.5%), and Statoil Canada Ltd. (5%). The Hibernia project is managed by the Hibernia Development Management Corporation ("HMDC").

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[34] **R-13**, Newfoundland Labrador Department of Natural Resources website excerpt, "Hebron" (Oct. 15, 2015). Available at http://www.nr.gov.nl.ca/nr/energy/petroleum/offshore/projects/hebron.html.

[35] **C-139**, CNLOPB, 2014-2015 Annual Report. The total projected oil reserves and resources for each of the projects are as follows: Hibernia = 1,644 MMbbls (p. 29); Terra Nova = 528 MMbbls (p. 29); White Rose = 305 MMbbls, which includes the South Avalon Pool, the South White Rose Pool, the West White Rose Pool, North Avalon Pool and Hibernia Formation (p. 30). The North Amethyst field, discovered in 2006, is a satellite field adjacent to the White Rose development. Reserves are estimated to be 75 MMbbls (p. 30); and Hebron = 707 MMbbls (p. 31).

37. In September 1985[36] and May 1986,[37] investors in the Hibernia project committed to invest in R&D and E&T in the Province. In a Benefits Plan submitted to the Board for approval, the investors made a commitment to, among other things, "support local research institutions and promote further research and development in Canada to solve problems unique to the Canadian offshore environment"[38] throughout the duration of the Hibernia project. The investors also made a commitment to "[c]arry out a program of timely reporting to the Canada/Newfoundland Board to enable the Board to monitor the level of efforts and benefits achieved".[39]

38. In June 1986, the Board approved the commitments made by investors to invest in R&D and E&T ("Decision 86.01"), but stated that "effective monitoring and reporting will be necessary to ensure that the Benefits Plan's objectives are accomplished during the execution of the project."[40] The Board also stated:

> The development and implementation of a benefits plan is, because of the nature of the subject matter, an evolutionary process. The Board has found the Proponent willing to amend its positions to comply with regulatory requirements and to respond positively to issues of concern. *It is the Board's expectation that the Proponent's demonstrated responsiveness in the area of benefits will continue through the duration of the project*.[41]

39. Investors in the Hibernia project, including the Claimant, have affirmed their commitment to invest in R&D and E&T in the Province and have submitted reports to the Board detailing their expenditures on R&D and E&T in the Province since 1986.[42]

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[36] **C-29**, Mobil Oil Canada, Hibernia Canada/Newfoundland Benefits Plan (Sept. 15, 1985).

[37] **C-43**, Mobil Oil Canada, Supplementary Canada/Newfoundland Benefits Plan: Hibernia Development Project (May 28, 1986) ("Hibernia Supplementary Benefits Plan").

[38] **C-43**, Hibernia Supplementary Benefits Plan, p. 7.

[39] **C-43**, Hibernia Supplementary Benefits Plan, p. 4.

[40] **C-37**, CNLOPB, Hibernia Decision 86.01 (Jun. 18, 1986), pp. xi and 23 ("Hibernia Decision 86.01").

[41] **C-37**, Hibernia Decision 86.01, p. 8 (emphasis added).

[42] **C-67**, Hibernia 1986 Benefits Report (Apr. 20, 1987); **C-68**, Hibernia 1987 Benefits Report (Mar. 25, 1988); **C-69**, Hibernia 1988 Benefits Report (Mar. 31, 1989); **C-70**, Hibernia 1989 Benefits Report (Mar. 31, 1990); **C-24**, Hibernia 1998 Benefits Report (1999); **C-72**, Hibernia 1999 Benefits Report (Mar. 14, 2000); **C-73**, Hibernia 2000 Benefits Report (Jan. 1, 2001); **C-74**, Hibernia 2001 Benefits Report (Apr. 15, 2002); **C-75**, Hibernia 2002 Benefits Report (Apr. 17, 2003); **C-76**, Hibernia 2003 Benefits Report (Apr. 6, 2004); **C-77**, Hibernia 2004 Benefits Report (Mar. 2005); **C-78**, Hibernia 2005 Benefits Report (Feb. 2006); **C-79**, Hibernia 2006 Benefits Report (Mar. 2007); **C-80**, Hibernia 2007 Benefits Report (Feb. 2008); **C-81**, Hibernia 2008 Benefits Report (Mar. 2009); **R-14**, Hibernia 2009 Benefits Report (Mar. 1, 2010); **R-15**, Hibernia 2010 Benefits Report (Mar. 31, 2011); **R-16**,

40. Investors in the Hibernia project have also applied to the Board eight times since 1986 to amend the project's Development Plan, which includes the Benefits Plan and sets out the project's approach to development.[43] Furthermore, after the 2004 Guidelines were upheld by Canadian courts as a lawful promulgation under the Accord Act (discussed further below), investors in Hibernia "confirm[ed] that the Board's guidelines related to Diversity, Research and Development, and Education and Training appl[ied] to the entire Hibernia project"[44] and the Hibernia Benefits Plan was amended on November 19, 2010 to expressly include compliance with the 2004 Guidelines.[45]

41. As of December 31, 2015, the Hibernia project had produced approximately 952 million barrels of oil.[46] Hibernia is exceptionally lucrative for its investors and the Claimant recently described it as a "world-class project".[47] For example, Hibernia's revenues between 2004 and 2015 were $47.867 billion[48] and estimated projected revenues between 2016 and 2036 are

Hibernia 2011 Benefits Report (Mar. 31, 2012); **R-17**, Hibernia 2012 Benefits Report (2013); **R-18**, Hibernia 2013 Benefits Report (2014); **R-19**, Hibernia 2014 Benefits Report (2015); **R-20**, Hibernia 2015 Benefits Report (2016).

[43] **C-47**, CNLOPB, Hibernia Decision 90.01 (Aug. 1990); **C-46**, CNLOPB, Hibernia Decision 97.01 (1997); **C-48**, CNLOPB, Hibernia Decision 2000.01 (2000); **C-49**, CNLOPB, Hibernia Decision 2003.01 (Mar. 2003); **C-50**, CNLOPB, Hibernia Decision 2003.02: Respecting the Extension of the Ben Nevis/Avalon Appraisal Period (Oct. 2003); **C-51**, CNLOPB, Hibernia Decision 2006.01: Respecting the Amendment to the Hibernia Development Plan (Jan. 2006); **C-52**, CNLOPB, Hibernia Decision 2009.10 (2009); **C-54**, CNLOPB, Hibernia Decision 2010.02 (2010).

[44] **R-21**, Letter from Paul Leonard, HMDC to Max Ruelokke, CNLOPB (Nov. 16, 2010).

[45] **R-22**, Letter from Max Ruelokke, CNLOPB to Paul Leonard, HMDC (Nov. 19, 2010); **C-54**, CNLOPB Decision Report 2010.02, Hibernia Development Plan Amendment Application 2010-09-02.

[46] Claimant's Memorial, ¶ 24.

[47] **R-23**, CBC News Article, "A crown jewel for ExxonMobil: Hibernia a quiet workhorse in N.L.'s offshore" (Jun. 9, 2016), p. 2. Available at http://www.cbc.ca/beta/news/canada/newfoundland-labrador/hibernia-crown-jewell-1.3622103.

[48] **C-123**, Letter from F. Smyth, CNLOPB to Paul Sacuta, HMDC (Feb. 26, 2009) attaching 2004-2008 R&D/E&T Expenditure Obligations, pp. MOB0002699-2701; **R-24**, Letter from Jeffrey Bugden, CNLOPB to Paul Sacuta, HMDC attaching 2009 R&D/E&T Expenditure Obligations (Feb. 11, 2010), p. 2; **R-25**, Letter from Jeffrey Bugden, CNLOPB to Paul Leonard, HMDC attaching 2010 R&D/E&T Expenditure Obligations (Feb. 7, 2011), p. 2; **R-26**, Letter from Jeffrey Bugden, CNLOPB to Jamie Long, HMDC attaching 2011 R&D/E&T Expenditure Obligations (Jan. 31, 2012), p. 2; **R-27**, Letter from Jeffrey Bugden, CNLOPB to Jamie Long, HMDC attaching Jan-Apr 2012 R&D/E&T Expenditure Obligations (Jun. 11, 2012), p. 2; **R-28**, Letter from Jeffrey Bugden, CNLOPB to Jamie Long, HMDC attaching 2012 R&D/E&T Expenditure Obligations (Feb. 12, 2013), p. 2; **R-29**, Letter from Jeffrey Bugden, CNLOPB to Jamie Long, HMDC attaching 2013 R&D/E&T Expenditure Obligations (Feb. 14, 2014), p. 2; **R-30**, Letter from Mike Baker, CNLOPB to Jamie Long, HMDC attaching 2014 R&D/E&T Expenditure Obligations (Mar. 18, 2015), p. 2; **R-31**, Letter from Mike Baker, CNLOPB to Jamie Long, HMDC attaching Jan-Apr 2015 R&D/E&T Expenditure Obligations (Jun. 25, 2015), p. 2; **R-32**, Letter from Mike Baker, CNLOPB to Jennifer Walck, HMDC attaching May-Dec 2015 R&D/E&T Expenditure Obligations (Feb. 9, 2016), p. 2.

roughly [redacted].[49] The Claimant's investment in the Hibernia project has thus provided significant returns for the corporation.[50] All investors in the Hibernia project, including the Claimant, committed to invest in R&D and E&T in the Province in exchange for these revenues.

2. Terra Nova Project

42. Terra Nova is owned by the following investors: Suncor (37.675%), ExxonMobil (19%), Statoil Canada Ltd. (15%), Husky Oil Operations Limited (13%), Murphy Oil Company Ltd. (10.475%), Mobacher Operating Ltd. (3.85%), and Chevron (1%). The project is managed by Suncor.[51]

43. In 1996, investors in the Terra Nova project committed to spend on R&D and E&T in the Province in its Benefits Plan: "[t]he Operator will report to the C-NOPB [sic] yearly…The reports will detail: …A summary of R&D expenditures reported by program and total expenditure".[52] The investors also stated in the Benefits Plan:

> To ensure benefits are flowing effectively to Newfoundland and other regions of Canada, the Proponents will work with the C-NOPB [sic] to effect efficient monitoring of the Proponents' performance relative to their commitments to this benefits plan.[53]

44. These commitments were reviewed by a panel organized to consult with the public and examine the environmental, socio-economic and safety impacts of the Terra Nova project. In its report, the Terra Nova Project Environmental Assessment Panel emphasized the importance of R&D and E&T:

> When Northern Cod and groundfish stocks collapsed on the Grand Banks it became clear that research beyond the standard monitoring of stock status was necessary to deal with uncertainty about the factors responsible and to predict

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[49] **R-33**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Updated Calculation Report of Howard Rosen dated August 6, 2010, Schedule 2 ("Mobil/Murphy – Rosen III").

[50] **R-23**, CBC News Article, "A crown jewel for ExxonMobil: Hibernia a quiet workhorse in N.L.'s offshore" (Jun. 9, 2016), p. 3.

[51] Claimant's Memorial, ¶ 31.

[52] **R-34**, Development Application: Terra Nova Development, Canada-Newfoundland Benefits Plan (Mar. 31, 1996), s. 9.2.2 ("Terra Nova Benefits Plan").

[53] **R-34**, Terra Nova Benefits Plan, s. 9.2.

> future developments. Hence, the Northern Cod Science Program was developed to identify and meet these needs…This sort of basic research will also be necessary to lessen the uncertainties of operating petroleum facilities in the Grand Banks environment. *Funding basic research from revenues generated from offshore petroleum resources is a requirement of the Atlantic Accord*.[54]

45. The Environmental Assessment Panel stressed the need for the Board to monitor the proponent's compliance with its benefits commitments, recommending that the Board "commence a regular public information program to update the people of the Province on the results of its compliance monitoring efforts".[55]

46. Following the release of the report of the Terra Nova Project Environmental Assessment Panel, the Board issued a decision ("Decision 97.02") expressing its dissatisfaction with the commitment made by the Terra Nova investors to spend on R&D and E&T in the Province:

> [T]he Proponent's commitments vis-à-vis its future support of such [R&D] activities are at best qualified, particularly inasmuch as there is no measure of the level of effort the Proponent intends to make in this regard (e.g., there are no expenditure estimates provided in the Benefits Plan).[56]

47. After endorsing the Panel's recommendation that the investors fund R&D and E&T in the Province, the Board concluded that the investors had not "fully satisf[ied] the statutory requirement that the Benefits Plan contain provisions intended to ensure that expenditures are made on research and development and education and training in the Province."[57] The Board accordingly imposed specific reporting requirements on the investors in the Terra Nova project:

> The Board appreciates the difficulty in providing, in advance, detailed research and development and education and training plans for the entire duration of the Development and, therefore, to provide a framework for monitoring the Proponent's activities in this regard, establishes a condition to its approval of the Benefits Plan that:

[54] **R-35**, Report of the Terra Nova Project Environmental Assessment Panel (Aug. 1997), p. 49 ("Terra Nova Environmental Assessment Panel Report") (emphasis added).

[55] **R-35**, Terra Nova Environmental Assessment Panel Report, Recommendation 23, p. 26.

[56] **C-41**, CNLOPB, Terra Nova Decision 97.02 (Dec. 1997), p. 23, s. 3.5.1 ("Terra Nova Decision 97.02").

[57] **C-41**, Terra Nova Decision 97.02, p. 24, s. 3.5.3.

> **Condition 7:**
>
> The Proponent report to the Board by March 31 of each year, commencing in 1998, its plans for the conduct of research and development and education and training in the Province, including its expenditure estimates, for a three-year period and on its actual expenditures for the preceding year.[58]

48. Thus, the Board expressly stated that it would monitor R&D and E&T to ensure that investors in the Terra Nova project would invest in R&D and E&T in the Province. Investors in the Terra Nova project have detailed such expenditures in annual reports to the Board since 1998[59] and have amended the project's Development Plan twice.[60]

49. The Terra Nova investors, including the Claimant, specifically recognize the benefits that R&D and E&T expenditures have for the project itself and for its employees:

> Research and Development (R&D) is a key focus area for the Terra Nova project as it provides the opportunity for real and quantifiable benefits for the project itself, the local oil and gas industry, and the people of Newfoundland and Labrador. In addition to the potential positive impact of R&D activities in terms of the business case, investment in R&D activities also provides a mechanism for the Terra Nova project to identify areas where processes and associated infrastructure can be improved in terms of safety to people and the environment…Terra Nova's commitment to its employees is evident by the significant annual investment made in E&T.[61]

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[58] **C-41**, Terra Nova Decision 97.02, p. 24, s. 3.5.3.

[59] **C-84**, Terra Nova 1998 Benefits Report (Mar. 1999); **C-87**, Terra Nova 1999 Benefits Report (Apr. 2000); **C-90**, Terra Nova 2000 Benefits Report (Apr. 2001); **C-91**, Terra Nova 2001 Benefits Report (Mar. 2002); **C-92**, Terra Nova 2002 Benefits Report (Mar. 2003); **C-93**, Terra Nova 2003 Benefits Report (Mar. 2004); **C-94**, Terra Nova 2004 Benefits Report (Mar. 2005); **C-95**, Terra Nova 2005 Benefits Report (Mar. 2006); **C-96**, Terra Nova 2006 Benefits Report (Mar. 2007); **C-35**, Terra Nova 2007 Benefits Report (Mar. 2008); **C-97**, Terra Nova 2008 Benefits Report (Mar. 2009); **R-36**, Terra Nova 2009 Benefits Report (Mar. 31, 2010); **C-289**, Letter from G. Vokey, Suncor Energy Inc., to J. Bugden, CNLOPB, attaching Suncor Annual Canada-Newfoundland and Labrador Benefits Report 2010 (Mar. 31, 2011); **C-244**, Suncor Annual Canada-Newfoundland and Labrador Benefits Report 2011 (Mar. 28, 2012); **R-37**, Terra Nova 2012 Benefits Report (2013); **R-38**, Terra Nova 2013 Benefits Report (2014); **R-39**, Terra Nova 2014 Benefits Report (2015); **R-40**, Terra Nova 2015 Benefits Report (2016).

[60] **C-62**, CNLOPB, Terra Nova Decision 2002.01 (Oct. 2002); **R-41**, CNLOPB, Terra Nova Decision 2005.01 (Jun. 2005); **R-42**, CNLOPB, Terra Nova Decision 2005.02 (Aug. 2005); **C-63**, CNLOPB, Terra Nova Decision 2005.03 (Dec. 2005).

[61] See for example, **R-37**, Terra Nova 2012 Benefits Report (2013), pp. 16-17; **R-38**, Terra Nova 2013 Benefits Report (2014), pp. 13-14; **R-39**, Terra Nova 2014 Benefits Report (2015), pp. 11-12; **R-40**, Terra Nova 2015 Benefits Report (2016), pp. 11-12.

50. As of December 31, 2015, the Terra Nova project had produced approximately 379 million barrels of oil.[62] Terra Nova has thus been very lucrative for the investor companies. For example, Terra Nova's revenues between 2004 and 2015 were $20.319 billion[63] and estimated projected revenues between 2016 and 2026 are [redacted].[64] In exchange for these revenues, and in accordance with the statutory obligation under the Accord Act, the investors have committed to invest in R&D and E&T in the Province.

3. All Other Projects Have Also Committed to Invest in R&D and E&T in the Province

51. The White Rose[65] and the Hebron[66] project operators have also committed to invest in R&D and E&T in the Province. The White Rose Benefits Plan was submitted to the Board on January 15, 2001 by Husky Oil Operations Limited on behalf of itself and Petro-Canada (now Suncor).[67] The proponents recognized that R&D and E&T is as "an important component of the Canada-

[62] Claimant's Memorial, ¶ 29.

[63] **C-124,** Letter from F. Smyth, CNLOPB to Gary Vokey, Petro-Canada (Mar. 3, 2009) attaching 2004-2008 R&D/E&T Expenditure Obligations, pp. MOB0002703-2705; **R-43**, Letter from Jeffrey Bugden, CNLOPB to Gary Vokey, Suncor Energy Inc. attaching 2009 R&D/E&T Expenditure Obligations (Feb. 11, 2010), p. 2; **R-44**, Letter from Jeffrey Bugden, CNLOPB to Gary Vokey, Suncor Energy Inc. attaching 2010 R&D/E&T Expenditure Obligations (Jan. 31, 2011), p. 2; **R-45**, Letter from Jeffrey Bugden, CNLOPB to Gary Vokey, Suncor Energy Inc. attaching Jan-Mar 2011 R&D/E&T Expenditure Obligations (Apr. 29, 2011), p. 2; **R-46**, Letter from Jeffrey Bugden, CNLOPB to Sandy Martin, Suncor Energy attaching Apr-Dec 2011 R&D/E&T Expenditure Obligations (Jan. 31, 2012), p. 2; **R-47**, Letter from Jeffrey Bugden, CNLOPB to Sandy Martin, Suncor Energy attaching 2012 R&D/E&T Expenditure Obligations (Feb. 12, 2013), p. 2; **R-48**, Letter from Jeffrey Bugden, CNLOPB to Sandy Martin, Suncor Energy attaching 2013 R&D/E&T Expenditure Obligations (Feb. 14, 2014), p. 2; **R-49**, Letter from Mike Baker, CNLOPB to Dwayne Zeller, Suncor Energy Inc. attaching Q1 2014 R&D/E&T Expenditure Obligations (Jun. 4, 2014), p. 2; **R-50**, Letter from Mike Baker, CNLOPB to Brent Jenke, Suncor Energy Inc. attaching Q2-Q4 2014 R&D/E&T Expenditure Obligations (Mar. 18, 2015), p. 2; **R-51**, Letter from Mike Baker, CNLOPB to Brent Jenke, Suncor Energy Inc. attaching 2015 R&D/E&T Expenditure Obligations (Feb. 9, 2016), p. 2.

[64] **R-33**, Mobil/Murphy – Rosen III, Schedule 3.

[65] The White Rose project is owned by the following investors: Husky Energy Operations Ltd. (72.5%) and Suncor Energy (27.5%). As of March 31, 2015, the White Rose project (including the North Amethyst field) produced a total of 242.2 MMbbls of oil. **C-139**, CNLOPB, 2014-2015 Annual Report (Jun. 26, 2015), p. 30.

[66] The Hebron project is owned by the following investors: ExxonMobil Canada Properties (35.5%), Chevron Canada Limited (29.6%), Suncor Energy Inc. (21%), Statoil Canada Ltd. (9%) and Nalcor Energy – Oil and Gas Inc. (4.9%). The first oil is expected from the Hebron field in 2017. **R-52**, Hebron Project website excerpt, "Co-venturers". Available at: http://www.hebronproject.com/project/cov.aspx; **C-139**, CNLOPB, 2014-2015 Annual Report (Jun. 26, 2015), p. 31.

[67] **R-53**, White Rose Oilfield Development Application, Volume 1: Canada-Newfoundland Benefits Plan (Jan. 2001) ("White Rose Benefits Plan"). Available at: http://www.cnlopb.ca/pdfs/wrda_vol1.pdf?lbisphpreq=1.

Newfoundland Benefits Plan"[68] and committed to "continue to participate with other industry representatives in forums designed to identify R&D priorities and projects which will advance the province's offshore industry as a whole, and fit with the overall objectives of a sustainable, commercial petroleum economy".[69] The White Rose proponents committed to comply with the 2004 Guidelines and invest in R&D and E&T in the Province.[70]

52. The Hebron Benefits Plan was submitted to the Board in April 2011 by ExxonMobil Canada Properties Limited on behalf of itself and the Hebron co-venturers. The Hebron investors affirmed the importance of R&D and E&T to sustainable economic development in the Province, and to the advancement of its oil and gas industry, and committed to invest $120 million in R&D and E&T in the Province.[71] The 2004 Guidelines allow investors to propose such R&D and E&T programs in lieu of the benchmarks provided by the 2004 Guidelines.[72]

53. All projects in the Newfoundland offshore area are thus committed to invest in R&D and E&T in the Province pursuant to the Accord Act and 2004 Guidelines. All future projects will also be subject to the same regime. The Claimant is "very interested in this area, as evidenced by the fact [that we] continue to invest in the leases" and has expressed its "hope" to spearhead yet another producing field in the region.[73] In fact, the Claimant currently has an interest in 7 exploration licences (comprising 1,541,407 hectares) and 24 significant discovery licences (comprising 76,726 hectares) in the Newfoundland offshore.[74]

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[68] **R-53**, White Rose Benefits Plan, s. 3.5.

[69] **R-53**, White Rose Benefits Plan, s. 3.5.

[70] **C-104**, CNLOPB, White Rose Decision 2001.01 (Nov. 26, 2001), p. 31 ("White Rose Decision 2001.01").

[71] **R-54**, Hebron Project, Canada-Newfoundland and Labrador Benefits Plan (Apr. 2011), s. 3.3.5; **R-55**, CNLOPB Staff Analysis: Hebron Benefits Plan (Apr. 2012), p. 21. See also, **R-56**, Hebron Benefits Agreement between Her Majesty the Queen in Right of the Province of Newfoundland and Labrador and Chevron Canada Limited et al. (Aug. 20, 2008), s. 5.9; **R-57**, Letter from Jeffrey Bugden, CNLOPB to Denise Noftall, ExxonMobil Canada Ltd. (Sep. 30, 2011); **R-58**, Letter from Denise Noftall, ExxonMobil Canada Ltd. to Jeff Bugden, CNLOPB (Nov. 4, 2011), p. 4.

[72] **C-3**, 2004 Guidelines, s. 2.0.

[73] **R-23**, CBC News Article, "A crown jewel for ExxonMobil: Hibernia a quiet workhorse in N.L.'s offshore" (Jun. 9, 2016), p. 5.

[74] **R-59**, CNLOPB, Table of Current Exploration Licences (Jun. 7, 2016). Available at: http://www.cnlopb.ca/pdfs/elgbr.pdf?lbisphpreq=1; **R-60**, CNLOPB, Table of Current Significant Discovery Licences (Jun. 7, 2016). Available at: http://www.cnlopb.ca/pdfs/sdlgbr.pdf?lbisphpreq=1.

C. The 2004 Guidelines

54. In 2001, Hibernia and Terra Nova began to report to the Board decreasing expenditure levels of R&D and E&T. For example, Hibernia reported that its R&D and E&T expenditures decreased by almost 50% from 1998 to 2001[75] and the Terra Nova Annual Benefits Report for the year 2001 projected only $300,000 to $400,000 as the average annual expenditure amount for R&D and E&T until the end of 2004.[76] This substantial decline in reported expenditures raised concerns with the Board that the projects were not fulfilling their obligations under Section 45(3)(c) of the Accord Act.

55. Around the same time, the Board had an opportunity to clarify the statutory requirement to spend on R&D and E&T in the Province during the public consultation process in 2001 for the White Rose project. A report by the Public Review Commissioner appointed for White Rose recommended that the Board "release publicly a definitive statement as to how the Board intends to interpret the Atlantic Accord and the Accord Acts and how the Board will implement or administer its benefits responsibilities", including the requirements for spending on R&D and E&T by investors in Newfoundland's offshore oil projects.[77]

56. The Board agreed with the Commissioner's recommendation and initiated extensive consultations with industry (including the Claimant) to consider how best to implement the recommendation.[78] On November 5, 2004, the Board issued the Guidelines under its Section 151.1(1) statutory authority concerning the R&D and E&T expenditure requirements under

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[75] **R-61**, *Hibernia and Petro-Canada v. C-NOPB*, Supreme Court of Newfoundland and Labrador Trial Division, 2007 NLTD 14 (Jan. 22, 2007), ¶ 79 ("Trial Court Decision").

[76] **C-91**, Terra Nova 2001 Benefits Report (Mar. 2002), pp. 22, 36.

[77] **R-62**, Report of the Public Review Commissioner for the White Rose Development Application (Sep. 2001), Recommendation 4.5, p. 69; **C-104**, White Rose Decision 2001.01, p. 15.

[78] In July 2003, well before the Guidelines were implemented, the Board presented a draft of the 2004 Guidelines to both HMDC and Petro-Canada (operator of the Terra Nova project at the time). Subsequently, when the Canadian Association of Petroleum Producers ("CAPP") presented a consolidated industry position opposing the Guidelines, the Board invited CAPP to present its views on alternate means to encourage and promote research and education in the Province on February 9, 2004. In May 2004, and again in June 2004, the Board met with HMDC to discuss the 2004 Guidelines and potential alternatives. The Board indicated that it was "open-minded and prepared to be creative," but wanted a quantifiable commitment to be part of any solution. In June 2004, the Board agreed to postpone the implementation of the Guidelines while the operators sought an alternative solution on the understanding that, if no alternative was found, the Guidelines would apply from the previous April. In July 2004, the Board met again with the operators and encouraged them to provide an alternative proposal in writing. Such a proposal was never provided by the operators. See **R-2**, Mobil/Murphy – Canada's Counter-Memorial, ¶¶ 97-104.

Section 45(3)(c).[79] Consistent with the objective of the Atlantic Accord and Accord Act to ensure economic development in the Province and the commitments made by investors to uphold that objective, the 2004 Guidelines state:

> This document is intended to provide an operator engaged in petroleum exploration development and production activities in the Newfoundland Offshore Area with guidance parameters and criteria for R&D expenditures in the Province, which are required under Section 45 of the Legislation…Research & Development [and E&T] represent one avenue whereby the exploration for, and the development and production of the petroleum resources in the Newfoundland Offshore area can make a contribution to the sustainable development of the Province. This was the vision or intent of the legislators at the time when they inserted the requirement for Research & Development and Education & Training 'in the Province' into the Atlantic Accord legislation. The petroleum resource is finite and exhaustible, and it is the intent of this provision of the legislation that its exploitation create a lasting economic legacy for the people of the Province. This is best achieved by building on the intellectual capacity and human resources of the Province. Achievement of this legislative intent is a key reason why some parameters or guidance are required in respect of the requirement in the Act that there be expenditures in the Province for R&D. These guidelines seek to establish such parameters.[80]

57. The 2004 Guidelines establish a formula to calculate R&D and E&T expenditure obligations for all oil projects in the Newfoundland offshore area. The Board undertook to determine, based on Statistics Canada statistics, the "upstream" research and development expenditure norms of oil and gas extracting companies in Canada. Based on this research, and using a five-year moving average, the Board established a percentage of total annual revenue to be spent on R&D and E&T in the Province. For example, upstream oil companies spent approximately 0.6% of revenue on R&D and E&T projects across Canada between the years 1995 and 2000. Put another way, approximately 0.6% of the value of every barrel of oil produced in Canada during that timeframe went towards R&D and E&T. The 2004 Guidelines thus provide that a similar percentage of the revenue derived from oil produced in the offshore area be invested in R&D and E&T in the Province.[81] The actual amount of expenditure required

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[79] **C-120**, Letter from F. Way, CNLOPB, to J. Taylor, HMDC (Nov. 5, 2004); **C-122**, Letter from F. Way, CNLOPB, to G. Carrick, Petro-Canada (Nov. 5, 2004).

[80] **C-3**, 2004 Guidelines, s. 1.0 (emphasis added).

[81] To develop its guidelines on R&D and E&T expenditures required by the Accord Act, the Board examined "national norms for such expenditures by the private sector." The Board commissioned a report in 2002 which

in a specific year will depend on the five-year average Statistics Canada benchmark, the price of oil, and the volume of oil that is produced.[82]

58. As an alternative to the parameters set by the 2004 Guidelines, the Board also allows investors to "propose an R&D program in lieu of the requirement of the [2004] guidelines."[83] This option was selected by the investors in the Hebron Project, but has not been elected by investors in any other offshore project.

D. Canadian Courts Confirmed that the 2004 Guidelines Were Lawfully and Reasonably Promulgated under the Accord Act

59. In 2005, HMDC and Suncor (formerly Petro-Canada), the operators of the Hibernia and Terra Nova projects, respectively, challenged the 2004 Guidelines before Canadian courts alleging that the Board had acted in excess of its statutory authority in promulgating the Guidelines.[84] In particular, the operators argued that the 2004 Guidelines constituted an unlawful amendment to the approved Hibernia and Terra Nova Benefits Plans (Decision 86.01 and Decision 97.02, respectively). The operators alleged that those Benefits Plans allowed them to spend only on R&D and E&T they considered necessary for the specific projects rather than in-line with the formula and other parameters set out in the 2004 Guidelines.[85]

60. The Canadian courts were thus asked to decide, among other things: (a) whether the 2004 Guidelines were adopted under the authority of the Accord Act; (b) whether the operators could fulfill their statutory obligation to spend on R&D and E&T by spending only on what is "necessary" for the projects; (c) whether the Guidelines are consistent with Decisions 86.01 and 97.02 approving the Hibernia and Terra Nova Benefits Plans; and (d) whether the Board reserved

considered levels of expenditure both generally and specifically in the petroleum industry (**R-63**, James Feehan, Ph.D., Statistics on Industry R&D Expenditures for Canada-Newfoundland Offshore Petroleum Board (Mar. 2002). The Board subsequently examined reports by Statistics Canada on average R&D expenditure by oil companies in Canada and internally discussed these reports (For example, see **R-64**, Presentation, Industrial Relations Department "Research and Development, a Presentation to the C-NOPB" (Apr. 2002)).

[82] **RE-1**, Expert Report of Richard E. Walck, Global Financial Analytics, ¶¶ 22-27 ("Walck Report I").

[83] **C-3**, 2004 Guidelines, s. 2.0.

[84] **R-61**, Trial Court Decision, ¶ 7.

[85] **R-61**, Trial Court Decision, ¶ 46.

the authority to monitor expenditures on R&D and E&T and intervene if expenditures were inadequate.

61. On January 22, 2007, the Supreme Court of Newfoundland and Labrador Trial Division rejected the challenge by the Hibernia and Terra Nova operators and confirmed that the 2004 Guidelines were properly issued and applied to the two projects under the authority of Section 45(3)(c) of the Accord Act to ensure that expenditures on R&D and E&T be made in the Province. The Court affirmed the importance of the Atlantic Accord, noting that its purpose is "[t]o recognize the equality of both governments in the management of the resource, and ensure that the pace and manner of development optimize the social and economic benefits to Canada as a whole and the Newfoundland and Labrador in particular."[86]

62. Upholding the decision of the Trial Court on September 4, 2008, the Court of Appeal wrote in its judgment:

> I see the Board as legitimately and reasonably performing its role of administering offshore petroleum resources so as to meet the Accord's objective of optimizing social and economic benefits for this Province and Canada. Rather than accepting development plans which would see the residents of this Province and this Country simply as "hewers of wood and drawers of water", performing only the lesser skilled tasks in the offshore petroleum industry, the Board reasonably interprets the Accord as requiring expenditures on research and development in this Province and Country as a mechanism to ensure residents become involved in highly skilled aspects of the industry. In the words of the Board, this builds "on the intellectual capital and human resources of the Province". The knowledge and skills obtained will remain to benefit this Province and Country economically and socially after the finite petroleum reserves have been exhausted. The use of Canadian industry norms to limit the extent of the expenditures provides a reasonable assurance to oil companies that the Board's demands will remain moderate in this respect.[87]

63. The Court of Appeal also rejected the argument that Section 45(3)(c) of the Accord Act only requires the operators to spend on R&D and E&T based on project needs:

> Considered in the context of the Accord, I do not interpret [clauses 51 and 55 of the Atlantic Accord] as restricting the authority of the Board to impose only

[86] **CL-2**, Atlantic Accord, s. 2(d).

[87] **C-153**, Court of Appeal Decision, ¶ 134.

research and development requirements which "have application" to specific projects.

First, clauses 51 and 55 must be interpreted in the light of clause 2(d), which says one purpose of the Accord is: "[T]o recognize the equality of both governments in the management of the resource, and ensure that the pace and manner of development optimize the social and economic benefits to Canada as a whole and to Newfoundland and Labrador in particular." Requiring expenditures on research and development relating generally to the offshore petroleum environment is a legitimate mechanism for such optimization, along with taxes, royalties, job creation, education and training, and, with appropriate agreement, profit-sharing.

Second, section 45(3) of the federal Act provides that a Canada-Newfoundland benefits plan shall contain provisions intended to ensure that expenditures shall be made for research and development to be carried out in the Province. These mandatory provisions contain no qualification entitling oil companies to refuse to expend on research and development because they are of the opinion the needs of their projects can be met with existing knowledge and technology.

Third, in Decision 86.01, the Board expressed its intention to enforce the commitment for Hibernia made by Mobil to "promote further research and development in Canada to solve problems unique to the Canadian offshore environment". This did not restrict research and development to the specific needs of the Hibernia project.

Fourth, in Decision 97.02, Section 3.5.1, the Board stated:

> In the Board's opinion, the [Terra Nova Project Environmental Assessment] Panel's recommendation [51] related to funding basic research is consistent with the thrust of this legislative requirement [for Benefits Plans to contain provisions intended to ensure that expenditures are made on research and development].

Recommendation 51 reads in part:

> The panel recommends that the Board require operators of offshore oil projects to fund basic research…

Here again the reference to basic research indicates there was no intention in Decision 97.02 to restrict research requirements to those needed by a specific project.

The trial judge correctly noted, at para. 47 of his decision, that the appellants, "by accepting the Board's approval of their respective benefit plans, have accepted that the Board has an ongoing obligation and authority to assess and monitor the appropriateness of the levels of expenditure on research and development…" and it should not now be open to them to deny the Board's

> authority. If the appellants considered Decisions 86.01 and 97.02 to be wrong, they should have challenged these when made, not after enjoying the opportunity to profit from their developments.[88]

64. Canadian courts have thus unequivocally confirmed that the obligation to spend on R&D and E&T in the Province is not limited only to "project needs". The courts also confirmed that the Board's use of a five-year average of Statistics Canada's R&D and E&T spending statistics by upstream companies in Canada was perfectly reasonable. The Trial Court held that the Board "has the authority to establish reasonable levels of expenditure required to be made for research and development and education and training as part of its ongoing monitoring and enforcement role under the Accord and the *Act*."[89] This was confirmed by the Court of Appeal.[90]

65. The courts also considered whether establishing reasonable levels of R&D and E&T expenditures was consistent with Decisions 86.01 and 97.02. The Court of Appeal held that "application of the Guidelines to the Hibernia and Terra Nova Projects does not involve an amendment to the benefits plans. Rather, the Guidelines set parameters consistent with the Board's responsibility to monitor expenditures for research and development required under the benefits plans."[91] The Court of Appeal held that "the Board in its *Decision 86.01* and its *Decision 97.02* reserved for itself authority to determine on a continuing basis by its monitoring process whether the companies were making adequate expenditures on research and development"[92] and that "the reservation of authority to require more expenditures was more than implicit."[93] The judgment went on:

> <u>[The Board] approved the Hibernia and Terra Nova projects on condition that the Board have the authority to continuously monitor research and development expenditures and intervene by issuing guidelines requiring higher expenditures should the appellants' level of expenditures fall below that which</u>

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[88] **C-153**, Court of Appeal Decision, ¶¶ 128-133.

[89] **R-61**, Trial Court Decision, ¶ 74 (emphasis in original). See also, ¶ 56.

[90] **C-153**, Court of Appeal Decision, ¶ 79: ("the applications judge did not err when he concluded…that the Board has authority to establish reasonable levels of expenditures to be made by the companies for research and development.").

[91] **C-153**, Court of Appeal Decision, ¶ 105.

[92] **C-153**, Court of Appeal Decision, ¶ 125 (emphasis in original).

[93] **C-153**, Court of Appeal Decision, ¶ 126.

> the Board considered appropriate. These were the rules of the game when development approvals [sic] issued. The same rules apply today.[94]

66. In sum, both the Trial Court and Court of Appeal confirmed that the adoption of the 2004 Guidelines was a proper exercise of the authority granted to the Board by the Accord Act to ensure expenditures on R&D and E&T are made in the Province. The courts also held that the 2004 Guidelines were consistent with the Accord Act and Benefits Plans. Leave to appeal the decision of the Court of Appeal was rejected by the Supreme Court of Canada.[95]

E. The Claimant Makes Several Factual Mischaracterizations in its Memorial Regarding the Newfoundland Offshore Regulatory Regime

1. The Claimant is Wrong When It States that the Accord Act and Benefits Plans Only Require Investment in R&D and E&T on an "As Needed" Basis

67. In its Memorial, the Claimant argues that the 2004 Guidelines "imposed a set of mandatory requirements above and beyond those established in the Accord Acts or the Board's Decision approving the Hibernia and Terra Nova Benefits Plans."[96] The Claimant argues that, prior to the 2004 Guidelines, "the Projects were expected to undertake R&D [and E&T] only as necessary."[97]

68. The Tribunal must not be misled: the Claimant advanced the same argument in front of Canadian courts and the Mobil/Murphy NAFTA arbitration and it was rejected. For example, the Newfoundland & Labrador Trial Court held:

> To adopt the applicants' submissions would be to allow them to unilaterally determine what amount to spend on research and development and education and training. They could choose to spend nothing and simply report that they were spending nothing. This, in their interpretation, would be the fulfilment of their obligation. As I have already stated, this is not a reasonable and purposive interpretation of the legislation and the Board's authority and obligations under the Accord and the *Acts*.[98]

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[94] **C-153**, Court of Appeal Decision, ¶ 135 (emphasis added). See also **R-61**, Trial Court Decision, ¶ 47.

[95] **C-154**, *Hibernia and Petro-Canada v. C-NOPB,* Supreme Court of Canada Judgment, February 19, 2009, p. 2.

[96] Claimant's Memorial, ¶ 104.

[97] Claimant's Memorial, ¶ 92. See also ¶¶ 34, 45, 79, and 104 for similar statements.

[98] **R-61**, Trial Court Decision, ¶ 46.

69. Similarly, the Newfoundland & Labrador Court of Appeal stated, "there is nothing in the [Accord] Act or the benefits plans supporting the conclusion that the company may unilaterally determine the level of expenditure on research and development."[99] The court went on to say:

> [S]ection 45(3) of the federal Act provides that a Canada-Newfoundland benefits plan *shall* contain provisions intended to ensure that expenditures shall be made for research and development to be carried out in the Province. These mandatory provisions contain no qualification entitling oil companies to refuse to expend on research and development because they are of the opinion the needs of their projects can be met with existing knowledge and technology.[100]

70. The same was also confirmed by the Mobil/Murphy NAFTA tribunal when it concluded that "[t]he Accord Acts state unambiguously that 'expenditures shall be made for research and development to be carried out in the Province and for education and training to be provided in the Province"[101] and that "[t]he purpose [of section 45(3)(c)] is to introduce an obligatory *expenditure* requirement."[102] Moreover, the tribunal concluded that the Claimants' obligation to spend under the Accord Acts and Benefits Plans is "neither time nor phase bound,"[103] and thus continues through the production phase of the projects.[104]

71. All investors in the Newfoundland offshore area, including all investors in the Hibernia, Terra Nova, White Rose, and Hebron projects, in exchange for exclusive rights to extract oil, have a statutory obligation to enhance the economic well-being of the Province by investing in R&D and E&T. Investors in future projects in the Newfoundland offshore area will have to do the same. Thus, the Claimant's statement that Section 45(3)(c) of the Accord Act only requires it to undertake R&D and E&T when "necessary" for the Hibernia and Terra Nova projects is patently false.

[99] **C-153**, Court of Appeal Decision, ¶ 66.

[100] **C-153**, Court of Appeal Decision, ¶ 130.

[101] **C-1**, Mobil/Murphy – Decision, ¶ 234.

[102] **C-1**, Mobil/Murphy – Decision, ¶ 234 (emphasis in original).

[103] **C-1**, Mobil/Murphy – Decision, ¶ 399.

[104] **C-1**, Mobil/Murphy – Decision, ¶ 399.

2. The Claimant's Spending Figures Contradict its Allegation that R&D and E&T is not Necessary During the Production Phase of the Projects

72. The Claimant argues that "[c]ompliance with the Guidelines pose[s] a real challenge for mature projects, as R&D and E&T expenditures [are]…no longer generally required on a large scale."[105] Thus, the Claimant argues that R&D and E&T expenditures during the production phase of the Terra Nova and Hibernia projects will be small because any project in its production phase will have little need for R&D and E&T.

73. This is a canard. The Claimant represented the same to the Mobil/Murphy tribunal, stating that R&D and E&T spending will decrease during the production phase of the projects.[106] To support its argument in that arbitration, the Claimant projected a *de minimis* level of R&D and E&T spending that it would undertake in the "ordinary course of business," and alleged the 2004 Guidelines at times require the projects "to spend an average of five times more on R&D and E&T"[107] and that "[o]ver the remaining life of the oil fields, the Guidelines will force Hibernia and Terra Nova to spend double what they otherwise would on R&D and E&T."[108]

74. The Claimant's own most up-to-date figures (which Canada believes are still understated) show clearly that this argument is false. The Claimant's figures for *actual* R&D and E&T spending in the "ordinary course of business" in comparison to what it projected to the Mobil/Murphy tribunal is far greater:

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[105] Claimant's Memorial, ¶ 123. See also, **CW-1**, Witness Statement of Paul Phelan, ¶ 27 ("Phelan Statement I"); **CW-5**, Witness Statement of Ryan Noseworthy, ¶ 13 ("Noseworthy Statement I"); **CW-4**, Witness Statement of Andrew Ringvee, ¶ 13.

[106] **R-65**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Claimant's Memorial dated August 3, 2009 ("Mobil/Murphy – Memorial"), ¶¶ 3-4: ("The anticipated need for R&D in the future is, however, nominal, because both projects are now at mature stages in their production cycles and thus have little need for ongoing technological innovation to support project operations. The new Guidelines require R&D expenditures several times greater than what the Claimants otherwise would spend in connection with their investments in the Province."). See also, ¶¶ 37-38; **R-66**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Expert Report of W. David Montgomery dated August 3, 2009, ¶¶ 25-27, 36.

[107] **R-67**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Claimants' Reply to Canada's Post-Hearing Submission dated January 2011, ¶ 33 ("Mobil/Murphy – Claimant's Reply to Canada's Post-Hearing Submission").

[108] **R-67**, Mobil/Murphy – Claimant's Reply to Canada's Post-Hearing Submission, ¶ 33.

Table: Comparison of Claimant's "Ordinary Course" Spending at Terra Nova[109]

	2004-2008	2009-2011	2012-2015	TOTAL
Estimates from Claimant's July 2009 Memorial Filing	[redacted]	[redacted]	[redacted]	[redacted]
Actual figures up to Claimant's March 2015 Memorial Filing[110]	[redacted]	[redacted]	[redacted]	[redacted]

Table: Comparison of Claimant's "Ordinary Course" Spending at Hibernia[111]

	2004-2008	2009-2011	2012-2015	TOTAL
Estimates from Claimant's July 2009 Memorial Filing	[redacted]	[redacted]	[redacted]	[redacted]
Actual figures up to Claimant's March 2015 Memorial Filing[112]	[redacted]	[redacted]	[redacted]	[redacted]

109 The Claimant's July 2009 figures are from Mr. Rosen's first expert report in the Mobil/Murphy arbitration. The Claimant's actual "ordinary course" spending is its share of (a) Contractor R&D/E&T expenditures, (b) "Not Claimed" (or "Ordinary Course") expenditures, and (c) HSE-Specific expenditures, plus Claimant's owner-specific "ordinary course" spending identified in Mr. Phelan's submittals to the Mobil/Murphy tribunal and this Tribunal. The "ordinary course" expenditures identified by Claimant in the Mobil/Murphy arbitration (Mr. Phelan's Fourth and Fifth Witness Statements) have been adjusted to reflect additional ordinary course expenditures identified by the Mobil/Murphy tribunal. See, **R-68**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Expert Report of Howard Rosen dated July 30, 2009, Schedule 3, Line K ("Mobil/Murphy – Rosen I"); **R-69**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Fourth Witness Statement of Paul Phelan dated July 23, 2012 ("Mobil/Murphy – Phelan IV"); **R-70**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Fifth Witness Statement of Paul Phelan dated November 30, 2012 ("Mobil/Murphy – Phelan V").

110 These are the Claimant's figures, which, as explained in Part V and Appendix A of this Counter-Memorial, Canada believes to be even higher.

111 The Claimant's July 2009 figures are from Mr. Rosen's first expert report in the Mobil/Murphy arbitration. The Claimant's actual "ordinary course" spending is its share of (a) Contractor R&D/E&T expenditures, (b) "Not Claimed" (or "Ordinary Course") expenditures, and (c) HSE-Specific expenditures, plus Claimant's owner-specific "ordinary course" spending identified in Mr. Phelan's submittals to the Mobil/Murphy tribunal and this Tribunal. The "ordinary course" expenditures identified by Claimant in the Mobil/Murphy arbitration (Mr. Phelan's Fourth and Fifth Witness Statements) have been adjusted to reflect additional ordinary course expenditures identified by the Mobil/Murphy tribunal. See, **R-68**, Mobil/Murphy – Rosen I, Schedule 2, Line K; **R-69**, Mobil/Murphy – Phelan IV; **R-70**, Mobil/Murphy – Phelan V.

112 These are the Claimant's figures, which, as explained in Part V and Appendix A of this Counter-Memorial, Canada believes to be even higher.

75. In the Mobil/Murphy arbitration the Claimant thus understated its "ordinary course" spending at Hibernia over this time period by 219% and understated its "ordinary course" spending at Terra Nova by 731%. The Claimant's actual figures also show that the trend is for ordinary course R&D and E&T expenditures to *increase* as the projects age, not decrease. This increase is likely related to efforts by the project proponents to increase or protect oil recovery from the projects.

76. For example, in 2012, Suncor (the operator of Terra Nova) engaged in an R&D project entitled "Reservoir Souring: Subsurface Control of H2S & Mitigation Techniques" ("H2S Project").[113] This H2S Project represents a [redacted] expenditure that arises directly out of a problem with "sour gas" in the Terra Nova reservoir, which forced Suncor to shut down two oil production wells in 2011 and 2012 and suffer a marked decrease in oil production. In its statement to the Board about this expenditure, Suncor wrote: [redacted][114] Suncor further stated that [redacted][115] and that [redacted][116]

77. In light of the upward trend in the Claimant's "ordinary course" figures, the Claimant's argument that R&D and E&T spending is "no longer generally required" during the production phase of a project is demonstrably not true. What is most egregious is that the Claimant's

[113] **R-71**, Letter from J. Bugden, CNLOPB to K. Healey, Suncor Energy attaching R&D Work Expenditure Application Form and Terra Nova R&D Project Abstract: Reservoir Souring: Subsurface Control of H2S and Mitigation Techniques (Nov. 9, 2012).

[114] **R-71**, Letter from J. Bugden, CNLOPB to K. Healey, Suncor Energy attaching R&D Work Expenditure Application Form and Terra Nova R&D Project Abstract: Reservoir Souring: Subsurface Control of H2S and Mitigation Techniques (Nov. 9, 2012), p. 1 of Project Abstract.

[115] **R-71**, Letter from J. Bugden, CNLOPB to K. Healey, Suncor Energy attaching R&D Work Expenditure Application Form and Terra Nova R&D Project Abstract: Reservoir Souring: Subsurface Control of H2S and Mitigation Techniques (Nov. 9, 2012), p. 2 of Project Abstract.

[116] **R-71**, Letter from J. Bugden, CNLOPB to K. Healey, Suncor Energy attaching R&D Work Expenditure Application Form and Terra Nova R&D Project Abstract: Reservoir Souring: Subsurface Control of H2S and Mitigation Techniques (Nov. 9, 2012), p. 2 of Project Abstract.

significant understatement of its R&D and E&T "ordinary course" spending during the production phase was one of the reasons why the Mobil/Murphy majority concluded that "the effect of the 2004 Guidelines bespeaks a set of requirements to purchase, use or accord a preference to local goods and services that have undergone a *substantial* expansion as compared with the earlier legal framework."[117] The dramatic change in the Claimant's own assessment of its "ordinary course" figures shows that what the Mobil/Murphy tribunal believed to be true on the basis of what the Claimant presented is actually false.

3. The Claimant is Wrong When it Argues that the Board Never Monitored R&D and E&T Expenditure Levels Prior to the 2004 Guidelines

78. The Claimant creates the impression in its Memorial that prior to the introduction of the 2004 Guidelines, the Board paid no attention to the type or extent of R&D or E&T engaged by the Hibernia and Terra Nova projects.[118] For example, the Claimant alleges that prior to the 2004 Guidelines it was only required to "periodically provide high-level reporting to the Board on R&D and E&T activity" but after the 2004 Guidelines it must now "provide detailed accounting of R&D/E&T expenditures during [each] OA period."[119] This misconstrues the level and consistency of the interest of the Board in the R&D and E&T work undertaken by both projects. The reality is that propagation of the 2004 Guidelines was just one part of an ongoing process of oversight and monitoring that the Board was engaged in since the projects first began.

79. For example, at the start of the Terra Nova project in 1996, Petro-Canada (then operator of the Terra Nova project) committed to "work with the [Board] to effect efficient monitoring of the Proponents' performance relative to their commitments to [their] benefits plan",[120] which included commitments to invest in R&D and E&T in the Province and to "report to the [Board] yearly…[a] summary of R&D expenditures reported by program and total expenditure."[121] In its assessment of these commitments, the Board stated:

[117] **C-1**, Mobil/Murphy – Decision, ¶ 401 (emphasis added).

[118] Claimant's Memorial, ¶ 85.

[119] Claimant's Memorial, p. 132.

[120] **R-34**, Terra Nova Benefits Plan, s. 9.2.

[121] **R-34**, Terra Nova Benefits Plan, s. 9.2.2.

> [T]he Board believes the Proponent will undertake significant training and research in the Province and that it understands the education and training capabilities available with the Province. The Board will require regular forecasting and reporting of education and training and research and development initiatives and expenditures. The Board believes the Proponent's commitments in the Benefits Plan will be fulfilled. However, the Board also has an obligation as the regulator to ensure that the Proponent's commitments are met.[122]

80. The Board also required the operator of Terra Nova to "report to the Board by March 31 of each year, commencing in 1998, its plans for the conduct of [R&D] and [E&T] in the Province, including its expenditure estimates, for a three-year period and on its actual expenditures for the preceding."[123] This has been done annually since 1998.

81. With respect to Hibernia, HMDC committed in 1986 to "[c]arry out a program of timely reporting to the Canada/Newfoundland Board to enable the Board to monitor the level of efforts and benefits achieved and to assist in promoting maximum benefits".[124] In response to this commitment, the Board stated its "expectation that the Proponent's demonstrated responsiveness in the area of benefits will contribute throughout the duration of the project," and that "effective monitoring and reporting will be necessary to ensure that the Benefits Plans objectives are accomplished during the execution of the project."[125] Thus, at the start of the production phase of the Hibernia project in 1998, HMDC submitted annual benefits reports summarizing benefits expenditures in the prior year, including R&D and E&T. The reports provided a breakdown by research area of cumulative expenditures since 1990, and quantified total expenditures in the Province in the prior year. The annual reports also contained an estimate of the R&D expenditures to be incurred in the current year, and indicated the total expenditures percentage incurred from 1997 onward.[126]

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[122] **C-41**, Terra Nova Decision 97.02, s. 1.2.

[123] **C-41**, Terra Nova Decision 97.02, s. 3.5.3.

[124] **C-43**, Hibernia Supplementary Benefits Plan, p. 4.

[125] **C-37**, Hibernia Decision 86.01, pp. xi, 23.

[126] **C-24**, Hibernia 1998 Benefits Report (1999); **C-72**, Hibernia 1999 Benefits Report (Mar. 14, 2000); **C-73**, Hibernia 2000 Benefits Report (Jan. 1, 2001); **C-74**, Hibernia 2001 Benefits Report (Apr. 15, 2002); **C-75**, Hibernia 2002 Benefits Report (Apr. 17, 2003); **C-76**, Hibernia 2003 Benefits Report (Apr. 6, 2004); **C-77**, Hibernia 2004 Benefits Report (Mar. 2005); **C-78**, Hibernia 2005 Benefits Report (Feb. 2006); **C-79**, Hibernia 2006 Benefits

82. The Canadian courts also confirmed that the Board has maintained a role since the very beginning in monitoring the level of R&D and E&T investments made by the Hibernia and Terra Nova projects. For example, the Trial Court of Newfoundland & Labrador stated:

> The applicants, by accepting the Board's approval of their respective benefits plans, have accepted that the Board has an ongoing obligation and authority to assess and monitor the appropriateness of the levels of expenditure on research and development and education and training. Their ability to proceed with their developments and the extraction of petroleum from the offshore were dependent on Board approval. They accepted these approvals which were subject to the Board's ongoing role in determining the appropriateness of the expenditures being made in compliance with their obligations for the duration of the project. Having accepted these approvals on the basis that they have done, it is not now open to them to deny the Board's authority to fulfill its duties set out under the Accord and the Act and its earlier interpretations contained in decisions 86.01, 90.01 and 97.02 to effectively monitor their activities and ensure compliance and adequate and reasonable expenditures.[127]

83. It is simply not credible for the Claimant to suggest that, prior to the 2004 Guidelines, there was only a "high level" obligation to report R&D and E&T expenditures under Section 45(3)(c) of the Accord Act. As per its statutory authority, the Board has been engaged since the outset of each project in monitoring the Claimant's investment in R&D and E&T in the Province. The 2004 Guidelines are one of several mechanisms of oversight and monitoring to ensure that the objectives of the Accord Act are fulfilled by investors in exchange for the exclusive rights to extract oil from reserves in the Newfoundland offshore area.

4. The Claimant Exaggerates When It Argues that the Pre-Approval Process for Making Proposed R&D and E&T Expenditures Eligible under the 2004 Guidelines is a "Burden"

84. In its Memorial, the Claimant alleges that "[t]he Guidelines impose far more restrictive local content requirements on investments than had been the case under the preexisting regime"[128] and emphasizes the pre-approval process for R&D and E&T expenditures under the 2004 Guidelines as evidence of an "additional burden" on the Claimant than what was required

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Report (Mar. 2007); **C-80**, Hibernia 2007 Benefits Report (Feb. 2008); **C-81**, Hibernia 2008 Benefits Report (Mar. 2009).

[127] **R-61**, Trial Court Decision, ¶ 47.

[128] Claimant's Memorial, ¶ 277.

under the Accord Act and Benefits Plans.[129] The Claimant advanced an identical argument in the Mobil/Murphy arbitration.[130] The Mobil/Murphy tribunal cited the Claimant's argument[131] and concluded that the "pre-authorization requirements" reinforce the "inconsistency" of the 2004 Guidelines with the requirements of the Accord Act and Benefits Plans.[132]

85. In reality, however, the pre-approval process for R&D and E&T expenditures is not a burden on the Claimant, but a benefit because it provides certainty as to the eligibility of R&D and E&T spending under the 2004 Guidelines before that spending is engaged. In a statement that contradicts its position in the Mobil/Murphy arbitration, the Claimant now acknowledges the benefit of pre-approvals in its Memorial:

> In response to the issuance of the Award in February 2015, the Board unilaterally suspended the pre-approval process required by the Guidelines for determining the eligibility of proposed R&D and E&T expenditures at Hibernia and Terra Nova. This freeze made it difficult for the Projects to plan and to make expenditures in compliance with the Guidelines. The difficulties were expressed in repeated correspondence to the Board. Without explanation, and despite repeated attempts to express its concerns about meeting the Guidelines' obligations, the Board maintained the freeze until January 12, 2016, when it began issuing pre-approvals again.[133]

86. The Claimant cannot have it both ways. It cannot on the one hand argue that the Board's pre-approval process is a burden that contributes to the unlawfulness of the 2004 Guidelines under the NAFTA, while on the other hand ask the Board to re-institute the pre-approval process

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[129] Claimant's Memorial, ¶ 277, "pre-approval requirement". See also, e.g. Claimant's Memorial, ¶ 41: ("The Accord Acts also do not require pre-approval of individual expenditures by the Board or any other entity"), ¶ 55: ("The Hibernia Benefits Plan did not dedicate any specific or fixed amount or percentage of revenue to R&D, nor did it call for the Board to scrutinize and pre-approve individual expenditures"), ¶ 67: (at the time the NAFTA was signed "the Hibernia project was not required to obtain pre-approval by the Board or any other government agency before making R&D expenditures"), ¶ 69: ("The Terra Nova Benefits Plan did not contain any specific commitment with respect to R&D activities nor require pre-approval of individual expenditures"), ¶ 79: ("No obligation to meet a target amount or to obtain pre-approval of planned R&D expenditures was established in the Accord Acts, the Hibernia or Terra Nova Benefits Plans, or the Hibernia Framework Agreement").

[130] See e.g. **R-67**, Mobil/Murphy – Claimants' Reply to Canada's Post-Hearing Submission, ¶ 26.

[131] **C-1**, Mobil/Murphy – Decision, ¶ 358.

[132] **C-1**, Mobil/Murphy – Decision, ¶ 401.

[133] Claimant's Memorial, ¶ 162. See also **CW-3**, Witness Statement of Krishnaswamy Sampath, ¶ 13: ("As HMDC's R&D Manager, I was responsible for preparing and submitting these Work Expenditure Application forms. From our viewpoint, it was required and necessary to obtain the Board's pre-approval before funding R&D or E&T activities that HMDC would not otherwise pay for, since we wanted to ensure that the expenditures would count toward the spending requirements set for Hibernia under the Guidelines.") ("Sampath Statement I").

after it was suspended in response to the Mobil/Murphy Award. The Claimant's double-position on this issue is particularly disagreeable because its portrayal of the Board's pre-approval process as a "burden" to the Mobil/Murphy tribunal contributed to the Majority's conclusion that the 2004 Guidelines were not covered by Canada's NAFTA Annex I reservation for the Accord Act.

F. The Mobil/Murphy Arbitration

1. Overview

87. While the Canadian domestic courts were considering the Claimant's challenge to the 2004 Guidelines, in November 2007, the Claimant and Murphy Oil Corporation (together "the Mobil/Murphy Claimants") filed a Request for Arbitration pursuant to the ICSID Additional Facility Rules alleging that Canada had breached its obligations under Section B of Chapter 11 of the NAFTA.[134] The Mobil/Murphy Claimants alleged that the Board's application of the 2004 Guidelines to the Hibernia and Terra Nova Projects breached NAFTA Article 1105 (Minimum Standard of Treatment) and Article 1106(1)(c) (Performance Requirements). It was further alleged that while Canada had, pursuant to Article 1108(1) of the NAFTA, made a reservation in Annex I of the NAFTA carving out the Accord Act from the application of Article 1106, the 2004 Guidelines did not fall within the scope of that reservation.[135] On the basis of these alleged breaches, the Mobil/Murphy Claimants sought in excess of $65 million for damages incurred for the time period beginning when the 2004 Guidelines were implemented (in 2004) and ending when the Hibernia and Terra Nova Projects would be terminated, which is now expected to be in the years 2040 and 2026 respectively.[136]

2. NAFTA Article 1105 – Minimum Standard of Treatment

88. The Mobil/Murphy Claimants argued that the 2004 Guidelines were a violation of NAFTA Article 1105(1), that is, the customary international law minimum standard of treatment of aliens.[137] They argued that the minimum standard of treatment afforded them the right to "a

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[134] **R-1**, Mobil/Murphy – Request for Arbitration.

[135] **R-1**, Mobil/Murphy – Request for Arbitration, ¶¶ 49-56.

[136] Claimant's Memorial, ¶¶ 24, 29.

[137] NAFTA Article 1105(1) states: "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." Article

stable regulatory regime for foreign investments" consistent with their "legitimate expectations" [138] and argued that the 2004 Guidelines "transformed the R&D expenditure obligations of operators with approved benefits plans in the province and thus violated the Claimants' legitimate expectations."[139]

89. The Mobil/Murphy tribunal rejected these arguments and affirmed that Article 1105 does not protect against changes in a State's regulatory framework:

> [Article 1105] does not require a State to maintain a stable legal and business environment for investments, if this is intended to suggest that the rules governing an investment are not permitted to change, whether to a significant or modest extent…[T]here is nothing in Article 1105 to prevent a public authority from changing the regulatory environment to take account of new policies and needs, even if some of those changes may have far-reaching consequences and effects, and even if they impose significant additional burdens on an investor.[140]

90. In applying this standard, the Mobil/Murphy tribunal noted there was nothing in the text of the Accord Act that prevented the federal and provincial governments from establishing a prescribed level of R&D and E&T expenditures.[141] The Mobil/Murphy tribunal rejected the argument that the Benefits Plans could not be supplemented or changed by new measures that were "consistent with and lawful under" the Accord Act and concluded that the Claimants were unable to point to any contrary promise or representation.[142]

91. The Mobil/Murphy tribunal stated that the judgment by the Newfoundland Court of Appeal that the Board had acted reasonably and lawfully in exercising its authority to apply the 2004

1105 was the subject of a NAFTA Free Trade Commission Note of Interpretation (July 31, 2001) which declared: "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party" and that "the concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens." See **RL-1**, NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter Eleven Provisions, 31 July 2001, ¶ 2(1) and (2) ("FTC Notes of Interpretation").

[138] **R-72**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Claimants' Reply Memorial dated April 8, 2010, ¶ 115 ("Mobil/Murphy – Reply Memorial").

[139] **R-72**, Mobil/Murphy – Reply Memorial, ¶ 181.

[140] **C-1**, Mobil/Murphy – Decision, ¶ 153.

[141] **C-1**, Mobil/Murphy – Decision, ¶ 159.

[142] **C-1**, Mobil/Murphy – Decision, ¶ 166.

Guidelines to the Hibernia and Terra Nova Projects was "relevant to and underpin[s its] ruling that no violation of Article 1105 has occurred."[143] Indeed, the Mobil/Murphy tribunal specifically endorsed the Court of Appeal judgment as the basis for its conclusion:

> There is no evidence before us that [the Claimants] sought assurances that Section 151.1 would not be relied upon to adopt new guidelines, or that any new guidelines would not be applied to their projects. Nor is there any evidence to show that they sought assurances that the Board's requirement to monitor the projects (to ensure that the Claimants' expenditures met the requirements of the benefits plans, as the Court of Appeal explained) would not lead to a situation in which the Board, having found that such expenditures were insufficient, would then impose additional requirements which were lawful under Canadian law.[144]

92. The Mobil/Murphy tribunal accordingly rejected the argument that the application of the 2004 Guidelines to the Hibernia and Terra Nova projects were a violation of the Claimants' legitimate expectations and concluded there was no violation of Article 1105.[145]

3. NAFTA Article 1106 – Performance Requirements

93. The Mobil/Murphy tribunal concluded that the 2004 Guidelines were subject to and covered by Article 1106(1)(c) of the NAFTA.[146] Article 1106(1)(c) provides that "[n]o Party may impose or enforce any of the following requirements…(c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory…".[147] The Mobil/Murphy tribunal determined that the term "services" in Article 1106(1)(c) was broad enough to capture the local R&D and E&T spending requirements articulated in the 2004 Guidelines and, when combined with the compulsory nature

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[143] **C-1**, Mobil/Murphy – Decision, ¶ 167; **C-153**, Court of Appeal Decision, ¶ 136.

[144] **C-1**, Mobil/Murphy – Decision, ¶ 169. In reaching this decision, the Mobil/Murphy tribunal cited the Court of Appeal's judgment which affirmed that "A reasonable inference flowing from the monitoring function is that the Board may determine that the expenditures of a company do not meet the requirements of the benefits plan" and that the Board "approved the Hibernia and Terra Nova projects on the condition that the Board have the authority to continuously monitor research and development expenditures and intervene by issuing guidelines requiring higher expenditures should the appellants' level of expenditures fall below that which the Board considered appropriate. These were the rules of the game when development approvals issued. The same rules apply today". **C-1**, Mobil/Murphy – Decision, ¶ 168, *citing* **C-153**, Court of Appeal Decision, ¶¶ 67, 135.

[145] **C-1**, Mobil/Murphy – Decision, ¶¶ 170-171.

[146] **C-1**, Mobil/Murphy – Decision, ¶ 490.

[147] NAFTA Article 1106(1)(c).

of the spending described, led to the conclusion that the 2004 Guidelines were contradictory to Article 1106(1)(c) of the NAFTA.[148]

4. NAFTA Article 1108 – Reservations and Exceptions

94. After the Mobil/Murphy tribunal found the 2004 Guidelines to be a prohibited performance requirement under Article 1106(1)(c), it had to assess whether Canada's NAFTA Annex I reservation for the Accord Act applied pursuant to Article 1108(1)(a)(i).[149]

95. Article 1108 allowed NAFTA Parties to designate certain measures as non-conforming in Annex I of the NAFTA and allows NAFTA Parties to amend such listed non-conforming measures so long as "the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 1102, 1103, 1106 and 1107."[150] This is colloquially referred to as the "ratchet test". The Claimant conceded early on in the Mobil/Murphy arbitration that the 2004 Guidelines were not an amendment to the Accord Act and hence were not be subject to the "ratchet test" set out in Article 1108.[151]

96. Annex I of the NAFTA, which lists the NAFTA Parties' non-conforming measures, contains a headnote that defines a number of terms used throughout Annex I. At issue in the Mobil/Murphy arbitration was the definition of "Measures":

> 1. The Schedule of a Party sets out, pursuant to Articles 1108(1) (Investment)…, the reservations taken by that Party with respect to existing measures that do not conform with obligations imposed by:
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> …

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148 **C-1**, Mobil/Murphy – Decision, ¶¶ 215-216, 237, 239.

149 NAFTA Article 1108(1)(a)(i) states "Articles 1102, 1103, 1106 and 1107 do not apply to (a) any existing non-conforming measure that is maintained by (i) a Party at the federal level, as set out in its Schedule to Annex I or III."

150 NAFTA, Article 1108(1)(c), Reservations and Exceptions.

151 **R-65**, Mobil/Murphy – Memorial, ¶¶ 170-171: ("To qualify as an amendment within the meaning of [Article 1108(1)(c)], the R&D Expenditure Guidelines therefore would have to constitute an amendment to a measure listed in Canada's Schedule to Annex I or a subordinate measure adopted thereunder as of the January 1, 1994 effective date of the NAFTA. Specifically, they would have to constitute an amendment to (i) the Accord Acts themselves, (ii) the 1987 Exploration Benefits Plan Guidelines issued pursuant to the Board's authority thereunder, or (iii) Decision 86.01 approving the Hibernia Benefits Plan. They plainly do not…on their face, the R&D Expenditure Guidelines are not an amendment within the meaning of Article 1108(1)." (emphasis added); **R-72**, Mobil/Murphy – Reply Memorial, ¶ 106: ("Canada concedes that the Guidelines are not an amendment to the Accord Acts, so Article 1108(1)(c)'s "ratchet rule" cannot resolve the Guidelines' non-conformity with Article 1106(1)."

> (d) Article 1106 (Performance Requirements)…
>
> 2. Each reservation sets out the following elements:
>
> …
>
> (f) **Measures** identifies the laws, regulations or other measures, as qualified, where indicated, by the **Description** element, for which the reservation is taken. A measure cited in the **Measures** element
>
> (i) means the measure as amended, continued or renewed as of the date of entry into force of this Agreement, and
>
> (ii) includes any subordinate measure adopted or maintained under the authority of and consistent with the measure;…[152]

97. Canada included the *Accord Act* in Annex I as a non-conforming "Measure" in order to maintain aspects of the legislation that did not conform with obligations under the NAFTA, such as Article 1106(1)(c). Specifically, Canada's reservation states:

> **Sector**: Energy
>
> …
>
> **Type of Reservation**: Performance Requirements (Article 1106)
>
> …
>
> **Level of Government**: Federal
>
> …
>
> **Measures**: …Canada-Newfoundland Atlantic Accord Implementation Act, S.C. 1987, c. 3.
>
> **Description**: …3. [T]he *Canada-Newfoundland Atlantic Accord Implementation Act*…require[s] that the benefits Plan ensure that: …(b) expenditures be made for research and development to be carried out in the province, and for education and training to be provided in the province…[153]

98. The Claimants argued that the 2004 Guidelines did not fall within this reservation for the Accord Act. They argued that the 2004 Guidelines did not fall within the definition of

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[152] **CL-5**, NAFTA, Annex I, s. 1 (pp. 126-127 of PDF).

[153] **CL-5**, NAFTA, Annex I, Schedule of Canada, Annex I-C-25 – I-C-27 (pp. 153-155 of PDF).

"measures" because they were not adopted "under the authority of and consistent with the measure" pursuant to Paragraph 2(f)(ii) of the Annex I headnote.[154]

99. In determining whether the 2004 Guidelines fall within the definition of "Measures", the Mobil/Murphy tribunal members were unable to agree on the meaning of "the measure" and "consistent with" in Paragraph 2(f)(ii).

100. With respect to the meaning of the word "the measure", there was disagreement as to whether the 2004 Guidelines had to be adopted under the authority of and consistent with just the listed non-conforming measure, that is, the *Accord Act*, or be adopted under the authority of and consistent with both the *Accord Act* <u>and</u> any existing subordinate measures that are "relevant" to the new subordinate measure, that is, the 2004 Guidelines. According to the Mobil/Murphy Majority, the term "the measure" included all relevant existing subordinate measures, requiring that any new subordinate measure be adopted under the authority of and consistent with not only the measure listed in Annex I (i.e. the *Accord Act*), but also any relevant intervening subordinate measure.[155] In this case, the majority decided that a "relevant" intervening subordinate measure was the Hibernia Benefits Plan and the Terra Nova Benefits Plan. The Majority accordingly held that the 2004 Guidelines must be consistent with not only the *Accord Act*, but also with both the Hibernia and Terra Nova Benefits Plans.[156]

101. With respect to the meaning of "consistency", there was disagreement amongst the Mobil/Murphy tribunal members as to whether it was necessary to evaluate the extent to which application of the new subordinate measure, that is, the 2004 Guidelines, decreased conformity with Article 1106 when compared to the "legal framework" that existed prior to the adoption of the 2004 Guidelines. According to the Mobil/Murphy Majority, the consistency of the 2004 Guidelines was to be evaluated not just in relation to the *Accord Act*, but also the Benefits Plans, and conformity with Article 1106 had to be evaluated.[157]

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[154] **R-65**, Mobil/Murphy – Memorial, ¶¶ 169-170.

[155] **C-1**, Mobil/Murphy – Decision, ¶ 343.

[156] **C-1**, Mobil/Murphy – Decision, ¶ 343.

[157] **C-1**, Mobil/Murphy – Decision, ¶¶ 394, 400.

102. Upon application of the above, the Mobil/Murphy Majority determined that the 2004 Guidelines were inconsistent with Article 1106(1)(c) of the NAFTA relative to the Hibernia and Terra Nova Benefits Plans because "the 2004 Guidelines bespeaks a set of requirements to purchase, use or accord a preference to local goods and services that have undergone a substantial expansion as compared with the earlier legal framework."[158] One tribunal member issued a reasoned dissent.[159]

103. On this basis, the Mobil/Murphy Majority concluded that the 2004 Guidelines did not fall within the definition of the word "Measures" under Paragraph 2(f) of the Annex I headnote, and were thus not reserved from the NAFTA. Hence, Canada had breached Article 1106(1)(c) of the NAFTA.

5. Damages

104. The Mobil/Murphy Claimants alleged damages totaling \$65.41 million[160] "for the cost of [their] compliance with the Guidelines through the remaining life of the Hibernia and Terra Nova projects."[161] To quantify this loss the Claimant provided the Mobil/Murphy tribunal with a damages model that predicted future annual expenditure requirements under the 2004 Guidelines, predicted future expenditures it would have accrued in the "ordinary course of business", and claimed the difference as representative of its loss.[162]

105. Canada's primary opposition to the Claimant's damages case was based on the fact that it claimed for damages "not yet incurred," which Canada argued was beyond the jurisdiction of the tribunal and "inconsistent with international principles of compensation."[163] The Claimant modelled its damages case on the loss it would incur *in the future* as a result of its future R&D and E&T expenditures under the 2004 Guidelines at the Hibernia and Terra Nova projects, rather

[158] **C-1**, Mobil/Murphy – Decision, ¶ 401.

[159] **C-186**, *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Government of Canada* (ICSID ARB(AF)/07/4) Partial Dissenting Opinion of Professor Phillippe Sands dated May 17, 2012 ("Mobil/Murphy – Dissent").

[160] **R-68**, Mobil/Murphy – Rosen I, ¶ 14 (\$50.48 million for Mobil and \$14.93 million for Murphy).

[161] **R-65**, Mobil/Murphy – Memorial, ¶ 223 (f).

[162] **R-65**, Mobil/Murphy – Memorial, ¶ 218.

[163] **R-2**, Mobil/Murphy – Canada's Counter-Memorial, ¶¶ 332-339.

than on any loss it *had incurred*. The Claimant was not able to cite any award by an international tribunal that ordered compensation for damages not yet incurred.[164] Canada explained that the problem lay in the Claimant's defective damages model, which should have been based on damages it had incurred already rather than damages it might incur in the future.[165] The Claimant decided not to provide the tribunal with an alternate damages model, arguing that it had already incurred all of the losses that it claimed and that the Mobil/Murphy tribunal could award its requested future damages.[166]

106. The Mobil/Murphy tribunal disagreed with Canada's position that it did not have jurisdiction over the Claimant's claim for damages not yet incurred. It determined that NAFTA Article 1116(1) provided it with the requisite jurisdiction to award future damages[167] and "[i]n the present case, the introduction of the 2004 Guidelines triggered an obligation to make expenditures that would continue over the life of the projects."[168] The Mobil/Murphy tribunal thus concluded that it had competent jurisdiction to consider and award future damages until the end of the life of the Hibernia and Terra Nova projects.

107. However, the Mobil/Murphy tribunal found that the Claimant failed to provide sufficient evidence to prove its claim for damages not yet incurred. Despite numerous submissions, expert reports, dozens of legal authorities and an oral hearing, the Majority concluded that there was "insufficient certainty and [that] too many questions still remain[ed] unanswered to allow it to

[164] See **R-73**, *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Government of Canada* (ICSID ARB(AF)/07/4) Canada's Reply to Claimant's Post Hearing Brief dated January 31, 2011, ¶ 130 ("Mobil/Murphy – Canada's Reply to Claimants' Post Hearing Brief").

[165] **R-73**, Mobil/Murphy – Canada's Reply to Claimants' Post Hearing Brief, ¶ 155.

[166] **R-73**, Mobil/Murphy – Canada's Reply to Claimants' Post Hearing Brief, ¶ 129, fn. 254. **R-74**, *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Government of Canada* (ICSID ARB(AF)/07/4) Transcript from the Hearing on the Merits, Day 1 (Oct. 19, 2010), p. 128:13-20: ("Rivkin: So, in our case, Claimants' loss in damage consists in the obligations created through the Board's implementations of the Guidelines, and those obligations, of course, already exist. The fact that some of their effects will not be felt until later years or indeed that Claimants' obligations are met in part through future conduct, through future expenditure, is irrelevant.") ("Mobil/Murphy – Day One Hearing Transcript").

[167] **C-1**, Mobil/Murphy – Decision, ¶ 427.

[168] **C-1**, Mobil/Murphy – Decision, ¶ 429.

assess with sufficient certainty the amounts of damages incurred under the 2004 Guidelines for the 2010 – 2036 period."[169]

108. The Mobil/Murphy tribunal found the Claimant's damages model to be "extremely hazardous"[170] because it required forecasting of several uncertain variables that, when compounded, could not meet the standard of reasonable certainty. The Claimants' model for damages not yet incurred left the tribunal with no choice but to reject the 2010-2036 damages claim.

109. After the Decision was rendered, the Mobil/Murphy Claimants re-filed their damages claim for 2004-2012 and argued that they should be paid $33.993 million in damages incurred for that period.[171] After further submissions and an oral hearing, the Mobil/Murphy tribunal awarded the Claimants only $17.294 million.[172] The Mobil/Murphy tribunal declined to award the Claimants costs.[173]

G. The Decision of the Mobil/Murphy Majority that the 2004 Guidelines are Not Protected by Canada's Annex I Reservation is Flawed

110. While the final ruling by the Mobil/Murphy Majority that the 2004 Guidelines are not covered by the Annex I *Accord Act* reservation, and hence not exempt from Article 1106(1)(c), is binding as between the Claimant and Canada, understanding why the reasoning behind that decision is deficient is important context for this Tribunal. This analysis is also important to correct misstatements by the Claimant as to how the Mobil/Murphy Decision should be read and understood.

[169] **C-1**, Mobil/Murphy – Decision, ¶ 474.

[170] **C-1**, Mobil/Murphy – Decision, ¶ 477.

[171] **R-75**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Claimants' Damages Submission dated July 23, 2012, ¶ 30; **R-69**, Mobil/Murphy – Phelan IV, Annex A. The damages for the Hibernia project were calculated through to April 30, 2012 and for Terra Nova through to December 31, 2011.

[172] **C-2**, Mobil/Murphy – Award, ¶ 178.

[173] **C-2**, Mobil/Murphy – Award, ¶¶ 176-178.

1. The Mobil/Murphy Majority Improperly Concluded that Newly Adopted Subordinate Measures had to be Consistent with Existing Subordinate Measures

111. Paragraph 2(f)(ii) of the NAFTA Annex I Interpretive Note sets out that the "Measures" element of a reservation "identifies the laws, regulations or other measures, as qualified, where indicated, by the Description element, for which the reservation is taken." That provision goes on to say that "a measure cited in the Measures element…includes any subordinate measure adopted or maintained under the authority of and consistent with the measure."[174]

112. A key issue upon which the disputing parties and the Mobil/Murphy tribunal split is whether "the measure" means only the measure which is listed in the Annex I reservation or if "the measure" will subsume other subordinate measures which are adopted later. If the former (urged by Canada and endorsed by the dissenting arbitrator), whether a subordinate measure is covered by the reservation depends on whether it was adopted under the authority of the listed measure and is consistent with the listed measure. If the latter (urged by the Claimant and adopted by the Majority), then a subordinate measure's authority is derived only from the listed measure but its consistency is assessed against not only the listed measure but other subordinate measures as well, depending on whether they are "relevant."[175]

113. A critical flaw in the Mobil/Murphy Majority's reasoning is that its interpretation of "the measure" adopted a double-meaning within the same sentence. The Majority said that determining whether a subordinate measure (in this case, the 2004 Guidelines) was "**under the authority of**…the measure" dictates that "the measure" means only the measure specifically listed in the reservation, that is, the Accord Act.[176] But then the Majority said that when determining whether a subordinate measure (again, the 2004 Guidelines) was "**consistent with** the measure," "the measure" changes its meaning to include not only the listed measure (the

[174] **CL-5**, NAFTA, Annex I, s. 2(f)(ii) (emphasis added).

[175] **C-1**, Mobil/Murphy – Decision, ¶¶ 330, 333.

[176] **C-1**, Mobil/Murphy – Decision, ¶ 330: ("In this case, "the measure" that is the necessary reference for determining the "authority" of the 2004 Guidelines is the Federal Accord Act alone.").

Accord Act), but all other subordinate measures previously adopted, in this case, including the Hibernia and Terra Nova Benefits Plans.[177]

114. With respect, this is not logical. The Majority's interpretation requires that the single phrase "the measure" take on two different meanings with respect to the "authority of" requirement on the one hand and the "consistent with" requirement on the other hand. However, the phrasing of Paragraph 2(f)(ii) plainly states that both "maintained" and "adopted" measures are to be determined by reference to "the measure", which indicates that it must be the same "measure". The Majority's strained interpretation ignores the definite article "the" in "the measure," which designates a term that has already been mentioned; and the only previous mention of "measure" in Paragraph 2(f)(ii) is the "measure cited in the Measures element", that is, the listed "non-conforming measures" (i.e., the Accord Act).

115. Professor Sands recognized this flawed reasoning when he wrote in his dissenting opinion:

> [T]he conditions of 'authority' and 'consistency' are connected: both requirements are to be assessed by reference to "the measure", which indicates that it must be the same measure…[o]n what basis then does the Majority conclude that authority could derive from an existing subordinate measure rather than the listed measure? There is no way to know, as no explanation is given as to why authority in such a situation refers to (i) the listed measure or (ii) the listed measure and the existing subordinate measure. For this reason, in the absence of a clear explanation, the impression is created that the Majority may simply have assumed the conclusion it comes to. In any event, on the approach of the Majority, in the present case it is apparent that the words "the measure" mean one thing for the assessment of 'authority' (on the Federal Accord Act) and a different thing for the assessment of 'consistency' (the Federal Accord Act and Decisions 86.01 and 97.02)."[178]

116. As noted by Professor Sands, the only way to avoid "an endless and unhappy circularity of reasoning" is to interpret "the measure" as the measure listed in the Annex I reservation (in this case, the Accord Act).[179]

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[177] **C-1**, Mobil/Murphy – Decision, ¶ 332: ("In the first instance, 'consistent with the measure' is to be determined by virtue of a comparison of a new subordinate measure with the reserved measure. In our view, once a subordinate measure meets the test of authority and consistency with the reserved measure under paragraph 2(f), it can then become part of the legal framework of "the measure" for purposes of evaluating new subordinate measures.").

[178] **C-186**, Mobil/Murphy – Dissent, ¶ 22.

[179] **C-186**, Mobil/Murphy – Dissent ¶ 31.

117. The difficulty in understanding the Majority's interpretation is compounded by the fact that there was agreement amongst the Parties to the NAFTA that "the measure" in paragraph 2(f)(ii) meant the listed measure and not all other subordinate measures.[180] Contrary to what the Claimant suggests in its Memorial,[181] this was Canada's position throughout the Mobil/Murphy arbitration,[182] as was plainly recognized by the tribunal itself.[183] The Claimant itself acknowledged the commonality of views amongst the NAFTA Parties:

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[180] See **R-76**, *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Government of Canada* (ICSID ARB(AF)/07/4) Submission of the United Mexican States dated July 8, 2010, ¶ 3: ("Mexico agrees with Canada that, consistent with the use of the phrase 'adopted or maintained' and its variations throughout the NAFTA, the sue of the phrase 'adopted and maintained' in Article 2(f)(ii) of the Interpretive Note to Annex I measure that subordinate measures that are adopted after the NAFTA entered into force are covered by the reservations in Articles 1108(1)(a)(i) and (ii), provided that such measures are adopted under the authority of and consistent with a measure expressly listed in Annex I.") (emphasis added); **R-77**, *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Government of Canada* (ICSID ARB(AF)/07/4) Submission of the United States of America dated July 8, 2010, ¶ 5: ("By including subordinate measures that are 'adopted and maintained' by a Party, the headnote to Annex I provides that each measure listed on a Party's Schedule pursuant to Article 1108(1) includes any existing subordinate measures – i.e., subordinate measures in effect on the date of entry into force – that are 'maintained' by a Party, as well as any new subordinate measures – i.e., subordinate measures that come into effect after entry into force – that are 'adopted' by a Party, as long as such subordinate measures are adopted or maintained under the authority of and consistent with the listed measure.") (emphasis added); ¶ 8: ("Similarly, under the headnote to Annex I, each measure listed on a Party's Schedule pursuant to Article 1108(1) includes any existing subordinate measure – i.e., one in effect on the date of entry into force – that a Party might choose to 'maintain', and any new subordinate measure – i.e., one in effect only after entry into force – that a Party might choose to 'adopt' so long as the subordinate measure is adopted or maintained under the authority of and consistent with the listed measure.") (emphasis added); **R-78**, *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Government of Canada* (ICSID ARB(AF)/07/4) Canada's Reply to Article 1128 Submissions dated September 1, 2010, ¶ 2: ("Canada listed the Atlantic Accord Implementation Acts in Annex I, thus reserving them from Article 1106. Article 2(f)(ii) of the Interpretive Note to Annex I extends the reservation for listed measures to 'any subordinate measure adopted or maintained under the authority of and consistent with the measure." Since the Guidelines are subordinate to the Acts, they are also reserved under Article 1106."); ¶ 12: ("All three NAFTA parties agree that a measure subordinate to a measure listed in Annex I is also reserved, even if it is adopted after the NAFTA entered into force.") ("Mobil/Murphy – Canada's Reply to 1128 Submissions").

[181] The Claimant takes a single statement during oral argument out of context to suggest that Canada agreed with the Majority's approach to interpreting "the measure" in paragraph 2(f)(ii). See Claimant's Memorial, ¶ 273, citing to **C-188**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Transcript [Excerpts] 240:17-241:4. The comment by Canada was made in the context of oral submissions regarding the decisions of the Canadian court's rulings upholding the 2004 Guidelines and, in particular, that the Mobil/Murphy tribunal should defer to that finding. The Canadian courts had already decided that the 2004 Guidelines set parameters entirely consistent with the Accord Act and the Benefits Plans and, as Canada was arguing in the context of when the comment cited by the Claimant was made, Canada was not urging an approach or interpretation but rather arguing that as a factual matter, this had already been determined and the NAFTA tribunal should endorse the same approach. See **R-74**, Mobil/Murphy – Day One Hearing Transcript, pp. 217-250. At worst, it was an impromptu misstatement in response to a question from the tribunal and plainly did not represent Canada's position, as is evidenced by the substantial written submissions describing otherwise.

[182] See e.g., **R-2**, Mobil/Murphy – Canada's Counter-Memorial, ¶¶ 224, 227, 231, 233-234; **R-79**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Canada's Rejoinder Memorial dated June 9, 2010, ¶¶ 76-77, 108, 114 ("Mobil/Murphy – Canada's Rejoinder Memorial"); **R-78**, Mobil/Murphy – Canada's Reply to 1128 Submissions, ¶¶ 2, 12; **R-80**, *Mobil Investments Canada Inc. and*

> Review of the Article 1128 submissions thus reveals a single, limited point common to the views expressed by the NAFTA Parties: the reference to subordinate measures in the headnote to Annex I can encompass future subordinate measures, provided that they are adopted and maintained under the authority of and consistent with the listed measure."[184]

118. To make the Majority's interpretation even more problematic, it added another element of uncertainty by concluding that "the measure" may include some subordinate measures but not others, depending on whether they are "relevant" or not.[185] Thus, "the measure" might be one or it might be a dozen. This creates ambiguity because it will be unknown to the reserving NAFTA Party and investors what has been reserved and what has not. The Majority's approach leads to significant uncertainty and lack of transparency by not offering any clear indication of what was reserved and elevates subordinate measures to the equivalent level of a listed non-conforming measure in the definition of "Measures". NAFTA tribunals are left to "come to a judgment"[186] on which existing subordinate measures are "relevant" to determining whether a new subordinate measure decreases conformity with the previous "legal framework." The more plausible object of Paragraph 2(f)(ii) of Annex I was to simply achieve a limited interpretive effect that ensured, for the avoidance of doubt, that any listed reserved measure that benefits from the reservation also "includes any subordinate measure adopted or maintained under the authority of and consistent with the measure."[187]

2. The Mobil/Murphy Majority Improperly Equated "Consistent With" with the Ratchet Test Under Article 1108

119. Article 1108(1)(c) addresses amendments to non-conforming measures which a NAFTA Party has reserved from particular provisions of Chapter 11 or 12. Article 1108(1)(c) states:

Murphy Oil Corporation v. Government of Canada (ICSID Case No. ARB(AF)/07/4) Canada's Post-Hearing Submission dated December 3, 2010, ¶ 36 ("Mobil/Murphy – Canada's Post-Hearing Submission").

[183] **C-1**, Mobil/Murphy – Decision, ¶ 311: ("The Respondent disagrees with equal vigor; on its approach, the words "the measure" means that an assessment of whether 2004 Guidelines are adopted 'under the authority of and consistent with the measure' is to be carried out only by reference to the Federal Accord Act.").

[184] **R-81**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Claimants' Submission on the US and Mexico's NAFTA Article 1128 Submissions dated September 1, 2010, ¶ 22 (emphasis added).

[185] **C-1**, Mobil/Murphy – Decision, ¶¶ 330, 333.

[186] **C-1**, Mobil/Murphy – Decision, ¶ 401.

[187] **C-186**, Mobil/Murphy – Dissent, ¶¶ 32-33.

> Articles 1102, 1103, 1106 and 1107 does not apply to: …an amendment to any non-conforming measure…to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 1102, 1103, 1106 and 1107.

120. The legal test in Article 1108(1)(c) requires an evaluation of whether the amendment in question decreased the conformity of the measure, as it existed immediately before the amendment, with the NAFTA provision against which the reservation was made. This is often referred to as the "ratchet test" because Article 1108(1)(c) ensures that a NAFTA Party cannot make a non-conforming listed measure less liberal, or more trade restrictive, than it was previously. In other words, amendments to reserved measures can only be liberalizing and cannot be more trade restrictive.

121. The Claimant conceded early on in the Mobil/Murphy arbitration that the 2004 Guidelines were not an amendment to the Accord Act and hence could not be subject to the "ratchet test" set out in Article 1108(1)(c).[188] Later, however, the Claimant argued that "the ratchet rule test for amendments and the test for subordinate measures should be interpreted so as to reach the same result."[189] In particular, the Claimant argued that "the drafters of the NAFTA could not have intended for there to be any substantive difference between the 'consistent with' standard (in Paragraph 2(f)(ii) of the Interpretative Note to Annex I) and the 'not decreasing the conformity of' standard (in Article 1108(1)(c))."[190]

122. Canada opposed the Claimant's effort to read into the definition of "Measures" under the Annex I headnote a legal test that the NAFTA Parties had made explicit in a completely different

[188] **R-65**, Mobil/Murphy – Memorial, ¶¶ 170-171: ("To qualify as an amendment within the meaning of [Article 1108(1)(c)], the R&D Expenditure Guidelines therefore would have to constitute an amendment to a measure listed in Canada's Schedule to Annex I or a subordinate measure adopted thereunder as of the January 1, 1994 effective date of the NAFTA. Specifically, they would have to constitute an amendment to (i) the Accord Acts themselves, (ii) the 1987 Exploration Benefits Plan Guidelines issued pursuant to the Board's authority thereunder, or (iii) Decision 86.01 approving the Hibernia Benefits Plan. <u>They plainly do not</u>…On their face, <u>the R&D Expenditure Guidelines are not an amendment within the meaning of Article 1108(1)</u>." (emphasis added); **R-72**, Mobil/Murphy – Reply Memorial, ¶ 106: ("Canada concedes that the Guidelines are not an amendment to the Accord Acts, so Article 1108(1)(c)'s "ratchet rule" cannot resolve the Guidelines' non-conformity with Article 1106(1))."

[189] **R-82**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Claimants' Response to the Mobil/Murphy Tribunal's Letter of June 23, 2011 dated July 29, 2011, ¶ 12. See also ¶ 11: ("the term 'consistent' in paragraph 2(f)(ii) requires that the new subordinate measure not decrease the conformity of the listed measure with the NAFTA obligation from which it is reserved.").

[190] **R-67**, Mobil/Murphy – Claimants' Reply to Canada's Post-Hearing Submission, ¶ 27.

part of the NAFTA text. Canada wrote: "There is no basis for introducing into paragraph 2(f)(ii) of Annex I the ratchet mechanism of Article 1108(1)(c)."[191]

123. Despite itself having recognized the 2004 Guidelines were not an amendment and that the tests were not the same,[192] the Mobil/Murphy Majority proceeded to eliminate the difference anyway and in effect apply the Article 1108(1)(c) ratchet test to the 2004 Guidelines:

> While the amendment standard in Article 1108 and the consistency standard in paragraph 2(f) are not identical provisions, they are substantially reinforcing and tug in the same direction, namely, to ensure that the reservations are not expanded or altered to such a degree so as to enlarge the non-conformity of the reservation vis-à-vis the obligation against which the measure is reserved.[193]

124. It was on this "ratchet" basis that the Majority concluded that the 2004 Guidelines are not a subordinate measure under paragraph 2(f)(ii) because they "render the local content regime that arises, more non-conforming with Article 1106 than was the case when the measures that applied to the Hibernia and Terra Nova investment projects were defined by the [Accord Act] the Hibernia and Terra Nova Benefits Plans, and related Board Decisions."[194] However, the definition of "Measure" under paragraph 2(f)(ii) makes no mention of a "decrease in conformity" test in the manner expressly provided by Article 1108(1)(c).

125. In addition, the Majority elsewhere states that "an additional or more onerous burden cannot *per se* be deemed to be an inconsistency" under paragraph 2(f)(ii).[195] Thus, on the one hand, a ratchet test purportedly applies under paragraph 2(f)(ii), but on the other hand, more

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[191] **R-83**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Canada's Response to the Tribunal's Question on "The Measure" dated August 2, 2011, ¶ 17. See also, ¶¶ 18-21. **R-80**, Mobil/Murphy – Canada's Post-Hearing Submission, ¶ 33: ("A measure can be 'consistent with' a measure listed in Annex I of the NAFTA if it imposes additional and/or more onerous burdens on a legal or natural person who is subject to that measure. <u>The effect of additional and/or more onerous burdens on a legal or natural person is addressed in NAFTA Article 1108(1)(c), not Article 2(f)(ii) of the Interpretive Note of Annex I. These Articles have different purposes, contain different tests, and cannot be conflated.</u>") (emphasis added); **R-84**, Letter from the Mobil/Murphy Tribunal to Disputing Parties (Jun. 23, 2011). The United States and Mexico declined to make a submission on the Mobil/Murphy Tribunal's question on how to interpret "the measure" in Annex I paragraph 2(f)(ii) (**R-85**, Letter from the United States to the Mobil/Murphy Tribunal (Aug. 1, 2011); **R-86**, Letter from Mexico to Mobil/Murphy Tribunal (Jul. 29, 2011)).

[192] **C-1**, Mobil/Murphy – Decision, ¶¶ 305-308.

[193] **C-1**, Mobil/Murphy – Decision, ¶ 341.

[194] **C-1**, Mobil/Murphy – Decision, ¶ 409.

[195] **C-1**, Mobil/Murphy – Decision, ¶ 400.

onerous burdens can be applied without a finding of inconsistency. Professor Sands recognized that the Majority's approach is inherently flawed:

> On its face, therefore, a new 'subordinate measure' may lead to a situation in which additional burdens are imposed, so that conformity may be decreased, but the requirements of 'authority' and 'consistency' are still met (all three NAFTA Parties confirm that this is the approach they intended and drafted). Despite the manifest difference in the test to be applied, and notwithstanding the concurrence that the 2004 Guidelines are consistent with the Federal Accord Act, the Majority (albeit with a variety of formulations) applies the standard relating to amendments to its consideration of the consistency of the application of the 2004 Guidelines to the Projects. The Majority compares the extent of the inconsistency introduced by the 2004 Guidelines with that which pertained before the 2004 Guidelines were adopted (although it never actually sets out the standard that is to be applied in determining where a line has been crossed so as to give rise to 'inconsistency'). This is despite the fact that, for obvious reasons, neither party has argued that the 2004 Guidelines, Decision 86.01 and Decision 97.02 are to be treated as amendments to the Federal Accord Act. […] As such, the question of whether or not the application of the 2004 Guidelines "decrease conformity" or "increases inconsistency", for example, with Article 1106 by reference to the situation that existed prior to their application, is wholly without justification. The Majority has, in effect, introduced a new element that the drafters of the NAFTA plainly intended to exclude. The Majority provides no proper explanation to support its approach.[196]

126. In sum, the Majority's reading of "consistent with" is inconsistent within the context of its own decision and improperly conflated two separate and distinct tests for amendments and subordinate measures.

3. The Mobil/Murphy Majority Made No Effort at Consonance With the Judgments of the Canadian Courts

127. The Mobil/Murphy Majority determined that the 2004 Guidelines were inconsistent with the Accord Act and the Hibernia and Terra Nova Benefits Plans. The Majority found that the 2004 Guidelines imposed burdens that were of an "inhospitable, inharmonious, incompatible, contradictory nature, and…otherwise inconsistent with the existing legal framework."[197] This finding, however, which was central to the Majority's decision on liability, is hardly consonant

[196] **C-186**, Mobil/Murphy – Dissent, ¶ 24 (emphasis added).

[197] **C-1**, Mobil/Murphy – Decision, ¶¶ 394, 401.

with findings made by the Canadian courts when the Claimant and others challenged the Board's authority to issue the 2004 Guidelines under the Accord Act and challenged the consistency of the spending requirement under the 2004 Guidelines with the obligations under the Hibernia and Terra Nova Benefits Plans and Decisions.

128. For example, the penultimate paragraph that concludes the decision from the Trial Court of Newfoundland and Labrador states:

> In the context of the Accord, the Accord Acts and the previous Board decisions, the Board has the power, and it is not unreasonable, to impose R&D Guidelines in furtherance of its obligation to ensure that a benefits plan provides that expenditures shall be made for research and development in the province. It is not patently unreasonable, or unreasonable, for the Board to establish a level of expenditure based on industry norms…"[198]

129. Similarly, the Newfoundland and Labrador Court of Appeal concluded:

> The [Benefits] decisions granting the appellants approval for their projects have not been fundamentally changed. The Board reasonably interpreted its decisions. They approved the Hibernia and Terra Nova projects on condition that the Board have the authority to continuously monitor research and development expenditures and intervene by issuing guidelines requiring higher expenditures should the appellants' level of expenditures fall below that which the Board considered appropriate. These were the rules of the game when development approvals issued. The same rules apply today.[199]

130. It is difficult to comprehend how the Mobil/Murphy Majority could reach the conclusion that the 2004 Guidelines are "inhospitable, inharmonious, incompatible, [and] contradictory" to the "legal framework" that existed prior to the 2004 Guidelines, while two levels of Canadian courts determined that the 2004 Guidelines were perfectly "reasonable" and in fact no different than the "rules" that existed previously. The Majority's finding is hard to reconcile with the court's finding that "the Guidelines set parameters consistent with the Board's responsibility to monitor expenditures for research and development required under the benefits plans",[200] and that "[h]aving accepted [the Benefits Plans and the obligations therein], it is not now open to [the operators] to deny the Board's authority to fulfill its duties set out under the Accord and the *Act*

[198] **R-61**, Trial Court Decision, ¶ 92.

[199] **C-153**, Court of Appeal Decision, ¶ 135.

[200] **C-153**, Court of Appeal Decision, ¶ 105.

and its earlier interpretations contained in decisions…to effectively monitor their activities and ensure compliance and adequate and reasonable expenditures".[201] The dissonance between these interpretations can only be explained by the Mobil/Murphy Majority's inappropriate construction of a "legal framework" test based on the ratchet mechanism from Article 1108(1)(c).

4. The Required Spending Under the 2004 Guidelines is not "Inconsistent" with the Hibernia Benefits Plan or the Terra Nova Benefits Plan

131. In undertaking its analysis on whether the 2004 Guidelines were consistent with the Accord Act and Hibernia and Terra Nova Benefits Plans, the Mobil/Murphy Majority considered the financial effect of the 2004 Guidelines and "whether the burden introduced by the new subordinate measure [was] of such a degree as to make it inhospitable or incompatible with the reserved measure".[202] The Mobil/Murphy Tribunal did "not conclude that the mere fact that additional expenditures may be imposed [made] the 2004 Guidelines inconsistent with the reserved and subordinate measures"[203] but found that the "characteristics of the financial profile of the 2004 Guidelines" were a "substantial expansion" beyond what would have been spent by the Claimant but for the 2004 Guidelines.[204]

132. As such, the Claimant's allegation concerning an increase in unnecessary R&D and E&T spending was central to the tribunal's determination of consistency. The Claimant alleged, and the Majority believed, that the 2004 Guidelines would at times require it "to spend an average of five times more on R&D and E&T."[205] As a more general estimation over the life of the projects, the Claimant alleged that the 2004 Guidelines "prescribe an arbitrary level of expenditures on R&D/E&T that in practice amount to approximately $147 million in forced spending".[206]

133. But we now know that these estimates were based on a gross underestimation as to what the Claimants would actually spend in the "ordinary course" on R&D and E&T in the Province in the absence of the 2004 Guidelines. For example, at the time it filed its Memorial in the

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[201] **R-61**, Trial Court Decision, ¶ 92, ¶ 47.

[202] **C-1**, Mobil/Murphy – Decision, ¶ 401.

[203] **C-1**, Mobil/Murphy – Decision, ¶ 400.

[204] **C-1**, Mobil/Murphy – Decision, ¶ 400.

[205] **C-1**, Mobil/Murphy – Decision, ¶ 400.

[206] **C-1**, Mobil/Murphy – Decision, ¶ 358.

Mobil/Murphy arbitration, the Claimant represented that its "ordinary course" spending at the Hibernia and Terra Nova projects between 2004 and 2015 would total only [redacted] combined.[207] However, figures filed by the Claimant in this arbitration shows that its "ordinary course" spending in this period was [redacted] (which Canada believes is still an underestimation). The Claimant thus underrepresented its expenditures in the "ordinary course" in this period to the Mobil/Murphy tribunal by nearly 289%. Moreover, as will be discussed further below in Part V of this Counter-Memorial, between 2012 and 2015 the Claimant has in fact spent [redacted] *beyond* what it was required to spend under the 2004 Guidelines.[208] Thus, while the Claimant alleged in the Mobil/Murphy arbitration that it would be forced to spend significantly more on R&D and E&T in the Province than it normally would, it has now proceeded to invest even more than was required.

134. These inconsistencies reflect large distortions in the information which was before the Mobil/Murphy tribunal when it reached its decision on the consistency of the 2004 Guidelines with the previous "legal framework." The Mobil/Murphy tribunal's finding of inconsistency between the required spending under the 2004 Guidelines at Terra Nova and what the Claimant would invest in R&D and E&T at that project in any event is particularly acute. After the Decision was rendered the Mobil/Murphy tribunal awarded the Claimant a mere $726,080 in damages for additional spending under the 2004 Guidelines at the Terra Nova project between 2004 and 2011. To put this in perspective, that is only $90,750 of additional spending per year on R&D and E&T out of the project's revenues over the same period, which total over $15.75 billion.[209] It is nearly impossible to regard this amount as a "substantial expansion" in spending.

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[207] *Supra*, ¶ 74.

[208] *Infra*, ¶ 210.

[209] For Hibernia, see **C-123**, Letter from F. Smyth, CNLOPB to Paul Sacuta, HMDC (Feb. 26, 2009) attaching 2004-2008 R&D/E&T Expenditure Obligations, pp. MOB0002699-2701; **R-24**, Letter from Jeffrey Bugden, CNLOPB to Paul Sacuta, HMDC attaching 2009 R&D/E&T Expenditure Obligations (Feb. 11, 2010), p. 2; **R-25**, Letter from Jeffrey Bugden, CNLOPB to Paul Leonard, HMDC attaching 2010 R&D/E&T Expenditure Obligations (Feb. 7, 2011), p. 2; **R-26**, Letter from Jeffrey Bugden, CNLOPB to Jamie Long, HMDC attaching 2011 R&D/E&T Expenditure Obligations (Jan. 31, 2012), p. 2, and for Terra Nova, see **C-124,** Letter from F. Smyth, CNLOPB to Gary Vokey, Petro-Canada (Mar. 3, 2009) attaching 2004-2008 R&D/E&T Expenditure Obligations, pp. MOB0002703-2705; **R-43**, Letter from Jeffrey Bugden, CNLOPB to Gary Vokey, Suncor Energy Inc. attaching 2009 R&D/E&T Expenditure Obligations (Feb. 11, 2010), p. 2; **R-44**, Letter from Jeffrey Bugden, CNLOPB to Gary Vokey, Suncor Energy Inc. attaching 2010 R&D/E&T Expenditure Obligations (Jan. 31, 2011), p. 2; **R-45**, Letter from Jeffrey Bugden, CNLOPB to Gary Vokey, Suncor Energy Inc. attaching Jan-Mar 2011 R&D/E&T Expenditure Obligations (Apr. 29, 2011), p. 2; **R-46**, Letter from Jeffrey Bugden, CNLOPB to Sandy Martin, Suncor Energy attaching Apr-Dec 2011 R&D/E&T Expenditure Obligations (Jan. 31, 2012), p. 2.

Perhaps even more telling is the fact the Claimant's own assessment of its "ordinary course" spending at Terra Nova between 2012 and 2015 is more than sufficient to meet the spending requirement set by the 2004 Guidelines over that timeframe; that is, the 2004 Guidelines did not require the Claimant to spend any more than it otherwise would have.

135. Based on what is now known about the actual R&D and E&T spending requirements at the two projects, as well as the other critiques Canada has described above, it is apparent that the Mobil/Murphy Majority's conclusion that spending under the 2004 Guidelines is "inhospitable" or "incompatible" or a "substantial expansion" of what would be spent in the absence of the 2004 Guidelines was premised on a factual scenario presented by the Claimant which has proven not to be true.

III. THIS TRIBUNAL HAS NO JURISDICTION *RATIONAE TEMPORIS* OVER MOBIL'S CLAIM

A. Summary of Canada's Position

136. The Claimant asserts in its Memorial that this Tribunal "has jurisdiction *rationae temporis*" in this dispute.[210] The Claimant is wrong.

137. The Claimant has completely ignored the preclusive effect of the limitations period under NAFTA Articles 1116(2) and 1117(2), which serve as a prerequisite to engage Canada's consent to arbitrate under Article 1122(1). Indeed, the Claimant did not even mention these provisions in its Memorial and simply asserted that since the NAFTA has been in force since January 1, 1994 and the "measures at issue—namely the Guidelines"[211] were subsequently implemented in 2004, and the Claimant submitted a Request for Arbitration on January 16, 2015, this Tribunal must have temporal jurisdiction.[212] The Claimant's reasoning is in direct conflict with the plain language of the NAFTA and also contradicts its own position in the Mobil/Murphy arbitration.

138. This Tribunal must decide for itself whether it has jurisdiction *rationae temporis* over this dispute. Jurisdiction may not simply be assumed, nor can a decision thereon be deferred to the

[210] Claimant's Memorial, ¶ 177.

[211] Claimant's Memorial, ¶ 176.

[212] Claimant's Memorial, ¶¶ 176-177.

non-binding speculation of the *functus* Mobil/Murphy tribunal. When this Tribunal considers the plain wording of Articles 1116(2) and 1117(2), the consistent interpretations of those provisions by NAFTA tribunals and the three NAFTA Parties, as well as the explicit positions of the Claimant itself, there can be no conclusion other than to find that it has no jurisdiction over a claim filed on January 16, 2015 with respect to a measure adopted on November 5, 2004.

B. NAFTA Articles 1116 and 1117 Impose a Strict Three-Year Time Limitation Period for Submitting a Claim to Arbitration

139. A NAFTA Party only consents to arbitration "in accordance with the procedures set out in this Agreement."[213] As explained by the *Methanex* tribunal:

> In order to establish the necessary consent to arbitration, it is sufficient to show (i) that Chapter 11 applies in the first place, i.e. that the requirements of Article 1101 are met, and (ii) that a claim has been brought by a claimant investor in accordance with Articles 1116 or 1117 (and that all pre-conditions and formalities required under Articles 1118-1121 are satisfied). Where these requirements are met by a claimant, Article 1122 is satisfied; and the NAFTA Party's consent to arbitration is established.[214]

140. Conformity with NAFTA Articles 1116(2) and 1117(2) is thus one of the pre-conditions to Canada's consent to arbitration and must be complied with in order to establish this Tribunal's jurisdiction.

141. Article 1116(2) of the NAFTA establishes a three-year limitation period for an investor to bring a claim under Chapter Eleven:

> An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.[215]

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[213] NAFTA, Article 1122(1).

[214] **RL-2**, *Methanex Corporation v. United States of America* (UNCITRAL) Partial Award, 7 August 2002, ¶ 120 ("*Methanex – Partial Award*").

[215] NAFTA, Article 1116(2). Article 1117(2) of the NAFTA establishes the same three-year limitations period with respect to the investor's enterprise: ("An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.").

142. Accordingly, a claimant may not bring a claim if more than three years have elapsed since it first acquired knowledge, or should have first acquired knowledge, of the alleged breach and the alleged loss arising out of that breach. The specific quantum of loss need not be known in order to establish the requisite knowledge. This has been confirmed in the *Grand River v. United States*, *Mondev v. United States*, *Apotex v. United States* and *Bilcon v. Canada* arbitrations,[216] as well as by the recent decision in the *Mesa v. Canada* arbitration, where the tribunal noted, in reference to Article 1116:

> It merely requires the investor to "claim" that it has incurred harm due to the breach. It is not for the investor to prove at this early stage that it has actually suffered a loss or damage. Proof of actual damage is a matter for the merits, as opposed to the jurisdiction phase of the arbitration.[217]

143. The standard articulated in Articles 1116 and 1117 is a strict limitations period that forms one of the fundamental bases of Canada's consent to arbitrate disputes under NAFTA Chapter 11. As the *Feldman v. Mexico* tribunal stated:

> [T]he Arbitral Tribunal stresses that, like many other legal systems, NAFTA Articles 1117(2) and 1116(2) introduce a clear and rigid limitation defense, which, as such, is not subject to any suspension […], prolongation or other qualification. Thus the NAFTA legal system limits the availability of arbitration within the clear-cut period of three years…[218]

144. In other words, the NAFTA Parties do not consent to arbitrate claims that fall outside the limitations period.[219] The three year time limitation period under Articles 1116(2) and 1117(2)

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[216] **RL-3**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Decision on Objections to Jurisdiction, 20 July 2006, ¶¶ 77-78 ("*Grand River – Decision on Objections to Jurisdiction*"); **RL-4**, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002, ¶ 87; **RL-5**, *Apotex Inc. v. United States of America* (UNCITRAL) Award on Jurisdiction and Admissibility, 14 June 2013, ¶¶ 318-320, 324-325 ("*Apotex – Award on Jurisdiction*"); **RL-6**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon Of Delaware Inc. v. Government of Canada* (UNCITRAL) Award on Jurisdiction and Liability, 17 March 2015, ¶¶ 271-275 ("*Bilcon – Award*").

[217] **RL-7**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Award, 31 March 2016, ¶ 313.

[218] **RL-8**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)99/1) Award, 16 December 2002, ¶ 63 ("*Feldman – Award*") (emphasis added and citation omitted). See also **RL-9**, *Corona Materials, LLC v. Dominican Republic* (ICSID Case No. ARB(AF)/14/3) Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR CAFTA, 31 May 2016, ¶¶ 192, 199 citing *Feldman – Award* with approval in interpreting equivalent the three-year limitations period in the DR-CAFTA as "strict" and not susceptible to suspension or tolling ("*Corona – Award on Preliminary Objections*").

[219] **RL-5**, *Apotex – Award on Jurisdiction*, ¶¶ 314-315, 324, 335; **RL-10**, *Eli Lilly and Company v. Government of Canada* (UNCITRAL) Submission of Mexico Pursuant to NAFTA Article 1128, 18 March 2016, ¶¶ 4-8 ("*Eli Lilly – Mexico 1128 Submission*"); **RL-11**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL)

commences on the date when the investor (or enterprise) first acquired, or should have first acquired, knowledge of the alleged breach.

145. The question before this Tribunal is simple: on what date did the Claimant first acquire such knowledge? Put another way, when was the Claimant first aware that the application of the 2004 Guidelines to the Terra Nova and Hibernia projects resulted in an alleged breach of the NAFTA and associated alleged loss or harm?

146. The answer to this question is also simple: November 5, 2004, the date that the 2004 Guidelines were promulgated by the CNLOPB. Indeed, as described below, the Claimant explicitly asserted in the Mobil/Murphy arbitration that it filed its NOA on November 1, 2007 to ensure it was done within the three-year limitations period and in order to come within the tribunal's jurisdiction *rationae temporis*.[220]

147. In contrast, Mobil provides no explanation in its Memorial in this arbitration as to why it had to comply with the NAFTA's limitations period then, but need not do so now. Even more striking is the Claimant's attempt to hide its prior position on the issue. The table below sets out what the Claimant wrote on August 3, 2009, in its Mobil/Murphy arbitration Memorial regarding jurisdiction *rationae temporis* and compliance with NAFTA Article 1116(2) and 1117(2) compared to what it wrote in its March 11, 2016 Memorial for this arbitration (key differences are underlined for emphasis):

Mobil/Murphy Memorial dated August 3, 2009, ¶¶ 142-144	Mobil Memorial dated March 11, 2016, ¶¶ 176-177
Heading: "The Dispute Meets the Temporal Requirements of the NAFTA" Under 2203 of the NAFTA, the treaty has been in force for both the United States and Canada since January 1, 1994. The measures at issue – namely, the 2004 R&D Expenditure Guidelines <u>and efforts by the Board to require</u>	Heading: "The Tribunal has Temporal Jurisdiction" Under 2203 of the NAFTA, the treaty has been in force for both the United States and Canada since January 1, 1994. The measures at issue – namely, the Guidelines, were implemented well after the NAFTA entered into force.

Submission of the United States of America, 14 February 2014, ¶¶ 2-3 ("*DIBC – U.S. 1128 Submission*"); **RL-12**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL) Submission of Mexico Pursuant Article 1128 of NAFTA, 14 February 2014, ¶¶ 21-23 ("*DIBC – Mexico 1128 Submission*").

[220] **R-65**, Mobil/Murphy – Memorial, ¶¶ 142-144.

compliance with their terms – were implemented well after the NAFTA entered into force. In Chapter 11 of the NAFTA, Canada agreed to submit to arbitration of disputes pertaining to the substantive obligations undertaken therein. Claimants accepted this offer in their Request for Arbitration, which was received by the ICSID Secretary-General on November 1, 2007. This acceptance formed an agreement to arbitrate on that date. Claimants' Request was timely received by the Secretary-General within the three-year period of limitations established in the treaty. The record thus amply establishes the Tribunal's jurisdiction *rationae temporis*. Fn. 279: Articles 1116(2) and 1117(2) of NAFTA state that an investor may not make a claim if more than three years have elapsed between the time when the investor first knew or should have known of the alleged breach and the time when the claim is brought. The Request for Arbitration was made within three years of the promulgation of the Guidelines and the Board's efforts to enforce their terms.	In Chapter 11 of the NAFTA, Canada agreed to submit to arbitration of disputes pertaining to the substantive obligations undertaken therein. Mobil accepted this offer in its Request for Arbitration, which was received by the ICSID Secretary-General on January 16, 2015. The tribunal therefore has jurisdiction *rationae temporis*.

148. The above confirms several critical points. First, the Claimant acknowledges that the measure at issue in this arbitration is the same as that challenged in the Mobil/Murphy arbitration: the 2004 Guidelines.[221] Second, the Claimant agrees that compliance with Articles 1116(2) and 1117(2) is a matter of jurisdiction *rationae temporis*. Third, the Claimant recognizes that an agreement to arbitrate is only formed when a request for arbitration is filed within the three-year time period allowed by NAFTA and, hence, failure to do so vitiates Canada's consent to arbitrate. Fourth, the Claimant agrees that a notice of arbitration must be filed within three years of having first acquired knowledge of breach and loss, and otherwise the claim is time-barred. None of these points can be contested by the Claimant now.

[221] Claimant's Memorial, ¶ 7: ("The Board continues to impose the Guidelines in breach of Canada's obligations under the NAFTA. Mobil has therefore brought this second arbitration to recover the substantial losses it has incurred since 2012 due to the ongoing application of the Guidelines.").

149. None of this should come as a surprise to the Claimant. It urged the Mobil/Murphy tribunal to award future damages over the life of the Hibernia and Terra Nova projects. The Claimant wrote in its December 3, 2010 post-hearing submission:

> Because the NAFTA permits only monetary relief, this Tribunal does not have the option of simply enjoining enforcement of the Guidelines against the Claimants. <u>Further, the NAFTA provides for a three-year statute of limitations, which may well prevent Claimants from bringing future claims based on the Guidelines (which were first applied to the Hibernia and Terra Nova Projects in 2004).</u> Thus, it appears that Claimants can only receive full relief for the damages caused by the Guidelines through a calculation of future damages on the principles and variables espoused by the Claimants…[222]

150. No consideration of or reference to this warning by the Claimants was made by the Mobil/Murphy tribunal in its Decision or Award.[223] Whatever the reason for the omission, it is not relevant in these proceedings. What is relevant is that the Claimant itself recognized that if the Mobil/Murphy tribunal did not accept its claim for future damages (which it did not because the Claimant's damages model was too speculative and uncertain), it would be time-barred from bringing another claim before another NAFTA tribunal.

151. The consequences under Article 1116(2) and 1117(2) are decisive: the Claimant cannot seek damages for a measure enacted on November 5, 2004 by filing a Notice of Arbitration on January 16, 2015, more than eleven years later. The NAFTA simply does not permit this to occur and there is no scope or discretion on the part of the Tribunal to dispense with the wording of the NAFTA. The Claimant affirmed in the Mobil/Murphy arbitration that it had to comply with the three-year time bar rule in order to perfect Canada's consent to arbitration under Article 1122(1) and engage the tribunal's temporal jurisdiction. The same rule applies now, which means this claim is time-barred and this Tribunal has no jurisdiction *rationae temporis*.

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[222] **R-87**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Claimants' Post-Hearing Brief dated December 3, 2010, ¶ 67 (emphasis added). The Claimants referred to and quoted NAFTA Article 1116(2) in the footnote to this paragraph.

[223] The sole mention of the NAFTA limitations period in the Decision comes in a three sentence footnote obliquely "not[ing]" the discussion of continuing breaches in *UPS v. Canada* in the context of Article 1116(2). See **C-1**, Mobil/Murphy – Decision, fn. 458. The Mobil/Murphy tribunal made no further observation on the issue in the Decision or Award.

C. The Continuation of the 2004 Guidelines Does Not Establish Jurisdiction under NAFTA Articles 1116 and 1117

152. The fact that the 2004 Guidelines continue to apply to the Hibernia and Terra Nova projects does not allow the Claimant to escape the three-year limitations period set out in Articles 1116(2) and 1117(2).[224] Not only would such an interpretation contradict the plain language of those provisions and the long-standing and consistent position of all three NAFTA Parties that a continuing course of conduct does not renew the limitations period, it would have an impact for the NAFTA Chapter Eleven regime far beyond the present dispute.

153. As noted above, Articles 1116(2) and 1117(2) stipulate that a claim cannot be filed if more than three years have "elapsed from the date on which the investor (or enterprise) first acquired, or should have first acquired, knowledge" of alleged breach and loss. This is true regardless of whether the measure at issue is a one-time, instantaneous event, or an event that continues.

154. The ordinary meaning of NAFTA Chapter Eleven's time limitation for filing a claim has been succinctly described by Professor Reisman:

> It takes great effort to misunderstand Article 1116(2). It establishes that the challenge of the compatibility of the measure must be made within three years of *first* acquiring (i) knowledge of the measure and (ii) that the measure carries economic cost for those subject to it. If the challenge is not made within those three years, it is time-barred.[225]

155. The use of the word "first" is critical to the meaning of Articles 1116(2) and 1117(2). The word "first" means "earliest in occurrence, existence."[226] The inclusion of "first" to modify the phrase "acquired knowledge" was a deliberate drafting choice of the NAFTA Parties intended to mark the beginning of the time when knowledge of breach and loss existed and not the middle or end of a continuous event or period.

156. The NAFTA contemplated that measures which might be construed as "continuing" could be challenged under Chapter Eleven. This is made clear by Article 1101 which provides that

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[224] While the time-bar applies regardless, Canada does not concede that this constitutes a "continuing breach" as understood in international law.

[225] **RL-13**, W. Michael Reisman, Opinion with Respect to the Effect of NAFTA Article 1116(2) on Merrill & Ring's Claim, 22 April 2008, ¶ 28 ("*Reisman Opinion*") (emphasis in the original).

[226] **R-88**, *Shorter Oxford English Dictionary*, 5th ed. (Oxford University Press, 2003), at p. 965.

Chapter Eleven applies to "measures adopted or maintained" by a Party.[227] Mindful of this, the NAFTA Parties deliberately chose to identify the precise moment at which the time limitation applicable to such claims would apply. The running of the three-year countdown is to be calculated from the "first" acquisition of relevant knowledge, not subsequent, repeated or ultimate acquisition of such knowledge.[228]

157. All three NAFTA Parties have consistently taken this position. For example, in its NAFTA Article 1128 non-disputing Party submission to the tribunal in *Merrill & Ring v. Canada*, the United States wrote:

> An investor *first* acquires knowledge of an alleged breach and loss at a particular moment in time: under 1116(2), that knowledge is acquired on a particular "date". Such knowledge cannot *first* be acquired on multiple dates, nor can such knowledge *first* be acquired on a recurring basis.[229]

158. Mexico concurred "in its entirety" with the U.S. 1128 submission in *Merrill & Ring*.[230]

159. Since *Merrill & Ring*, the United States, Mexico and Canada have been united in their views that a continuing course of conduct does not renew the limitations period. This interpretation of Articles 1116(2) and 1117(2) has been affirmed by the NAFTA Parties in *DIBC v. Canada*,[231] *Bilcon v. Canada*,[232] *Apotex v. United* States,[233] *Mercer v. Canada*,[234] and most recently in *Eli Lilly v. Canada* where the United States wrote:

[227] Similarly, various substantive obligations envisage claims concerning continuing measures. For example, Article 1105(2) provides for non-discriminatory treatment by measures a Party "adopts or maintains" relating to losses owing to armed conflict or civil strife. Article 1108(2), (2) and (3) addresses non-conforming measures "maintained" by a Party. Article 1113 allows a Party to deny benefits as a result of measures it "adopts or maintains," while Article 1114 states that nothing in Chapter Eleven prevents a Party from "adopting, maintaining or enforcing" a measure to ensure investment activity is sensitive to environmental concerns.

[228] **RL-14**, *Merrill & Ring Forestry L.P. v. Government of Canada* (UNCITRAL) 1128 Submission of the United States, 14 July 2008, ¶ 5 ("*Merrill & Ring – U.S. 1128 Submission*").

[229] **RL-14**, *Merrill & Ring – U.S. 1128 Submission,* ¶¶ 5, 10, 17 (emphasis in original). As Professor Reisman has explained, "an investor does not and logically cannot 'first acquire' knowledge of the allegedly incompatible measure that constitutes the challenged 'breach' *repeatedly*." **RL-13**, *Reisman Opinion*, ¶ 29 (emphasis in original).

[230] **RL-15**, *Merrill & Ring Forestry L.P. v. Government of Canada* (UNCITRAL) Submission of Mexico Pursuant Article 1128 of NAFTA, 2 April 2009 ("*Merrill & Ring – Mexico 1128 Submission*").

[231] **RL-12**, *DIBC – Mexico 1128 Submission,* ¶ 21; **RL-11**, *DIBC – U.S. 1128 Submission*, ¶ 3; **RL-16**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL) Canada's Reply to the NAFTA Article 1128 Submissions, 3 March 2014, ¶¶ 27-28 ("*DIBC – Canada's Reply to 1128 Submissions*").

> An investor or enterprise *first* acquires knowledge of an alleged breach and loss at a particular moment in time; that is, under Articles 1116(2) and 1117(2), knowledge is acquired as of a particular "date." Such knowledge cannot *first* be acquired at multiple points in time or on a recurring basis. As the *Grand River* tribunal recognized, a continuing course of conduct by the host State does not renew the limitations period under Articles 1116(2) and 1117(2), once an investor or enterprise knows, or should have known, of the alleged breach and loss or damage incurred thereby. Accordingly, once a claimant *first* acquires (or should have first acquired) knowledge of breach and loss, subsequent transgressions by the State Party arising from a continuing course of conduct do not renew the limitations period under Articles 1116(2) or Article 1117(2).[235]

160. Similarly, in its submission to the *Eli Lilly v. Canada* tribunal, Mexico noted:

> It follows that neither a continuing course of conduct nor the occurrence of subsequent acts or omissions can renew or interrupt the three-year limitation period once it has commenced to run.
>
> …given that the NAFTA Parties have repeatedly concurred the view that the three-year limitation period cannot be extended by an allegation that the alleged violation has continued, their "clear and consistent position...on this issue constitutes a 'subsequent agreement between the parties regarding the interpretation of the treaty' and/or 'subsequent practice' which 'shall be taken into account' when interpreting NAFTA".[236]

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[232] **RL-17**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon Of Delaware Inc. v. Government of Canada* (UNCITRAL), Submission of the United States of America, 19 April 2013, ¶ 12 ("*Bilcon – U.S. 1128 Submission*"). In the footnote following this paragraph, the United States noted: ("The United States' views on the interpretation of NAFTA Articles 1116(2) and 1117(2) are reflected in the attached non-disputing Party submission of July 14, 2008 in the NAFTA Chapter Eleven case Merrill & Ring Forestry, L.P. v. Canada.").

[233] **RL-18**, *Apotex Inc. v. United States of America* (UNCITRAL) Memorial on Objections to Jurisdiction of Respondent United States of America, 16 May 2011, ¶¶ 46-49.

[234] **RL-19**, *Mercer International Inc. v. Government of Canada* (ICSID Case No. ARB(AF)/12/3) Submission of the United States of America, 8 May 2015, ¶ 5; **RL-20**, *Mercer International Inc. v. Government of Canada* (ICSID Case No. ARB(AF)/12/3) Canada's Rejoinder Memorial, 31 March 2015, ¶¶ 223-228.

[235] **RL-21**, *Eli Lilly and Company v. Government of Canada* (UNCITRAL) Submission of the United States of America, 18 March 2016, ¶ 4 (emphasis added). This is consistent with the position taken by the United States in other arbitrations involving limitations periods identical to that of NAFTA Article 1116(2) and 1117(2). See also, **RL-22**, *Corona Materials LLC v. Dominican Republic* (ICSID Case No. ARB(AF)/14/3) Submission of the United States of America, 11 March 2016, ¶ 5 ("*Corona – U.S. Submission*"); **RL-9**, *Corona – Award on Preliminary Objections*, ¶ 215 (confirming that the limitations period cannot be evaded by basing its claim on the most recent transgression).

[236] **RL-10**, *Eli Lilly – Mexico 1128 Submission*, ¶¶ 7-8 (emphasis added).

161. These common, concordant and consistent views of the NAFTA Parties on the interpretation of the limitation period should be given considerable weight.[237] The *Vienna Convention on the Law of Treaties* ("VCLT") Article 31(3) provides that:

> There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation […].[238]

162. The consistent submissions made by the NAFTA Parties before other tribunals establish the subsequent agreement and subsequent practice of the NAFTA Parties regarding the proper interpretation of the limitation period provided for in the NAFTA. Pursuant to Article 31(3) of the VCLT, this "*shall be taken into account*" by the Tribunal.

163. NAFTA tribunals have also affirmed that a continuing course of conduct does not renew the NAFTA's limitations period. The *Grand River v. United States* tribunal described the limitation periods in Articles 1116(2) and 1117(2) as having "introduced a clear and rigid limitation defense – not subject to any suspension, prolongation or other qualification".[239] In indicating its refusal to disregard the strict limitation period, the tribunal further observed that:

> [An analysis that led to] not one limitations period, but many…[would] render the limitations provisions ineffective in any situation involving a series of similar and related actions by a respondent state, since a claimant would be free to base its claim on the most recent transgression, even if it had knowledge of earlier breaches and injuries.[240]

164. Equally firm, the *Apotex v. United States* tribunal noted while dismissing all claims that were time-barred that "nothing in the text or jurisprudence of NAFTA Chapter Eleven suggests that a party can evade NAFTA's limitation period" by asserting that the measure at issue was

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[237] **RL-23**, *Canadian Cattlemen for Fair Trade v. United States of America* (UNCITRAL) Award on Jurisdiction, 28 January 2008, ¶¶ 181-189; **RL-24**, *Bayview Irrigation District et al. v. United Mexican States* (ICSID Case No. ARB (AF)/05/1) Award, 19 June 2007, ¶¶ 106-121 ("*Bayview – Award*").

[238] **CL-35**, *Vienna Convention on the Law of Treaties* (1969), Article 31(3).

[239] **RL-3**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 29.

[240] **RL-3**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 81.

"part of a '*continuing breach*' by the United States, or '*part of the same single, continuous action*'".[241]

165. The finding by the tribunal in the most recent case to discuss the issue, *Bilcon v. Canada*, is also consistent with the views of all three NAFTA Parties. In that case, the tribunal took the position that "an act can be complete even if it has continuing ongoing effects"[242] and held that breaches identified by the claimant that arose prior to the three year period, but had continuing effects that lasted past that date, were nonetheless time-barred. As the tribunal noted, these measures were:

> …distinct and completed events, specifically brought about by executive officials in relation to the project rather than of general application, and the Investors had actual or constructive knowledge that these breaches would cause significant loss or damage, even if the full extent of their ongoing adverse effects was not known.[243]

166. The only NAFTA case which has suggested that a continuing breach can evade Articles 1116(2) and 1117(2) was *UPS v. Canada*, decided in 2007.[244] With due respect to that tribunal, all three NAFTA Parties have agreed that it was wrong on this point.[245] No other NAFTA tribunal has endorsed the reasoning of the *UPS* tribunal, which was unsupported and lacking in analysis. The tribunal summarily stated that it was "true generally in the law" that limitation periods are renewed by continuing courses of conduct but made no assessment of the *lex specialis* specifically imposed by the NAFTA Parties in the treaty.[246] The interpretation gives the word "first" no meaning and runs afoul of the principle of interpretation of *effet utile*.[247] In any

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[241] **RL-5**, *Apotex – Award on Jurisdiction,* ¶ 325 (emphasis in original).

[242] **RL-6**, *Bilcon – Award*, ¶ 268 citing to both the decision in *Mondev v. United States* and Article 14(1) of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts which states: ("The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.").

[243] **RL-6**, *Bilcon – Award*, ¶ 281.

[244] **RL-25**, *United Parcel Service of America v. Government of Canada* (UNCITRAL) Award on the Merits, 24 May 2007, ¶¶ 26-28 ("*UPS – Award*").

[245] **RL-11**, *DIBC – U.S. 1128 Submission*, ¶¶ 8-10; **RL-17**, *Bilcon – U.S. 1128 Submission,* ¶¶ 8-10; **RL-14**, *Merrill & Ring – U.S. 1128 Submission*, ¶ 10; **RL-15**, *Merrill & Ring – Mexico 1128 Submission*. See also **RL-22**, *Corona – U.S. Submission*, ¶ 6; **RL-16**, *DIBC – Canada's Reply to 1128 Submissions*, ¶ 29.

[246] **RL-25**, *UPS – Award*, ¶ 28.

[247] In respect of "*effet utile*" also known as the doctrine of effectiveness see *e.g.* **RL-26**, Lord McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961) (reprinted 2003), at pp. 383-392.

event, the nature of the measures at issue in *UPS* were very different than the situation faced by this Tribunal.[248] Here, there is no debate that the specific measure in question was adopted and enforced on November 5, 2004 and directly applied to the Claimant's investments in the Hibernia and Terra Nova projects.[249] The Claimant has already recognized that if it had waited to file its original notice of arbitration after that date (for example, November 1, 2008 instead of November 1, 2007), it would have been time-barred under Articles 1116(2) and 1117(2) and the Mobil/Murphy tribunal would not have had jurisdiction *rationae temporis*.[250] It cannot argue any different position now.

167. In sum, the ordinary meaning, context and object and purpose of Articles 1116(2) and 1117(2) confirms that the continued application of a measure alleged to breach NAFTA does not renew the three-year limitations period under NAFTA Chapter Eleven. The limitations period started to run at the moment the Claimant first acquired knowledge of the alleged breach and alleged loss arising from that breach even if the effects of that measure continue on past that moment in time, or the Claimant continues to incur damages into the future. In this case, the Claimant first acquired the requisite knowledge in 2004. There is no legal discretion to extend the three-year time limit because of the continuation of the 2004 Guidelines.

D. Statements Made by the Mobil/Murphy Tribunal Regarding "Continuing Breach" Cannot Confer Jurisdiction on this Tribunal

168. Without having received any submission from the parties on the issue, the Mobil/Murphy Majority stated that the Claimant can "claim compensation in new NAFTA arbitration proceedings for losses which have accrued but are not actual in the current proceedings."[251] This statement has no legal effect in this arbitration for two reasons, either of which are sufficient to dispose of the matter.

[248] As the *Bilcon* tribunal noted, "*UPS* involved its own set of facts, including some measures that predated NAFTA or were of wide application rather than being specifically directed at the investor only." **RL-6**, *Bilcon – Award*, ¶ 265.

[249] On that date the Guidelines were applied retroactively to April 2004.

[250] **R-65**, Mobil/Murphy – Memorial, ¶¶ 142-144.

[251] **C-1**, Mobil/Murphy – Decision, ¶ 478. See also, ¶¶ 427-430.

169. First, the Mobil/Murphy tribunal had no authority to confer jurisdiction on this Tribunal. The principle of "*competence-competence*" in international arbitration demands that a tribunal determine *for itself* whether it has jurisdiction over a particular dispute.[252] This is reflected in Article 41(1) of the ICSID Convention, which specifically notes that "[t]he Tribunal shall be the judge of its own competence." The fundamental importance of this principle has been noted by numerous ICSID tribunals which have emphasized that they have an obligation to determine their own jurisdiction and cannot be controlled on this decision by another tribunal or position of a party.[253] This means that this Tribunal must assess for itself whether, given the terms of the NAFTA, Canada's consent to arbitration has been perfected and jurisdiction may be seized. This task falls squarely to this Tribunal and it cannot delegate that responsibility elsewhere.

170. Second, the statement by the Mobil/Murphy tribunal that the Claimant could initiate new proceedings before a new NAFTA tribunal does not have *res judicata* effect, so it would not be binding on this Tribunal in any event. The question of whether a continuing breach is actionable under NAFTA regardless of the three-year time bar in Articles 1116(2) and 1117(2) was not considered or addressed at all by the Mobil/Murphy tribunal. While the majority made reference to various cases that dealt with the question of continuing breaches, it was addressing those issues in the context of a very different issue (whether it had jurisdiction to award future

[252] **RL-27**, Christoph Schreuer et al., *The ICSID Convention: A Commentary* (2nd ed.) (Cambridge: Cambridge University Press, 2009), p. 517: ("The power of a judicial body to determine its own competence is an accepted principle of international adjudication").

[253] See for example, **RL-28**, *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13) Procedural Order No. 2, 16 October 2002, ¶ 22: ("We also note that Article 41(1) of the ICSID Convention establishes a legal rule of fundamental importance to the proper operation of the ICSID arbitral system: 'The Tribunal shall be the judge of its own competence'"), ¶ 28: ("However, although the Supreme Court Judgment of July 3, 2002 is final as a matter of the law of Pakistan, as a matter of international law, it does not in any way bind this Tribunal. We have already adverted to the requirement of Article 41 of the ICSID Convention that this Tribunal determine whether it has the jurisdiction to consider the claims that have been advanced and that we cannot decline to do so."); **RL-29**, *Malicorp Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/08/18) Award, 7 February 2011, ¶ 98: ("It is not disputed that an arbitral tribunal seised of an objection to jurisdiction not only has the right but the obligation to rule on its own jurisdiction"); **RL-30**, *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary* (ICSID Case No. ARB/07/22) Award, 23 September 2010, ¶ 5.3: ("Pursuant to Article 41 of the ICSID Convention, the Tribunal is the judge of its own competence and therefore compliance with certain preconditions must be analyzed"); **RL-31**, *Ickale Insaat Limited Sirketi v. Turkmenistan* (ICSID Case No. ARB/10/24) Award, 8 March 2016, ¶ 239: ("Indeed, if this were not the case, and if the Tribunal were to be considered bound by the legal argument of the Parties, the Tribunal might have to reach a decision that it does not consider to be legally correct."); **RL-32**, *Venezuela Holdings B.V. and others (Case formerly known as Mobil Corporation and others) v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27) Decision on Jurisdiction, 10 June 2010, ¶¶ 74-75 (concluding that the interpretation given to the jurisdiction provision of Article 22 of the Venezuelan Investment Law by Venezuelan authorities or by Venezuelan courts "cannot control the Tribunal's decision on its competence.").

damages, which it affirmed that it did).[254] The Mobil/Murphy tribunal engaged in no reasoning and made no decision on the question of whether the Claimant would be time-barred from bringing claims in successive NAFTA arbitrations. While a finding on that question would not have been binding on this Tribunal anyway due to the principle of *competence competence* and the nondiscretionary rules set out in Articles 1116(2) and 1117(2), the fact that there was no such decision removes the need to delve into any theoretical debate regarding *res judicata*. There can be no *res judicata* effect on a question that was never put before and determined by a previous tribunal.[255]

171. Regardless of what the Mobil/Murphy tribunal may have assumed was permissible under the NAFTA, this Tribunal must assess for itself, based on the language of the NAFTA, whether it has jurisdiction *rationae temporis* over the current dispute. For the reasons discussed above, the answer to that question is plainly no.

E. Conclusion

172. The Claimant bears the burden of proving that its claim satisfies the prerequisites necessary to establish Canada's consent to arbitration.[256] The Claimant's explicit position in the Mobil/Murphy arbitration establishes that the current claim cannot satisfy NAFTA Articles 1116(2) and/or 1117(2), and its efforts to hide its prior position is telling. Regardless, when this Tribunal considers the ordinary meaning of Articles 1116(2) and 1117(2), the consistent interpretation of those provisions by NAFTA tribunals, and the subsequent agreement and practices of all three NAFTA Parties, there can be no conclusion other than that the current claim

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[254] **C-1**, Mobil/Murphy – Decision, ¶¶ 427-430, citing to *United Parcel Service of America v. Government of Canada* (UNCITRAL) Award on the Merits, 24 May 2007, ¶ 28 and *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Decision on Objections to Jurisdiction, 20 July 2006, ¶ 77.

[255] See e.g., **CL-22**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1) Award, 25 August 2014, ¶¶ 7.63-7.66 ("*Apotex III – Award*").

[256] **RL-5**, *Apotex – Award on Jurisdiction*, ¶ 150: ("Apotex (as Claimant) bears the burden of proof with respect to the factual elements necessary to establish the Tribunal's jurisdiction in this regard."). See also, **RL-2,** *Methanex – Partial Award*, ¶¶ 120-121 (finding that a claimant must establish that the requirements of NAFTA Articles 1116-1121 have been met); **RL-24**, *Bayview – Award*, ¶¶ 63, 122 (finding that "Claimants have not demonstrated that their claims fall within the scope and coverage of NAFTA Chapter Eleven" and rejecting the claimant's submission that the "Respondent bears the burden of demonstrating that the Tribunal should not hear the claim…"); **RL-33**, *Grand River Enterprises Six Nations, Ltd, et al. v. United States of America* (UNCITRAL) Award, 12 January 2011, ¶ 122: ("Claimants must…establish an investment that falls within one or more of the categories established by that Article [1139]").

is well beyond the three-year limitation period that started to run in at least November 2004, when the Claimant first acquired knowledge of breach and loss.

IV. THE CLAIMANT'S CLAIM IS BARRED UNDER THE DOCTRINE OF *RES JUDICATA*

A. Summary of Canada's Position

173. If the Tribunal decides that it has jurisdiction *rationae temporis* over this dispute, then the Claimant's claim is barred under the doctrine of *res judicata*. As a general principle of international law, *res judicata* precludes the re-litigation of disputes which have already been presented and decided in a previous proceeding between the same parties.

174. On November 1, 2007, the Claimant (along with Murphy) filed for arbitration against the Government of Canada under NAFTA Chapter Eleven challenging the 2004 Guidelines and claiming that its investments in the Hibernia and Terra Nova projects incurred damages. Over the next seven years, the Claimant advanced that claim in multiple written submissions and oral hearings, resulting in the Decision dated May 22, 2012 and a final Award against Canada on February 15, 2015. The Award should have marked the end of this dispute – the Claimant was awarded damages that it was able to persuade the Majority were in-line with international legal principles and prove with reasonable certainty, but the Mobil/Murphy tribunal ruled that the Claimant had failed to prove in law or in fact its damages from 2012 until the end of the lifetime of the Hibernia and Terra Nova projects.

175. Nevertheless, on January 16, 2015, the Claimant filed another NAFTA Chapter Eleven against Canada in an effort to recover the same damages that it already sought but failed to establish in the Mobil/Murphy arbitration. In its Memorial, the Claimant asserts that the doctrine of *res judicata* applies as a rule of international law under the NAFTA,[257] argues that compliance of the 2004 Guidelines with NAFTA Articles 1105, 1106(1)(c), and 1108 cannot be re-litigated,[258] and acknowledges that "[i]t is seeking precisely the same relief in this arbitration as it sought in the Mobil I Arbitration."[259] But the Claimant contradictorily argues that it is only

[257] Claimant's Memorial, ¶¶ 184-187.

[258] Claimant's Memorial, ¶¶ 179-180.

[259] Claimant's Memorial, ¶ 190.

Canada who should be estopped by the doctrine of *res judicata* and that the Claimant should be paid over $20 million of compensation that it failed to recover in the previous arbitration.

176. The Claimant's selective application of the doctrine of *res judicata* is wrong. *Res judicata* precludes the Claimant from re-litigating its case, including its claim for damages during the period 2012-2015 arising from its investment in the Hibernia and Terra Nova projects because it already sought damages for that same period based on the same measure (the 2004 Guidelines) during the Mobil/Murphy arbitration. That tribunal explicitly affirmed that it had jurisdiction to award the Claimant these damages, but then decided that the Claimant had failed to meet the requisite standard of proof and decided it could not award damages for 2012-2015 and beyond. The fault for this lies entirely with the Claimant: it proposed a single damages model that was not only legally dubious but was so speculative and overreaching that its failure was entirely appropriate. The Claimant's second attempt to prove its losses runs contrary to the rationale behind the doctrine of *res judicata*: *interest republicae ut sit finis litium* ("it is in the public interest that there should be an end of litigation") and *nemo debet bis vexari pro una et eadem causa* ("no one should be proceeded against twice for the same cause.").[260]

177. Properly applied, *res judicata* bars reconsideration by a tribunal of disputes that were put before and finally decided by a competent tribunal. The Claimant cannot have a damages do-over when its first attempt failed. This Tribunal should reject this claim entirely.

B. *Res Judicata* International Law Doctrine: Definition and Methodology

178. NAFTA Article 1131 provides that tribunals "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."[261] As the Claimant notes, the doctrine of *res judicata* has been widely accepted and recognized as a rule of international law by international courts and tribunals, including ICSID and NAFTA tribunals.[262]

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[260] **RL-34**, *Interim Report: "Res Judicata" and Arbitration*, International Law Association, Berlin Conference (2004), pp. 2-3 ("*ILA 2004*").

[261] NAFTA, Article 1131(1).

[262] Claimant's Memorial, ¶ 185. See also e.g., **CL-22**, *Apotex III – Award*, ¶ 7.11. See generally **RL-34**, *ILA 2004*, p. 18. *Res judicata* has been applied as a general principle of international law by the Permanent Court of International Justice, the International Court of Justice, ICSID tribunals, UNCITRAL tribunals, the World Trade Organization dispute settlement bodies, the European Court of Justice, the United Nations Human Rights Committee, the European Court of Human Rights, the Iran-U.S. Claims Tribunal, UNCLOS tribunals, and Stockholm Chamber of Commerce tribunals.

Both the *Apotex v. United States* and *Waste Management v. Mexico* tribunals concluded in their respective awards that *res judicata* is a rule of international law that applies to Chapter 11 NAFTA disputes.[263]

179. The doctrine of *res judicata* stipulates that a final decision made by a competent international court or tribunal is conclusive between those same parties.[264] This means that the same question or dispute cannot be raised again by the same parties before another international tribunal.[265] The doctrine is intended to assure consistency amongst decisions, efficiency in decision-making, and finality of disputes.

180. For a claim to be barred by the *res judicata* effect of a prior decision, three criteria have to be satisfied: the proceedings must have been conducted (1) before international courts or arbitral tribunals in the same legal order, that is, both decision-making bodies are international courts or international tribunals; (2) between the same parties; (3) concerning the same subject matter.[266] These requirements are met in the present case.

C. The Mobil/Murphy Decision and Award Conclusively Addressed the Specific Claim and Issues Raised by the Claimant in this Arbitration

181. The Claimant is improperly seeking to re-litigate before this Tribunal the same claim and issues that it argued and lost in the Mobil/Murphy arbitration. This is evident from the "Relief Requested" by the Claimant in the Mobil/Murphy arbitration compared to the "Relief Requested" in the current arbitration:

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[263] **CL-22**, *Apotex III – Award*, ¶¶ 7.4-7.66; **CL-23**, *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3) Decision of the Tribunal on Mexico's Preliminary Objection concerning the Previous Proceedings, 26 June 2002, ¶ 39.

[264] **RL-35**, Vaughan Lowe, *Res Judicata and the Rule of Law in International Arbitration*, 8 Afr. J. Int'l & Comp. L. 38 (1996), pp. 38-39 ("*Lowe*"); **RL-34**, *ILA 2004*, p. 2. See e.g., **RL-36**, *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3) Decision on Jurisdiction, 14 November 2005, ¶¶ 70-72, 74, 78 ("*Vivendi – Decision on Jurisdiction*"); **CL-22**, *Apotex III – Award*, ¶ 7.12.

[265] **RL-35**, *Lowe*, pp. 38-39. See also **RL-36**, *Vivendi – Decision on Jurisdiction*, ¶ 72; **RL-37**, *Machado Case*, 3 Moore, International Arbitrations to Which the United States Has Been a Party 2193 (Spain-U.S. Claims Commission 1880) at p. 2194; **RL-38**, *Delgado Case*, 3 Moore, International Arbitrations to Which the United States Has Been a Party 2196 (Spain-U.S. Claims Commission 1880) at pp. 2199-2200.

[266] **CL-8**, Christoph Schreuer and August Reinisch, Legal Opinion in *CME Czech Republic B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL Quantum Proceedings ¶ 15; Claimant's Memorial, ¶ 188; **CL-22**, *Apotex III – Award*, ¶ 7.15; **CL-24**, *China Navigation Co., Ltd. (Great Britain) v. United States (Newchwang Case)*, Arbitral Tribunal (Great Britain-United States) constituted under the Special Agreement of August 18, 1910 (18 June 1913 - 22 January 1926), in Reports of International Arbitral Awards, vol. 6 (2006) at 65.

Relief Requested from the 2007 Mobil/Murphy Arbitration[267]	***Relief Requested from the 2015 Mobil Arbitration***[268]
For the foregoing reasons, the Claimants respectfully submit that the Tribunal should: (a) Find that the promulgation and enforcement of the 2004 R&D Expenditure Guidelines constitute a performance requirement within the meaning of Article 1106(1) of the NAFTA, and that Canada has breached its obligations under the Article as a result; (b) Find that the 2004 R&D Expenditure Guidelines are not covered by Article 1108(1) of the NAFTA or Canada's Annex I reservation to the treaty for the Federal Accord Act; […] (f) Order Canada to pay to Claimant Mobil Investments Canada Inc., or alternatively, to its indirectly controlled enterprises, money damages in an amount to be established at the hearing, but no less than CDN $50.48 million, plus interest as applicable when the Tribunal issues its final award, to compensate Claimant Mobil Investments Canada for the cost of its compliance with the Guidelines through the remaining life of the Hibernia and Terra Nova projects, in which it is an investor.	For the foregoing reasons, Mobil respectfully requests an award in its favor: A. Finding or otherwise affirming that the enforcement of the Guidelines constitute a performance requirement within the meaning of Article 1106(1) of the NAFTA, and that Canada has breached its obligations under the Article as a result; B. Finding or otherwise affirming that the Guidelines are not covered by Article 1108(1) of the NAFTA or Canada's Annex I reservation to the treaty for the Federal Accord Act; C. Directing Canada to pay damages to Mobil, or alternatively, to its indirectly controlled enterprises, in an amount to be proven at the hearing;

182. The Claimant has confirmed that it has brought forward its current claim in order to pursue damages for the same measure in relation to which the Mobil/Murphy tribunal already addressed both liability and damages. In fact, the Claimant describes this arbitration as "a second quantum phase of a prior arbitration"[269] and admits that "[i]t is seeking precisely the same relief in this

[267] **R-65**, Mobil/Murphy – Memorial, ¶ 223.

[268] Claimant's Memorial, ¶ 323.

[269] Claimant's Memorial, ¶ 1.

arbitration as it sought in the Mobil I Arbitration."[270] The Claimant admits that this arbitration and the Mobil/Murphy arbitration are based on "identical causes of action."[271]

183. Specifically, in the Mobil/Murphy arbitration the Claimant sought $23.11 million in compensation from Canada for damages incurred by its investment in the Hibernia project between 2012-2015,[272] and $4.55 million for damages incurred by its investment in the Terra Nova project for the same time period.[273] This is easily illustrated by the following excerpt from the Claimant's damages expert Mr. Rosen in the Mobil/Murphy arbitration: [274]

Schedule 1
Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada
Summary of Damages
As at June 30, 2010
Figures in $millions CDN

Timing of Incremental Spending

ExxonMobil					
Year	Share of Damages*				
	Hibernia	Terra Nova	Total	Cumulative Total	Cumulative %
2010**	[redacted]				
2011					
2012					
2013					
2014					
2015					
2016					
2017					

184. As set out in Mr. Phelan's witness statement in this arbitration, the Claimant is now seeking $18.72 million at the Hibernia project for the 2012-2015 period, and $1.770 million at the Terra Nova project for the 2012-2015 period.[275] There can thus be no dispute that the

[270] Claimant's Memorial, ¶ 190.

[271] Claimant's Memorial, ¶ 197.

[272] **R-33**, Mobil/Murphy – Rosen III, Schedule 1. In the Hibernia column (2012-2015): [redacted] + [redacted] + [redacted] + [redacted] = [redacted].

[273] **R-33**, Mobil/Murphy – Rosen III, Schedule 1. In the Terra Nova column (2012-2015): [redacted] + [redacted] + [redacted] + [redacted] = [redacted].

[274] **R-33**, Mobil/Murphy – Rosen III, Schedule 1. For ease of presentation, the table "Summary of Damages to Claimants" from Rosen III, Schedule I is omitted from the below excerpt.

[275] **CW-1**, Phelan Statement I, Annex A. Hibernia claim is $22,305,733 (from Line N) less $3,582,408 for prior shortfall award. Terra Nova claim is $2,122,383 (from Line N) less [redacted] adjustment per the letter from Norton Rose dated March 31, 2016 (**R-89**, Letter from Kevin O'Gorman, Norton Rose Fulbright LLP to Government of Canada (Mar. 31, 2016)).

Claimant sought damages from the Mobil/Murphy tribunal for exactly the same time period for the same measure for the same investments that it is currently seeking from this Tribunal.

185. The Claimant's damages case in the Mobil/Murphy arbitration, was, however, even more expansive than the aforementioned overlap because the Claimant sought damages "for the cost of its compliance with the Guidelines through the remaining life of the Hibernia and Terra Nova projects in which it is an investor."[276] To quantify this loss, the Claimant predicted future annual R&D and E&T expenditure requirements under the 2004 Guidelines, future R&D and E&T expenditures that it would have undertaken in the "ordinary course of business" (that is, in the absence of the 2004 Guidelines), and claimed the difference as representative of its loss.[277] The Claimant proposed an extremely low set of discount rates (from 0.857% to 2.776%) that it argued accounted adequately for any uncertainties in its predictions of the future.[278]

186. Canada's primary opposition to the Claimant's damages case was based on the fact that it claimed for damages "not yet incurred," which Canada argued was beyond the jurisdiction of the tribunal and "inconsistent with international principles of compensation."[279] The Claimant modelled its damages case on the loss it would incur *in the future* as a result of its future R&D and E&T expenditures under the 2004 Guidelines at the Hibernia and Terra Nova projects, rather than on any loss it *had incurred*. The Claimant was not able to cite any award by an international tribunal that ordered compensation for damages not yet incurred.[280] Canada explained that the problem lay in the Claimant's defective damages model, which should have been based on damages it had incurred already rather than what it might incur in the future.[281]

187. The manner in which the Claimant quantified its damages thus raised a number of specific sub-issues that were put before the Tribunal by the parties. These sub-issues were whether the tribunal had jurisdiction to hear the Claimant's case for future damages that it had not yet incurred, what degree of discretion tribunals have in quantifying damages under NAFTA Article

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[276] **R-65**, Mobil/Murphy – Memorial, ¶ 223 (f).

[277] **R-65**, Mobil/Murphy – Memorial, ¶ 218.

[278] **R-65**, Mobil/Murphy – Memorial, ¶ 219; **R-68**, Mobil/Murphy – Rosen I, ¶ 55.

[279] **R-2**, Mobil/Murphy – Canada's Counter-Memorial, ¶¶ 332-339.

[280] See **R-73**, Mobil/Murphy – Canada's Reply to Claimants' Post Hearing Brief, ¶ 130.

[281] **R-73**, Mobil/Murphy – Canada's Reply to Claimants' Post Hearing Brief, ¶ 155.

1135, what degree of certainty is required at international law to prove damages, what the likelihood and extent of the Claimant's future damages were and what certainty was associated with them, and what discount rate was appropriate in relation to their calculation.[282] These issues arose directly from the manner in which the Claimant modelled its damages case, were addressed extensively by the parties and subject to adversarial proceedings before the tribunal, and were addressed by the Mobil/Murphy tribunal in its Decision and Award. As that tribunal stated:

> The Parties undertook fairly extensive submissions and submitted elaborate expert reports on damages to be paid under the 2004 Guidelines for the 2010-2036 period.[283]

188. In sum, the following distinct questions were put before the Mobil/Murphy tribunal by the parties: (i) whether the promulgation and enforcement of the 2004 Guidelines violated Article 1105 of the NAFTA, (ii) whether the promulgation and enforcement of the 2004 Guidelines violated Article 1106 of the NAFTA, (iii) whether the 2004 Guidelines fell within the scope of Canada's reservation under Article 1108(1) of the NAFTA, (iv) whether the tribunal had jurisdiction to make an award for damages not yet incurred; and (v) what damages the Claimant had incurred as a result of the application of the 2004 Guidelines "through the remaining life of the Hibernia and Terra Nova projects."[284]

189. The Mobil/Murphy tribunal released its Decision on May 22, 2012,[285] and its final Award on February 20, 2015.[286] All five of the questions above were distinctly answered by the Mobil/Murphy tribunal in the *dispositif*:

> On the basis of the foregoing, the Tribunal decides:

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[282] **R-72**, Mobil/Murphy – Claimants' Reply Memorial, ¶¶ 135-170; **R-79**, Mobil/Murphy – Canada's Rejoinder Memorial, ¶¶ 115-132.

[283] **C-1**, Mobil/Murphy – Decision, ¶ 452.

[284] **R-72**, Mobil/Murphy – Claimants' Reply Memorial, ¶ 301.

[285] **C-1**, Mobil/Murphy – Decision.

[286] **C-2**, Mobil/Murphy – Award. On February 16, 2016, Ontario's Superior Court of Justice dismissed Canada's application to set aside the Mobil/Murphy Decision and Award (**C-173**, *Attorney General of Canada v. Mobil et al.,* 2016 ONSC 790, ¶ 52). Canada did not appeal the judgment and has discharged its obligation to pay the Mobil/Murphy Award. Given that the finality of the Award is no longer at issue, questions relating to precisely when a NAFTA award becomes a final award under the *res judicata* doctrine, or what effects, if any, ongoing set aside proceedings in Canada or set aside of an award by a Canadian court have on the finality of a NAFTA award are moot (See Claimant's Memorial, ¶¶ 191-199).

> (1) Unanimously, the adoption and application of the 2004 Guidelines do not violate Article 1105 of the NAFTA;
>
> (2) Unanimously, the 2004 Guidelines are subject to and caught by Article 1106 of the NAFTA;
>
> (3) By a majority, the 2004 Guidelines as applied to the investment projects Hibernia and Terra Nova are not covered by Canada's reservation under Article 1108(1) of the NAFTA and therefore violate Article 1106 of the NAFTA;
>
> (4) By a majority, the Tribunal has jurisdiction to consider damages in this case pursuant to Article 1116(1) of the NAFTA;
>
> (5) By a majority, the Claimants are entitled to recover damages incurred as a result of the Respondent's breach.[287]

190. With respect to the Claimant's case for future damages, the Mobil/Murphy tribunal determined that NAFTA Article 1116(1) provides it with "jurisdiction to grant compensation for future damages."[288] The tribunal thus seized jurisdiction over the Claimant's entire damages claim (i.e., from 2004 until the end of the Hibernia and Terra Nova projects). The Mobil/Murphy tribunal then considered "*how* compensation for future damages is to be assessed or whether it is appropriate for this Tribunal to consider damages or make an award of compensation with regard to the future damages claimed in this particular case."[289] In other words, the Mobil/Murphy tribunal decided that it had the competent jurisdiction to consider and award (if proven) the Claimant's assessment of its future damages, including the same claim for damages the Claimant has put at issue in this arbitration.

191. Despite numerous submissions, expert reports, dozens of legal authorities and an oral hearing, the Mobil/Murphy tribunal refused to award the Claimant damages for its claimed future losses because the Claimant was unable to persuade the tribunal that its model for damages not yet incurred quantified those losses with reasonable certainty. After a critical examination, the Majority concluded that there was "insufficient certainty and [that] too many questions still

[287] **C-1**, Mobil/Murphy – Decision, ¶ 490.

[288] **C-1**, Mobil/Murphy – Decision, ¶ 430.

[289] **C-1**, Mobil/Murphy – Decision, ¶ 429.

remain[ed] unanswered to allow it to assess with sufficient certainty the amounts of damages incurred under the 2004 Guidelines for the 2010 – 2036 period."[290] The Majority wrote:

> [L]ooking at the totality of relevant and necessary variables that would comprise the calculation of damages, we are simply unable to have confidence that the estimation of the entire picture is one that meets a test of "reasonable certainty." The evaluation of future damages for such a long period is extremely hazardous and it does not, on balance, seem to us that the estimates are more probable than not.[291]

192. The Mobil/Murphy tribunal also noted (as Canada had pointed out) that the Claimant had been unable to provide any legal basis in support of the manner in which it modelled its damages case.[292] The tribunal determined that "the situation at hand [was] starkly different" from the situation in the authorities cited by the Claimant, noting that other international tribunals had awarded damages for future losses only in situations where the claim was for damages incurred (as in the case, for example, with loss of future profits when an investment is expropriated).[293] The Claimant's damages model asked the Mobil/Murphy tribunal to speculate as to variables that were unknown in the present but that would become fully ascertainable in the future,[294] so the authorities cited by the Claimant were "not apt for the…circumstances"[295] and "not useful for arguing that the principles should be applied" in this case.[296] The manner in which the Claimant presented its damages case was entirely unique – as Canada argued: "should this Tribunal award damages for compensation for damages not incurred, it would be the first international arbitration tribunal to do so."[297]

[290] **C-1**, Mobil/Murphy – Decision, ¶ 474.

[291] **C-1**, Mobil/Murphy – Decision, ¶ 477.

[292] **C-1**, Mobil/Murphy – Decision, ¶ 478.

[293] **C-1**, Mobil/Murphy – Decision, ¶¶ 475-476.

[294] **C-1**, Mobil/Murphy – Decision, ¶ 476.

[295] **C-1**, Mobil/Murphy – Decision, ¶ 475.

[296] **C-1**, Mobil/Murphy – Decision, ¶ 476.

[297] See **R-73**, Mobil/Murphy – Canada's Reply to Claimants' Post Hearing Brief, ¶ 130.

193. The Claimant had the discretion to pursue its damages case in the Mobil/Murphy arbitration in any manner of its choosing. As Canada explained to the Mobil/Murphy tribunal:

> The Claimants had a choice. For example, the Claimants could have claimed for any loss of value to their business from the Guidelines. Under this method, the Claimants' damages would be any difference between the value of the projects with and without the Guidelines. That difference, if any, may be a loss they have already incurred. The Claimants chose not to value their damages in this way. Instead, they chose to provide the Tribunal with only one way to quantify their losses. The Claimants cannot rely on their own choices to avoid the plain limits of the NAFTA and their burden of proof.[298]

194. Rather than provide the tribunal with an alternate damages model – one based on damages incurred and in line with established international legal principles – the Claimant argued that it had *already incurred* all of the losses that it claimed and that the Mobil/Murphy tribunal should award future losses as claimed by its quantification model.[299] Although the Majority agreed with the Claimant that it had the jurisdiction to award future losses, it found that the Claimant's assessment of those losses was "extremely hazardous"[300] and thus refused to award them.

195. The Claimant is now improperly seeking to re-litigate before this Tribunal the same claim and issues that have already been conclusively determined by the Mobil/Murphy tribunal. The maxim *nemo debet bis vexari pro una et eadem causa* must apply – Canada must not be sued by the Claimant for the same cause twice.

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[298] **R-73**, Mobil/Murphy – Canada's Reply to Claimants' Post Hearing Brief, ¶ 155. See also **RE-1**, Walck Report I, ¶ 30: ("Mobil and Murphy could have calculated their claims as the difference in value of their investments in Hibernia and Terra Nova (a) without the 2004 Guidelines and (b) with the 2004 Guidelines. That would be one measure of the impact of the 2004 Guidelines on Mobil and Murphy's investments (i.e., a calculation of "damages incurred"), and, assuming sufficient support for the calculations, would have fully resolved the dispute, since the value of the investment would consider all of the future Hibernia and Terra Nova cash flows. And, to the extent there was concern over the ability to estimate cash flows well into the future, the valuation could have been supported with transactional or other data on market comparables. Instead, Mobil and Murphy elected to frame their claim as one for their pro rata shares of increased costs to be incurred by the Project companies over the life of the projects, with no alternative method of calculation.").

[299] **R-73**, Mobil/Murphy – Canada's Reply to Claimants' Post Hearing Brief, ¶ 129, fn. 254; **R-74**, Mobil/Murphy – Day One Hearing Transcript, p. 128:13-20: ("Rivkin: So, in our case, Claimants' loss in damage consists in the obligations created through the Board's implementations of the Guidelines, and those obligations, of course, already exist. The fact that some of their effects will not be felt until later years or indeed that Claimants' obligations are met in part through future conduct, through future expenditure, is irrelevant.").

[300] **C-1**, Mobil/Murphy – Decision, ¶ 477.

196. The Claimant has offered no explanation whatsoever in support of its proposition that this tribunal give different *res judicata* treatment to various portions of the Mobil/Murphy Decision and Award. The Claimant argues that "[t]he question of liability can and should be resolved summarily by this tribunal by reliance upon the awards issued by the competent first tribunal"[301] but simply asserts that it can bring forward this second NAFTA claim to seek the same damages in relation to the same measure it sought before. In other words, the Claimant is asking this tribunal to treat the liability portion of the Mobil/Murphy tribunal's Decision as final and conclusive in relation to the measure at issue, while simultaneously treating the damages portion of the Tribunal's Decision and Award as not final and conclusive in relation to the measure at issue. This arbitrary distinction has no basis in law.

197. In sum, the Mobil/Murphy tribunal expressly ruled that it had jurisdiction over the Claimant's claim for future damages, including 2012-2015, but after extensive and sharply divided submissions between parties, refused to award them because the single damages model proposed by the Claimant was legally and factually flawed. The current claim is the Claimant's second bite at the cherry. The doctrine of *res judicata* demands that this Tribunal reject it.

D. The Mobil/Murphy Tribunal's Assumption that the Claimant Could File Additional NAFTA Claims Has No Legal Effect

198. In its Decision, the Mobil/Murphy tribunal said that "[g]iven that the implementation of the 2004 Guidelines is a continuing breach, the Claimants can claim compensation in new NAFTA arbitration proceedings for losses which have accrued but are not actual in the current [Mobil/Murphy] proceedings."[302] This statement did not, however, form any part of the Majority's reasoning nor its analysis of the Claimant's claim for future losses. At best, it was an assumption, and it has no legal effect before this Tribunal.

199. First, the statement is neither a finding of fact, law, or mixed fact and law, nor is it a directive or ruling. The tribunal provided no analysis to test the veracity of the statement, did not ask the parties to address it, cited no authority in support of it, and did not elaborate on it to any degree. Second, the Majority clearly explained that its decision not to award compensation for

[301] Claimant's Memorial, ¶¶ 1, 7.

[302] **C-1**, Mobil/Murphy – Decision, ¶ 478.

future losses was based only on the reasons discussed above.[303] Third, there is no causal connection between the assumption that a continuing breach may be claimed in future NAFTA arbitrations and the decision not to grant compensation for future losses. Finally, the Majority's statement does not form part of the rationale or reasoning underlying the operative part of the Decision and Award. For any one of these reasons, the Majority's assumption has no impact on the *res judicata* effect that bars the Claimant from bringing this claim.

E. Conclusion

200. If the Tribunal decides that it has jurisdiction *rationae temporis* over the dispute, then the Claimant's claim is barred under the doctrine of *res judicata*. As a general principle of international law, *res judicata* precludes the Claimant from re-litigating its case against Canada that it already presented in a prior proceeding and failed. The Claimant had its chance to make out its case before, international law dictates that it cannot come back and try again.

V. IF THE TRIBUNAL RULES IT HAS JURISDICTION AND CAN CONSIDER THE CLAIMANT'S DAMAGES CLAIM, THE CLAIMANT IS ENTITLED TO ONLY *DE MINIMIS* COMPENSATION

A. Summary of Canada's Position

201. If the Tribunal determines that it has jurisdiction over the dispute and that the Claimant is not barred by *res judicata* from claiming damages as a result of the 2004 Guidelines for the 2012-2015 period, it will find that the Claimant is entitled to virtually none of the compensation it has claimed.

202. The Claimant has exaggerated the basis of its damages claim by seeking compensation for spending over and above what was required under the 2004 Guidelines. As the expert report of Mr. Walck explains, the Claimant's new methodology (which is different from the approach it used in the Mobil/Murphy arbitration) is not the proper basis for measuring damages. Hence, at Terra Nova, because Suncor's normal course R&D and E&T spending substantially exceeded what was required to be spent under the 2004 Guidelines, the Claimant's investment in that project has not been injured and is entitled to <u>zero</u> compensation. At Hibernia, the Claimant was required to invest $29.364 million in R&D and E&T from 2012-2015 under the 2004

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[303] **C-1**, Mobil/Murphy – Decision, ¶ 478.

Guidelines,[304] actually invested [redacted],[305] and yet demands $18.723 million in damages based on that spending.[306] The Claimant is not legally entitled this entire amount. With tax credits deducted from the Claimant's adjusted assessment (which the Claimant agrees should be accounted for), the maximum possible recoverable amount for the Claimant's investment in the Hibernia project is [redacted].[307]

203. But even that ceiling amount cannot be awarded against Canada because the Claimant has generally failed to prove with reasonable certainty that its claimed expenditures are compensable. Not only is there a dearth of documentary evidence corroborating the Claimant's witness testimony (most of which is based on hearsay and speculation), several of the Claimant's major claimed expenditures concern R&D projects (including the Claimant's expenditures for [redacted] for the Gas Utilization Study at Hibernia and $696,899 for the H2S project at Terra Nova)[308] that are demonstrably <u>not</u> compensable because they were not caused by the 2004 Guidelines. While the Claimant is owed nothing for Terra Nova regardless, misclassifying some and failing to prove the compensatory nature of other R&D and E&T expenditures at the Hibernia project substantially reduces what the Tribunal can award as damages.

204. The Claimant also seeks compensation in this arbitration for R&D and E&T projects that it intends to use for its other oil projects in the offshore area or arctic environments. This is highly objectionable – the Claimant wants Canada to pay for R&D and E&T that it says are not necessarily "needed" at the Hibernia or Terra Nova projects, but that are intended for use at projects like Hebron, in the Arctic or elsewhere. Canada is not liable to compensate the Claimant for its own value-added R&D and E&T.

205. The Claimant's damages model also suffers from another underlying flaw: it assumes that, in the absence of the 2004 Guidelines, the Hibernia and Terra Nova Projects need only spend on R&D and E&T on as "as needed" basis. The Claimant then argues that it is entitled to compensation for any R&D or E&T expenditure that the Claimant alone deems are beyond the

[304] **RE-1**, Walck Report I, Table 1.

[305] **RE-1**, Walck Report I, Table 3.

[306] *Infra*, ¶ 210.

[307] **RE-1**, Walck Report I, Table 12 and ¶ 89.

[308] **CW-1**, Phelan Statement I, Annexes C, E, G and I.

"needs" of those projects. This is not correct. Even in the absence of the 2004 Guidelines, the Claimant has a statutory obligation under the Accord Act Section 45(3)(c) to invest in R&D and E&T in the Province beyond "project needs." Many of the claimed expenditures are doing exactly what the Accord Act requires.

206. Finally, whatever R&D and E&T expenditures might still remain as potentially compensable after having been scrutinized pursuant to the above, if any, must be further reduced to account for the significant savings the Claimant has received on its royalty payments to the Province as a result of its spending under the 2004 Guidelines. As well, the Claimant has failed to account for the value-added knowledge and other benefits it has received from its claimed R&D and E&T expenditures.

B. The Claimant Seeks Compensation for Spending on R&D and E&T Beyond What was Required by the 2004 Guidelines

207. The Claimant seeks compensation from Canada for spending on R&D and E&T beyond what the 2004 Guidelines required to be spent for 2012-2015 at the Hibernia and Terra Nova projects. This fails as a matter of law.

208. In the Mobil/Murphy arbitration, the Claimants' method for determining damages was set out by their expert, Mr. Howard Rosen, in his first report: "[t]he first step in my calculation was to determine the Projects' Total Requirement set out by the Guidelines."[309] The total required spending was then divided into (a) ordinary course spending, (b) incremental spending and, to the extent the total spending was less than the requirement, (c) shortfall. The Claimants' witness Mr. Paul Phelan (who has again submitted a witness statement in this arbitration) used the same approach in the Mobil/Murphy arbitration where he set out tables for Hibernia and Terra Nova that started with the *expenditure obligation*.[310]

209. As Mr. Walck of Global Financial Analytics LLC explains in his expert report submitted with this Counter-Memorial, the Claimant deviates significantly from the approach it adopted in the Mobil/Murphy arbitration. Instead of starting with the expenditure obligation determined by the Board pursuant to the formula set out in the 2004 Guidelines, the Claimant now begins its

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309 **R-68**, Mobil/Murphy – Rosen I, ¶ 30.

310 **R-69**, Mobil/Murphy – Phelan IV, ¶ 21.

calculation with the total amount spent on R&D and E&T, *which exceeds what it was required to spend*. Mr. Phelan now states, "[t]he starting point for quantifying Mobil's incremental expenditure losses is the gross R&D and E&T expenditures that are actually made and submitted to the Board."[311]

210. This change is untenable. By starting its calculation with total spending, the Claimant asks this Tribunal to award it not only the "incremental" spending that was needed to satisfy its expenditure obligation, but also allegedly "incremental" spending based on its surplus spending as well. The Claimant bases its claim on its total spending, which includes the following surplus spending:[312]

	Required Mobil Spending[313]	**Actual Mobil Spending[314]**	**Mobil Surplus Spending**
Hibernia	**$ 29,364,248**	[redacted]	[redacted]
Terra Nova	**$ 5,540,998**	[redacted]	[redacted]

211. The Claimant complains that the 2004 Guidelines caused it to spend more than it normally would on R&D and E&T, but proceeded to spend even more than what it was obliged to. This surplus spending is not compensable. NAFTA Article 1116(1) requires that the Claimant demonstrate that it "has incurred loss or damage, by reason of, or arising out of" a breach of NAFTA.[315] As explained by several NAFTA tribunals, this language requires a "sufficient causal link"[316] or an "adequate[] connect[ion]"[317] between the alleged breach of NAFTA and the loss

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[311] **CW-1**, Phelan Statement I, ¶ 56.

[312] **RE-1**, Walck Report I, Tables 1 and 3 (Hibernia) and Tables 2 and 4 (Terra Nova).

[313] **RE-1**, Walck Report I, Tables 1 and 2.

[314] **RE-1**, Walck Report I, Tables 3 and 4.

[315] NAFTA, Article 1116.

[316] **RL-39**, *S.D. Myers Inc. v. Government of Canada* (UNCITRAL) Second Partial Award, 21 October 2002, ¶ 140 ("*S.D. Myers - Second Partial Award*"); See also **RL-40**, *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, (ICSID Case No. ARB/05/22) Award, 24 July 2008, ¶ 779: ("Compensation for any violation of the BIT, whether in the context of unlawful expropriation or the breach of any other treaty standard, will only be due if there is a sufficient causal link between the actual breach of the BIT and the loss sustained by [the Enterprise].").

[317] **RL-8**, *Feldman – Award*, ¶ 194.

sustained by the investor. There is no causal link between the spending required by the 2004 Guidelines and the Claimant's surplus expenditures. The Claimant cites to the principle of compensation in international law as described in the *Chorzów Factory* case[318] – to put the investor back into the position it would have been but for the illegal act – but then ignores that principle by seeking compensation for R&D and E&T expenditures which were not caused by the 2004 Guidelines but were undertaken on the Claimant's own accord. In other words, if the Claimant was awarded compensation for its surplus spending, it would be put into a better position than it would been in without the 2004 Guidelines. The Tribunal may not award such monies as damages under accepted principles of compensation in international law.

212. Accordingly, because Suncor's normal R&D and E&T spending at the Terra Nova project exceeded what was required to be spent at that project for 2012-2015 pursuant to the 2004 Guidelines [redacted] of "ordinary course" spending[319] versus $5.541 million requirement),[320] the Claimant's investment at Terra Nova has not been impaired, meaning that the Claimant is entitled to receive <u>zero</u> compensation from Canada.[321] The Tribunal's analysis of the Claimant's damages claim for its investment in the Terra Nova project should end here.

213. For Hibernia, the Board calculated the Claimant's R&D and E&T investment obligation from May 1, 2012 through April 30, 2015 to be $29.364 million.[322] The Claimant's total investment of [redacted][323] is beyond what it was required to spend under the 2004 Guidelines, and was a result of its own business decisions and is not legally recoverable from Canada.

214. Accordingly, Mr. Walck has adjusted the Claimant's base calculation to reflect the proper measure of damages for the Claimant's investment in the Hibernia project, which is to begin with

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[318] Claimant Memorial ¶ 282, citing **CL-51**, *Case Concerning the Factory at Chorzów,* 1928 P.C.I.J. (ser. A), No. 17, Judgement No. 13 at 47.

[319] **RE-1**, Walck Report I, Table 4.

[320] **RE-1**, Walck Report I, Table 2.

[321] Calculated as 19% of contractor spending plus "not claimed" spending from **RE-1**, Walck Report I, Table 7 [redacted] x 0.19. Note that the [redacted] figure in the table above includes this "ordinary course" figure as well as the Claimant's claimed "incremental spending" at the Terra Nova project.

[322] **RE-1**, Walck Report I, Table 1.

[323] **RE-1**, Walck Report I, Table 3.

total spending required under the 2004 Guidelines and not the total amount of R&D and E&T the Claimant elected to spend.[324] Mr. Walck has also factored in the tax credits received by the Claimant under Canada's SR&ED tax program for its claimed spending under the 2004 Guidelines, which the Claimant agrees should be accounted for.[325] In addition, there is a [redacted] uncompensated R&D and E&T spending shortfall the Claimant held prior to 2012 that Mr. Walck adds to the Claimant's spending obligation at Hibernia.[326] Mr. Walck's adjustments result in [redacted] of R&D and E&T expenditures that the Claimant alleges would not have been undertaken in the absence of the 2004 Guidelines because they were not "necessary" for the Hibernia project.[327]

215. This is the maximum possible amount the Claimant could be awarded as compensation for its investment in the Hibernia project. But as described below, even this ceiling is far in excess of what the Claimant could possibly be entitled to as compensation.

C. The Claimant Has Generally Failed to Prove with Reasonable Certainty that Its Claimed R&D and E&T Expenditures Are Compensable

216. The Claimant allocates spending on R&D and E&T into categories of "ordinary course" spending and "incremental" spending. The Claimant alleges that it should be compensated for its R&D and E&T spending in the latter category. As a result, what the Claimant categorizes as "ordinary" versus "incremental" directly affects the bottom line – a dollar more of "ordinary course" spending is a dollar less of damages, and a dollar more of "incremental" spending is a dollar more of damages.

217. But the Claimant has generally failed to fulfil its burden of proving that its alleged "incremental" expenditures would not have been made in the "ordinary course" of business (i.e. in the absence of the 2004 Guidelines). Not only does the Claimant have little, if any, documentary support for its allegations, the documents it has produced prove that in reality many

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[324] **RE-1**, Walck Report I, ¶¶ 53-54.

[325] The Claimant has claimed SR&ED tax credits for an average of [redacted] of their incremental R&D spending, thus reducing their incremental spending of [redacted] by [redacted]. The resulting net claim for Mobil is [redacted]. See Claimant's Memorial, ¶¶ 311-312 and **RE-1**, Walck Report I, ¶ 79, Table 12.

[326] **RE-1**, Walck Report I, ¶ 71.

[327] **RE-1**, Walck Report I, Table 12.

of its alleged "incremental" expenditures are plainly R&D and E&T projects that were not caused by the 2004 Guidelines.

1. The Claimant's Evidence Does Not Meet the Standard of Reasonable Certainty

218. The Claimant seeks compensation for 68 individual R&D and E&T expenditures that it alleges are "incremental".[328] In Appendix A attached to this Counter-Memorial, Canada sets out its responses to each of those individual expenditures.

219. As is evident from Canada's responses in Appendix A, the Claimant lacks credible evidence to prove that its claimed R&D and E&T expenditures are compensable. It presents virtually no contemporaneous reports or other analysis but relies entirely on witness statements by its own employees who have simply decided for themselves which R&D and E&T expenditures should be paid for by Canada as compensation. The precarious situation created by the Claimant's approach to damages was noted by Professor Sands in the Mobil/Murphy Decision:

> I note the curiosity of a situation in which the level of compensation to be paid, assuming it to arise, falls to be assessed by reference to the difference between the amount the Claimants say they would have spent on R&D and E&T under the existing Benefits Plans (by unilateral self-determination), on the one hand, and the amounts required to be paid under the 2004 Guidelines, on the other. This may be a rare case in which a claimant is given such a role in contributing in this way to the assessment of the level of damages that it might in future be able to claim.[329]

220. Particularly suspect is the claim for approximately $1.770 million in damages for alleged incremental spending at the Terra Nova project.[330] The Claimant does not proffer any witness from Suncor, the operator of that project, let alone any contemporaneous and supporting documents from Suncor. The Claimant admits that it is not the operator of Terra Nova, "does not

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[328] Claimant's Memorial, Appendix A – Claimant's Table of Incremental Expenditures.

[329] **C-186**, Mobil/Murphy – Dissent, ¶ 42. Even the Mobil/Murphy Majority noted that much of the uncertainty regarding such expenditures arises because of the way the Claimant has presented its damages claim. See **C-2**, Mobil/Murphy – Award, ¶ 33: ("The Majority also notes that whilst it has not influenced its decision herein, some of the uncertainty surrounding this claim would not have arisen if the Claimants had opted to pay the amount of spending required under the Guidelines into a fund administered by the Board.").

[330] See **R-89**, Letter from Kevin O'Gorman, Norton Rose Fulbright LLP to Canada (Mar. 31, 2016). Claimant should have also revised this figure on Line N, which is the result of making the correction on line M.

unilaterally control project expenditures", "does not plan or manage R&D or E&T spending undertaken by the operator", and "does not make any 'unilateral self-determination' as to incremental spending."[331] Despite its lack of control and knowledge, the Claimant finds no difficulty seeking compensation from Canada based on the mere "belief" of its own employees who opine on what Suncor may or may not have done in the absence of the 2004 Guidelines.[332] While such hearsay evidence might be admissible in international arbitration, it is not regarded as a reliable source of fact, predominantly because it cannot be tested on cross-examination.[333] The Claimant bears the burden of proving its damages with sufficient certainty.[334] While the point is moot because the Claimant's investment in the Terra Nova project has not been impaired at all (as described above, its 2012-2015 obligations under the 2004 Guidelines were more than satisfied though normal course R&D and E&T expenditures), the lack of reliable evidence regarding alleged incremental expenditures made by Suncor at Terra Nova would justify dismissal of the claim in any event.[335]

221. Similarly, with respect to R&D and E&T spending at the Hibernia project, the Claimant has been unable to produce contemporaneous documents that prove with reasonable certainty that its claimed R&D and E&T expenditures would not have been undertaken in the absence of the 2004 Guidelines. Indeed, as Appendix A describes, the opinion testimony by the Claimant's

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[331] Procedural Order No. 4, Redfern, Mobil Response under Document Request #2.

[332] See e.g. **CW-1**, Phelan Statement I, ¶ 51; **CW-3**, Sampath Statement I, ¶ 101.

[333] **RL-41**, *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8) Award, 2 September 2011, ¶ 496.2: ("[The testifying witness'] evidence that the share certificates were not packaged in March 2004 was hearsay (i.e. not direct or firsthand testimony which could be tested by cross-examination). It is therefore not admitted in the circumstances…"); **RL-42**, *EDF (Services) Limited v. Romania* (ICSID Case No. ARB/05/13) Award, 8 October 2009, ¶ 224: ("While hearsay evidence is admissible in international arbitration, confirmatory evidence is normally required…"); **RL-43**, *Tenaris S.A. and Talta – Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/26) Award, 29 January 2016, ¶ 343: (dismissing witness testimony as "hearsay and unsupported by the documentary record."); **RL-44**, *Lao Holdings N.V. v. Lao People's Democratic Republic* (ICSID Case No. ARB(AF)/12/6) Decision on Jurisdiction, 21 February 2014, ¶ 141: (declining to rely on evidence based on hearsay and unsupported by contemporaneous documents).

[334] Canada does not have to compensate Claimants' best guess of damages. Neither guesswork nor speculation is acceptable. Rather, international tribunals and domestic courts have consistently applied the principle that compensable damages must be proved with reasonable certainty (See e.g. **RL-39**, *S.D. Myers – Second Partial Award*, ¶ 173; **RL-45**, *Amoco International Finance Corp v The Government of the Islamic Republic of Iran* (IUSCT Case No. 56(310-56-3)) Partial Award, 14 July 1987, ¶ 238).

[335] As described in Appendix A at pp. A-40-A-43, the H2S study in particular, is plainly ordinary course.

own employees is, for many of the claimed expenditures, inconsistent with internal documents produced by the Claimant.

222. For example, the Claimant demands [redacted] in compensation for the Gas Utilization Study at the Hibernia project. While certain initial expenditures in 2010 and 2011 relating to this R&D project were deemed compensable by the Mobil/Murphy tribunal,[336] since that time, the Claimant has leveraged this R&D investment into a major activity of enhanced oil recovery ("EOR") for the Hibernia project that it expects will yield [redacted] more barrels of oil and extend the life of the Hibernia field.[337]

223. The Claimant's witness, Mr. Noseworthy, testifies without any documentary support that the Claimant would not have engaged in such EOR in the absence of the 2004 Guidelines "because the incremental recovery we may be able to achieve is less than would typically be expected from EOR field development."[338] The documents produced by the Claimant, however, state the opposite:

- "Existing gas flood in Hibernia is very effective and significant potential exists for field wide gas injection to improve oil recovery. A successful R&D program could unlock [redacted] beyond the current Hibernia development plan."[339]
- "[E]nhanced oil recovery will become necessary to improve production capacity and ultimate recovery";[340]
- "Implementing EOR at the Hibernia field will increase ultimate recovery and will act as the foundation for an entirely new phase of the oil and gas industry in NFLD for both research and operations";[341]

[336] **C-2**, Mobil/Murphy – Award, ¶ 62; **CW-5**, Noseworthy Statement I, ¶ 19.

[337] **R-90**, Letter from Paul Leonard, HMDC to Hibernia Executive Committee Members attaching Authority for Expenditure for Gas Utilization Study R&D Project, p. MICI 0005090.

[338] **CW-5**, Noseworthy Statement I, ¶ 25.

[339] **R-90**, Letter from Paul Leonard, HMDC to HEC Members attaching Authority for Expenditure for Gas Utilization Study R&D Project (Mar. 24, 2011), p. MICI 0005090.

[340] **C-330**, Hibernia R&D Project Abstract: Hibernia Gas Utilization R&D Study (Oct. 2010), p. 1 (emphasis added).

[341] **C-330**, Hibernia R&D Project Abstract: Hibernia Gas Utilization R&D Study (Oct. 2010), p. 3.

- "The Gas Utilization Study potentially marks a new era in development of the Hibernia field";[342]
- "A disciplined EOR assessment process is being applied to guide the next phase of development at Hibernia".[343]

224. The documentary evidence produced thus far strongly suggests that the Claimant is actively pursuing EOR R&D at Hibernia not because it is compelled to do so as a result of the 2004 Guidelines but because it is "necessary" for that project.[344] This [redacted] claim for compensation should be denied.

225. If the Tribunal accepts that the Claimant's Gas Utilization Study would have been undertaken in the absence of the 2004 Guidelines, then the Claimant's maximum recoverable amount of damages for its investment in the Hibernia project drops to approximately [redacted].[345] That amount will fall further for every expenditure set out in Appendix A that the Claimant fails to prove is compensable with reasonable certainty, or that the Tribunal determines should not be compensated to the full extent demanded by the Claimant. Canada submits that the Claimant has failed to proffer sufficient evidence to prove that the R&D and E&T expenditures it demands as damages would not have been engaged in the absence of the 2004 Guidelines.

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[342] **R-91**, John J. Lawrence et al, Optimization of Gas Utilization to Improve Recovery at Hibernia (SPE 165240) (Jul. 2, 2013), p. 6.

[343] **R-92**, John J. Lawrence (ExxonMobil), Presentation: SPE 165240 Optimization of Gas Utilization to Improve Recovery at Hibernia (Jul. 2, 2013), slide 13.

[344] As described in Appendix A-31-A-36, Canada requested in its March 29, 2016 document requests that the Claimant produce documents relating to the GUS. The Tribunal denied that request on May 18, 2016 (Procedural Order No. 4, Redfern, Canada's Document Request No. 47). Canada respectfully submits that the Tribunal's decision has prejudiced its ability to present its case and challenge this [redacted] expenditure. The Mobil/Murphy tribunal's decision that the construction of a laboratory at Memorial University to undertake the GUS was an "incremental" expenditure is not determinative of these new and substantially different expenditures. While the Claimant produced a limited number of documents, those documents strongly suggest that there are others in the Claimant's possession which are vital to Canada's ability to present its case. Canada reserves its right to request further documents subsequent to the Claimant's Reply Memorial.

[345] To arrive at this figure, you subtract the Gas Utilization Study from **RE-1**, Walck Report I, Table 10 and then you subtract 24.86% SR&ED tax credit from that amount.

2. The Claimant Wrongly Seeks Compensation for R&D and E&T it or ExxonMobil Plans to Use at Other Projects

226. The Claimant seeks compensation for R&D and E&T expenditures that the Hibernia and Terra Nova *projects* would not have undertaken in the absence of the 2004 Guidelines,[346] but the evidence suggests that several of these claimed expenditures are R&D and E&T initiatives that the Claimant itself, or its parent company ExxonMobil, would have undertaken in the absence of the 2004 Guidelines to support other projects in Newfoundland or elsewhere in the world.

227. For example, the Claimant seeks $763,518 in compensation for a project called "Drift and Divergence of Ice Floes Project," which is an R&D project designed to test and validate a [redacted] created by ExxonMobil.[347] The Claimant alleges that this expenditure is compensable because "[b]asic studies on ice floes are not the kind of research that is needed to support Hibernia project operations."[348] While this may or may not be true vis-à-vis the Hibernia project, documentary evidence shows that the expenditure is one that would have been engaged by ExxonMobil regardless of the 2004 Guidelines:

> An improved understanding of ice drift and pressure dynamics has significant value to ExxonMobil and can be used to further the Corporation's future Artic business needs. …
>
> This is an opportunity for ExxonMobil to test/validate its ice drift forecasting model, to gain experience/skill at estimating pressure from ice divergence/convergence measurements, and to gain familiarity with the methodologies and data collection ahead of other proposed field programs (i.e. the Canadian Beaufort Sea). …
>
> ExxonMobil's [Upstream Research Company in Houston] proposes leveraging the opportunity by providing additional funding to obtain additional data that is of direct value to us.[349]

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[346] Claimant's Memorial, ¶ 292.

[347] **C-291**, Letter from K. Sampath, HMDC, to C. Dyer, CNLOPB, attaching Drift and Divergence of Ice Floes R&D Work Expenditure Application Form (Oct. 30, 2014), p. MOB 0005427.

[348] **CW-3**, Sampath Statement I, ¶ 126.

[349] **C-291**, Letter from K. Sampath, HMDC, to C. Dyer, CNLOPB, attaching Drift and Divergence of Ice Floes R&D Work Expenditure Application Form (Oct. 30, 2014), p. MOB0005427. Expenditures like this where the Claimant may have moved the research from one location to Newfoundland in order to fulfill obligations under the 2004 Guidelines would in any event only be compensable for the cost differential of conducting the R&D project in the Province as opposed to an alternative location. The Claimant has provided no such financial information.

228. There are several other claimed "incremental" expenditures which fall into this category.[350] It is objectionable for the Claimant to "leverage" R&D and E&T through the Hibernia project for use at its other projects and then claim full compensation against Canada for such expenditures on the pretence that they are not "necessary" for either the Hibernia or Terra Nova project. This shell-game of classifying its own R&D and E&T as "incremental" because such expenditures are not specific to the Hibernia or Terra Nova projects must be rejected.

3. Section 45(3)(c) of the Accord Act Requires the Claimant to Spend on R&D and E&T in the Province Beyond "Project Needs"

229. The Claimant's approach to the "ordinary course" versus "incremental" damages model also suffers from an underlying flaw: even in the absence of the 2004 Guidelines, it has a statutory obligation to spend on R&D and E&T in the Province pursuant to Section 45(3)(c) of the Accord Act.[351] The Claimant narrowly interprets that statutory obligation to mean that it is only required to spend on R&D and E&T when such spending is "necessary" for either the Hibernia or Terra Nova project.[352] The Claimant argues that, under Section 45(3)(c) of the Accord Act, "the Projects [are] expected to undertake R&D [and E&T] only as necessary."[353]

230. The Claimant's interpretation of its statutory obligations was rejected by two levels of Canadian Courts. The Newfoundland & Labrador Trial Court held that there is nothing in the Accord Act or the benefits plans supporting the conclusion that the company may unilaterally determine the level of expenditure on research and development.[354] The Court of Appeal stated unequivocally that section 45(3)(c) of the Accord Act "contain[s] no qualification entitling oil

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[350] See e.g., Environmental Genomics, Appendix A, pp. A-25-A-27; [redacted], Appendix A, pp. A-45-47; Ice Radar Enhancement Project, Appendix A, pp. A-47-A-48; [redacted] Appendix A, pp. A-53-A-55; Nuclear Magnetic Resonance to Detect Oil in and Under Ice, Appendix A, pp. A-66-A-68; R&D Applications of Iceberg Profiling, Appendix A, pp. A-73-A-75; [redacted], Appendix A, pp. A-82-A-83; Wave Impact Study, Appendix A, pp. A-93-A-94. Relevant exhibits are cited in Appendix A.

[351] **CL-1**, Accord Act, s. 45(3)(c).

[352] Claimant's Memorial, ¶¶ 277, 292.

[353] Claimant's Memorial, ¶ 92. See also ¶¶ 34, 45, 79, and 104 for similar statements.

[354] **R-61**, Trial Court Decision, ¶¶ 45, 46.

companies to refuse to expend on research and development because they are of the opinion the needs of their projects can be met with existing knowledge and technology."[355]

231. The Mobil/Murphy tribunal also agreed that the level of spending required by the Accord Act is not tied to "project needs" because "[t]he Accord Acts state unambiguously that 'expenditures shall be made for research and development to be carried out in the Province and for education and training to be provided in the Province"[356] and that "[t]he purpose [of Section 45(3)(c)] is to introduce an obligatory *expenditure* requirement."[357] The tribunal agreed that the obligation to spend under Section 45(3)(c) is "neither time nor phase bound,"[358] and thus continues through the production phase of the projects. The Mobil/Murphy tribunal also agreed that "additional expenditures may be imposed" without running afoul of the NAFTA.[359]

232. Early expenditures pre-dating the 2004 Guidelines also indicate that the Claimant understood that its obligation was to help provide for the sustainable development of the Province rather than just spend what was necessary for the projects. For example, the Claimant met its obligations under the Accord Act even before the 2004 Guidelines by spending on: a sponsorship of an Industrial Research Chair in Ocean Engineering at Memorial University ("MUN");[360] a sponsorship of the furnishing of a classroom for the MUN Centre of Management Development;[361] a donation to C-CORE's general trust fund;[362] funding for the establishment of a junior research Chair in Ocean Environmental Risk Engineering at MUN;[363] and funding for the MUN Chair for Women in Science in Engineering.[364]

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[355] **C-153**, Court of Appeal Decision, ¶ 130. The emphasis is the Court's. See also ¶¶ 131, 132.

[356] **C-1**, Mobil/Murphy – Decision, ¶ 234.

[357] **C-1**, Mobil/Murphy – Decision, ¶ 234 (emphasis in original).

[358] **C-1**, Mobil/Murphy – Decision, ¶ 399.

[359] **C-1**, Mobil/Murphy – Decision, ¶ 400.

[360] **C-67**, Hibernia 1986 Benefits Report (Apr. 20, 1987), s. d(2).

[361] **C-69**, Hibernia 1988 Benefits Report (Mar. 31, 1989), s. E.

[362] **C-70**, Hibernia 1989 Benefits Report (Mar. 31, 1989), s. D(3).

[363] **C-89**, Terra Nova 2000 E&T Benefits Report (Mar. 2001), p. 11.

[364] **C-89**, Terra Nova 2000 E&T Benefits Report (Mar. 2001), p. 11.

233. Thus, the Claimant's definition of "ordinary course" spending and its assumption that it should be compensated for any R&D or E&T beyond its direct needs at the Hibernia and Terra Nova projects is untenable. Even in the absence of the 2004 Guidelines, the Claimant has a statutory obligation to invest in R&D and E&T in the Province beyond the specific needs of the projects. Canada is thus not *de facto* liable to compensate the Claimant for all expenditures that it unilaterally deems are beyond "project needs" because, even in the absence of the 2004 Guidelines, the Claimant has a statutory obligation to spend on R&D and E&T in the Province pursuant to section 45(3)(c) of the Accord Act, and its own commitments in the Hibernia and Terra Nova Benefits Plans.[365]

D. Damages Awarded for Any R&D and E&T Expenditures Must Account for the Claimant's Royalty Payment Savings and Other Financial or Other Value-Added Gains Arising From Such Expenditures

1. The Claimant Fails to Account for its Royalty Payment Savings from its R&D and E&T Spending Under the 2004 Guidelines

234. Once the above analysis has been undertaken, if any R&D and E&T expenditures remain which are determined by the Tribunal to be compensable, then the Claimant's savings on its royalty payments to the Province as a result of such expenditures must be deducted from the final assessment of damages.

235. The Claimant is entitled to reductions in royalties payable to the Province through its R&D and E&T expenditures under the 2004 Guidelines. As the Claimant explains in its Memorial, it is "entitled to self-assess which incurred R&D [and E&T] expenditures may qualify as eligible deductions from the royalties on the Projects' revenues that are paid to the Province."[366] In other words, the Claimant decides for itself which R&D and E&T expenditures under the 2004 Guidelines qualify as an offset on its royalty payments to the Province. The Province then has an

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[365] For example, the Claimant promised the following in the Hibernia Benefits Plan: "research to develop effective countermeasures…to minimize oil spills from ALPs and subsea components due to iceberg impact", and "[c]ontinue to support local research institutions and promote further research and development in Canada to solve problems unique to the Canadian offshore environment". The Terra Nova Benefits Plan contains similar commitments: "support education and training generally in the Province beyond simply using local organizations and facilities to deliver the training needs of the [Terra Nova] Development", "continue funding basic research", and "a continuous program of observation and research that leads to the improvement of radar and other remote sensing devices that will make possible the early detection of low-lying masses of floating ice". See, **C-37**, Hibernia Decision 86.01, pp. 25, 82-83; **C-41**, Terra Nova Decision 97.01, pp. 23, 47.

[366] Claimant's Memorial, ¶ 315.

opportunity to audit the Claimant's royalty payments, which might include an assessment of the eligibility of the R&D and E&T expenditures under the royalty regime, depending on the nature of the audit.

236. The Claimant acknowledges that it includes all of its R&D and E&T expenditures under the 2004 Guidelines in its self-assessment under the royalty regimes for the Hibernia and Terra Nova projects.[367] The royalty payment savings earned by the Claimant as a result of its self-assessment are significant – expenditures of $1.0 million save the Claimant $300,000 in royalty payments at Hibernia (i.e., 30%),[368] and $425,000 at Terra Nova (i.e., 42.5%).[369] As a result of its spending under the 2004 Guidelines, the Claimant is currently enjoying [redacted] in savings on its royalty payments. For example, the Claimant's claimed expenditures in this arbitration total [redacted] at the Hibernia project and [redacted] at the Terra Nova project.[370] However, the royalty payment savings the Claimant is currently enjoying for these R&D and E&T expenditures could be more than [redacted] and [redacted], respectively.

237. The Claimant has previously acknowledged that it would be overcompensated if royalty savings were not deducted from its damages claim.[371] The Mobil/Murphy tribunal awarded the Claimant $13.893 million in compensation but did not deduct the approximately [redacted] in royalty payment savings enjoyed by the Claimant because, *inter alia*, the Claimant had agreed to repay the Province the amount of its savings so as to avoid a "double dip".[372] The Claimant makes the same promise in the current arbitration: "Mobil will repay to the Province the royalty deductions related to incremental expenditures to reflect any compensation that we receive from

[367] **R-93**, Letter from Sophie J. Lamb, Debevoise & Plimpton, LLP to Adam Douglas, Government of Canada (Sep. 5, 2012); **R-94**, Letter from David W. Rivkin, Debevoise & Plimpton, LLP to the Mobil/Murphy Tribunal (Sep. 17, 2012).

[368] **R-68**, Mobil/Murphy – Rosen I, ¶ 56(ii), fn. 25.

[369] **R-95**, Petro-Canada (Suncor) Annual Information Form 2008 [Excerpt] (Mar. 18, 2009), p. 28.

[370] **CW-1**, Phelan Statement I, Annex A, Line L. These amounts are prior to any deduction for SRED tax credits.

[371] **R-68**, Mobil/Murphy – Rosen I, ¶ 56(ii), fn. 25: ("If Incremental Spending were to be fully deductible from pre-tax income for the purposes of computing the royalties, the Incremental Spending pertaining to Hibernia and Terra Nova would decrease by 40% and 30%, respectively.").

[372] See e.g. **R-70**, Mobil/Murphy – Phelan V, ¶ 34.

Canada as a result of this arbitration."[373] To the best of Canada's knowledge, however, the Claimant has to date not repaid any monies to the Province.

238. The Claimant continues to refuse to account for the royalty payment savings that it enjoys as a result of its R&D and E&T spending under the 2004 Guidelines. None of the reasons advanced by the Claimant have merit. First, the Claimant argues that it is unclear how much of its R&D and E&T spending will be accepted as offsets to payments under the royalty regimes because the Province has six years to audit the Claimant's self-assessed royalty claims. As such, the Claimant argues that there is "no reliable historical data regarding acceptance of provincial royalty deductions."[374] It was, however, precisely for this reason that this Tribunal ordered the Claimant to produce to Canada "[d]ocuments concerning any R&D or E&T expenditures used to offset royalty payment to the Province between 2004 and 2008" at the Hibernia and Terra Nova projects.[375] The audits for the 2004-2008 period are complete and, as Canada explained in its document requests, "the requested documents will establish a pattern of deductions to royalty payments from the Claimant's past R&D and E&T spending under the Guidelines."[376] In fact, the documents produced by the Claimant do not indicate that any royalty deductions claimed from 2004-2008 for R&D and E&T expenditures were audited or denied by the Province. Thus, contrary to what the Claimant says, and unlike what was before the Mobil/Murphy tribunal, there is <u>now</u> "reliable historical data regarding acceptance of provincial royalty deductions." This Tribunal should therefore make the requisite deductions for any expenditure it deems compensable.

239. Second, the Claimant argues that "the interest rate that is applied to any amount to be repaid is very high, which could ultimately leave the Claimants [sic] out of pocket."[377] The Mobil/Murphy tribunal declined to make a deduction for the Claimant's royalty payment savings for the same reason. Putting aside the fact that the interest rate applicable at Hibernia [redacted] was a *negotiated term* agreed to by the Claimant at the outset of that project and that the

[373] **CW-1**, Phelan Statement I, ¶ 87.

[374] **CW-1**, Phelan Statement I, ¶ 88.

[375] See Procedural Order No. 4, Canada's Document Request Nos. 7 and 8.

[376] See Procedural Order No. 4, Canada's Document Request Nos. 7 and 8.

[377] **CW-1**, Phelan Statement I, ¶ 88.

interest rate applicable at Terra Nova (prime +2%) can hardly be said to be "high", the scope of either interest rate is clearly of no concern to the Claimant who includes all of its R&D and E&T expenditures under the 2004 Guidelines in its self-assessment under the royalty regimes for both projects.[378] If the Claimant was truly concerned about being "out of pocket" then it would not include 100% of its R&D and E&T expenditures to offset royalty payments. The more likely narrative is that the substantial savings enjoyed by the Claimant and (presumably) invested elsewhere exceeds the interest rates applied on any R&D and E&T expenditures that may be audited and denied.

240. Finally, the Claimant argues that no deductions should be made for its royalty payment savings because the Province may "claw back" any such savings.[379] The Mobil/Murphy tribunal also raised this as a possibility[380] but to Canada's knowledge the Province has not to date "clawed back" any of the Claimant's royalty payment savings.

241. For all of the foregoing reasons, unless the Claimant's royalty payment savings are factored into an assessment of its actual losses, the Claimant will be overcompensated with a windfall.

2. The Claimant Fails to Account for Other Financial or Other Value-Added Gains That it Has or Will Receive as a Result of the R&D and E&T Spending that it Claims as Damages Under the 2004 Guidelines

242. The Claimant acknowledges that the R&D and E&T expenditures it claims as damages in this arbitration were undertaken as part of an effort to "actively look[] for opportunities" to engage in value-added R&D and E&T that will provide benefit.[381] The R&D and E&T expenditure descriptions that the Claimant submits to the Board for approval include a summary of the "value-added" that the Claimant targets by engaging the expenditure. For example, the Claimant has told the Board that a successful R&D program under the Gas Utilization Study

[378] **R-93**, Letter from Sophie J. Lamb, Debevoise & Plimpton, LLP to Adam Douglas, Government of Canada (Sep. 5, 2012); **R-94**, Letter from David W. Rivkin, Debevoise & Plimpton, LLP to the Mobil/Murphy Tribunal (Sep. 17, 2012).

[379] **CW-1**, Phelan Statement I, ¶ 88.

[380] **C-2**, Mobil/Murphy – Award, ¶¶ 145-146.

[381] **CW-1**, Phelan Statement I, ¶ 37.

"could unlock [redacted] beyond the current Hibernia development plan."[382] The Claimant, however, seeks compensation in this arbitration for the full value of this R&D expenditure arguing that the R&D would not have been undertaken in the absence of the 2004 Guidelines.[383] If, however, the Claimant is compensated for the full value of this expenditure *and* unlocks [redacted] more barrels as a result of the R&D, it will have received a massive windfall at the expense of Canadian taxpayers. As described in Appendix A, if an otherwise compensable R&D or E&T expenditure provides the Claimant with financial or other value-added gains, these rewards must be factored into an assessment of damages otherwise the Claimant will be overcompensated.

E. Conclusion

243. The Tribunal's analysis of the Claimant's damages claim should start at correcting the unjustified attempt to recover anything spent of the Claimant's own volition beyond that which it was required to spend under the 2004 Guidelines during 2012-2015. This means Canada is not liable to pay any compensation to the Claimant for its investment in the Terra Nova project. For its investment in the Hibernia project, eliminating the surplus spending beyond what was required to be spent means that the absolute ceiling of damages is [redacted].

244. But the Tribunal must then scrutinize the R&D and E&T expenditures claimed as damages and reject any which the Claimant has failed to prove with reasonable certainty would not have been undertaken in the absence of the 2004 Guidelines. The Claimant has failed to meet its burden because it only provides as evidence the opinions of its own employees who make statements that conflict directly with contemporaneous documents. Moreover, many of Claimant's value-added R&D and E&T expenditures are being leveraged though the Hibernia and Terra Nova projects for use by the Claimant elsewhere. Such expenditures are not compensable.

245. That level of scrutiny, as well as factoring in the substantial savings received from royalty payment deductions and the other financial and value-added gains arising from any remaining

[382] **R-90**, Letter from Paul Leonard, HMDC to HEC Members attaching Authority for Expenditure for Gas Utilization Study R&D Project (Mar. 24, 2011), p. MICI 0005090.

[383] **CW-5**, Noseworthy Statement I, ¶¶ 19-25.

R&D or E&T expenditures considered by the Tribunal to be compensable, will reveal that compensation owed to the Claimant's is *de minimis*, if anything at all.

VI. ORDER REQUESTED

246. For the forgoing reasons, Canada respectfully requests that this Tribunal:

(i) Dismiss the Claimant's claim in its entirety and with prejudice on grounds of lack of jurisdiction and admissibility;

(ii) Dismiss the Claimant's demand for compensation;

(iii) Dismiss the Claimant's demand for interest and its costs;

(iv) Award Canada its costs; and

(v) Grant any further relief that is just.

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