

**IN THE ARBITRATION  
UNDER CHAPTER ELEVEN OF THE NAFTA  
AND THE ICSID CONVENTION**

BETWEEN:

MOBIL INVESTMENTS CANADA INC.

Claimant

AND

GOVERNMENT OF CANADA

Respondent

ICSID Case No. ARB/15/6

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**CLAIMANT'S POST-HEARING BRIEF**

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ARBITRAL TRIBUNAL:

Sir Christopher Greenwood QC

Mr. J. William Rowley QC

Dr. Gavan Griffith QC

SECRETARY OF THE TRIBUNAL:

Ms. Lindsay Gastrell

11 August 2017

## I. INTRODUCTION

1. In this brief, Mobil addresses the following questions posed by the Tribunal to the parties on 28 July 2017, the final day of the hearing:

- “Has there been a new breach following the Decision, by the Board, to continue to impose or enforce the Guidelines after the Decision of the earlier Tribunal?”
- “[I]s a breach of the obligation to perform in good faith a breach of an obligation under the NAFTA?”
- “[I]s an allegation of such a breach properly before [the Tribunal]?”<sup>1</sup>

Mobil additionally addresses questions put to Canada during the final day of the hearing concerning Article 1106(1)’s obligations not to “enforce any commitment or undertaking” to comply with a local performance requirement.<sup>2</sup>

2. Before addressing the above questions, Mobil wishes to avoid any doubt about its primary argument on limitations: Because the enforcement of the Guidelines is a continuing breach, the limitations provisions of Articles 1116(2) and 1117(2) are satisfied.<sup>3</sup> Importantly, these Articles “have a particular application to a continuing course of conduct” that causes losses to be incurred at **different points in time** (as opposed to losses that are incurred all at once).<sup>4</sup> This is **not** a case where once the Board began enforcing the Guidelines in 2009, Mobil at that point had already incurred the 2012-2015 losses, though it could not precisely quantify the amount of these losses.<sup>5</sup> Rather, applying the Mobil I Decision’s binding determination of when a loss is incurred—i.e., either when a “payment or expenditure has transpired,” or when there is “a call for payment or expenditure” and “a firm obligation to make a payment”<sup>6</sup>—Mobil necessarily had not incurred the 2012-2015 losses **at all** in 2009. It therefore follows that Mobil may make a claim for 2012-2015 losses in this proceeding now that it has incurred these losses. It would be paradoxical to conclude that the limitations provisions of Articles 1116(2) and 1117(2) begin to run for losses not yet

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<sup>1</sup> Day 4 Hearing Transcript at 217:14-17, 218:4-8.

<sup>2</sup> Day 4 Hearing Transcript at 142:9-17 (“PRESIDENT GREENWOOD: ... ‘No party may impose or enforce any of the following requirements or enforce any commitment or undertaking.’ Now, the phrase ‘or enforce any commitment or undertaking,’ that’s the one that refers to enforcing something that’s in an agreement concluded by the Party or by the Investor. If you parse the sentence, you’ve got several different prohibitions there ...”).

<sup>3</sup> Mobil’s Reply Memorial, ¶¶ 43-59; CE-1, Sarooshi Report I, ¶¶ 46-59.

<sup>4</sup> **RL-25**, *United Parcel Service of America v. Government of Canada*, Award on the Merits, 24 May 2007, ¶ 30.

<sup>5</sup> It is helpful to contrast the present case with the statements of various NAFTA tribunals collected at paragraph 274 of *Bilcon*, e.g., “[D]amage or injury may be incurred even though the amount or extent may not become known until some future time.” **RL-6**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, Award on Jurisdiction and Liability of March 17, 2015, ¶ 274 (quoting *Grand River*, at ¶ 77). These statements are unremarkable insofar as they are understood to apply to loss or damage that is *already* incurred. However, to Mobil’s knowledge, no NAFTA tribunal has held that the limitations provisions of Articles 1116(2) and 1117(2) begin to run on a claim for future loss or damage *before* the investor has incurred them. Indeed, such a holding would not comport with the text, policy, or logic of Articles 1116(2) and 1117(2).

<sup>6</sup> **C-1**, Mobil I Decision, ¶¶ 440, 469.

incurred, given that under 1116(1), 1117(1), and the Mobil I Decision the investor must have incurred the losses before it may make a claim for them.

3. If, however, the Tribunal does not accept Mobil's primary argument on limitations that Canada's continuing breach satisfies the limitations period, then Mobil submits that its alternative arguments on limitations should be accepted. Part II of this brief will set out a valid approach to limitations taken by several NAFTA tribunals, which consists of separating a series of events into distinct components. Part III will apply this approach to the facts of this case to show that events that occurred within three years of the present claim breach Article 1106(1). Part IV will show that Mobil's alternative arguments on limitations are properly before this Tribunal.

## II. CLAIMS BASED ON DISTINCT EVENTS THAT OCCURRED WITHIN THREE YEARS OF FILING ARE NOT TIME BARRED

4. Any analysis of limitations is specific to the facts of the case.<sup>7</sup> In applying Articles 1116(2) and 1117(2), it is "possible and appropriate," as the *Bilcon* tribunal held, "to separate a series of events into **distinct** components, some time-barred, some still eligible for consideration on the merits."<sup>8</sup> In following the approach taken by the *Feldman*, *Mondev*, and *Grand River* tribunals, the *Bilcon* tribunal found it unnecessary to resolve the "sharply different views on whether *UPS* was correct or not."<sup>9</sup>

5. In *Bilcon*, the claimants argued that a series of governmental actions relating to an environmental application process occurring over a five-year period formed a single continuing breach.<sup>10</sup> Respondent Canada argued that the claimants had first knowledge of both breach and loss long before the three-year limitations period began to run.<sup>11</sup> The *Bilcon* tribunal separated the environmental application process into four chronological events.<sup>12</sup> It went on to find that the first three events, having all occurred more than three years before filing, were time barred.<sup>13</sup> However, the tribunal denied Canada's limitations objection as to the fourth event, which had occurred within the three years.<sup>14</sup>

6. As noted by *Bilcon*, other tribunals have taken a similar approach:

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<sup>7</sup> **CL-92**, *Rusoro Mining Limited v. The Bolivarian Republic of Venezuela*, Award of August 22, 2016, ¶¶ 229-230 (noting that *UPS* and similar tribunals followed an approach that "although legally sound, is very fact specific and depends on the circumstances of the case"); **RL-6**, *Bilcon* Award, ¶ 265 (noting that "*UPS* involved its own set of facts"); **RL-61**, *Spence International Investments, LLC, Berkowitz et al. v. Republic of Costa Rica*, Interim Award of October 25, 2016, ¶166 (noting that the limitations "aspects of this case are heavily fact-specific" and "thus caution[ing] any reading of this Award that would give it wider 'precedential' effects"). Note also **RL-3**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, Decision on Objections to Jurisdiction of July 20, 2006, ¶ 36 ("NAFTA arbitral awards ... are rooted in their specific facts.").

<sup>8</sup> **RL-6**, *Bilcon*, ¶ 266 (emphasis added).

<sup>9</sup> *Id.* ¶¶ 265-266.

<sup>10</sup> *Id.* ¶¶ 251, 254.

<sup>11</sup> *Id.* ¶¶ 244, 247.

<sup>12</sup> *Id.* ¶ 119.

<sup>13</sup> *Id.* ¶¶ 266-281.

<sup>14</sup> *Id.* ¶¶ 281, 305.

- In *Apotex*, the NAFTA tribunal understood the claim to relate to four actions: (a) the FDA’s decision; (b) the D.C. District Court’s denial of emergency injunctive relief; (c) the D.C. Circuit’s affirmation of the denial; and (d) the D.C. Circuit’s denial of rehearing *en banc*.<sup>15</sup> The tribunal found that the first two actions were barred by the limitations period, but that the latter two actions were “clearly analytically **distinct**” and fell within the three year period.<sup>16</sup>
- In *Grand River*, the NAFTA tribunal was faced with a series of enforcement mechanisms that were enacted pursuant to a Master Settlement Agreement (“MSA”) with the tobacco industry.<sup>17</sup> The tribunal found that while “the MSA [itself], the escrow statutes [and] any related measures and enforcement actions taken prior to” the three-year window were barred,<sup>18</sup> related actions to “strengthen the enforcement” of those escrow statutes and related measures “remain[ed] for consideration on the merits.”<sup>19</sup> It thus permitted the claimants “to show that they suffered legally **distinct** injury on account of legislative actions occurring within the three years prior to the filing of their claim (or even after it was filed).”<sup>20</sup>
- In *Rusoro*, the tribunal was presented with a “string of acts:” measures enacted in 2009 which created a separate, disadvantaged regime for privately owned gold companies, measures enacted in 2010 which rolled back some of those reforms, and a 2011 Nationalization Decree.<sup>21</sup> The tribunal “br[oke] down each alleged composite claim into **individual** breaches ... to apply the time bar to each of such breaches separately.”<sup>22</sup> The result was that although the first two events fell outside the three-year window, the 2011 Nationalization Decree was considered on the merits.<sup>23</sup>
- In *Mondev*, under a stricter *ratione temporis* analysis, the NAFTA tribunal, denied a claim based on an expropriation that occurred prior to NAFTA’s entry into force. However, it considered on the merits claims that were based on post-entry-into-force events because it was “possible to point to conduct of the State after [NAFTA’s entry into force] which is itself a breach.”<sup>24</sup>

7. Separating a series of events into distinct components is all the more appropriate in the context of a claim under NAFTA Article 1106(1), as this provision contains both an obligation not to “impose or enforce” a local performance requirement and an obligation not to “enforce any commitment or undertaking” to comply with a local performance requirement. In Part III below, Mobil submits in its alternative case that

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<sup>15</sup> **RL-5**, *Apotex Inc. v. The Government of the United States of America*, Award on Jurisdiction and Admissibility of June 14, 2013, ¶ 316.

<sup>16</sup> *Id.* ¶ 334 (emphasis added).

<sup>17</sup> **RL-3**, *Grand River*, ¶¶ 6-21.

<sup>18</sup> *Id.* ¶ 83.

<sup>19</sup> *Id.* ¶¶ 84-87.

<sup>20</sup> *Id.* ¶ 101 (emphasis added).

<sup>21</sup> **CL-92**, *Rusoro*, ¶ 230.

<sup>22</sup> *Id.* ¶ 231 (emphasis added).

<sup>23</sup> *Id.* ¶¶ 229-231.

<sup>24</sup> **RL-4**, *Mondev International Ltd. v. United States of America*, Award of October 11, 2002, ¶ 70.

analytically distinct events in breach of Article 1106(1) occurred within the limitations period such that they are to be considered on the merits.<sup>25</sup>

### **III. DISTINCT EVENTS BREACHING ARTICLE 1106(1) OCCURRED WITHIN THREE YEARS OF THE PRESENT CLAIM**

8. In separating the series of events preceding Mobil's 16 January 2015 Request for Arbitration, there are at least two sets of events that occurred within the three-year window for which Mobil has timely made a claim. The first set, discussed at Part III.A, concerns Canada's failure to cease enforcing the Guidelines after being apprised by the Mobil I Decision that such enforcement was unlawful under the NAFTA. The second set, discussed at Part III.B, concerns the enforcement of new commitments or undertakings to comply with the Guidelines, which commitments or undertakings were made in Operations Authorizations obtained within the preceding three-year window. On the basis of either set or both sets of events, this Tribunal should conclude that Mobil's present claim is timely.

#### **A. Canada's failure to cease enforcing the Guidelines is a distinct breach of its NAFTA obligation to perform Article 1106(1) in good faith**

9. Canada's obligation to apply Article 1106(1) in good faith is contained in the treaty's requirement that the NAFTA accord with international law. This obligation is not disputed.<sup>26</sup> Article 102(2) of the NAFTA states that "[t]he Parties shall interpret and apply the provisions of this Agreement [the NAFTA] ... in accordance with applicable rules of international law." Tribunals have concluded that the rules of international law applicable to the NAFTA are codified in the *Vienna Convention on the Law of Treaties* (VCLT).<sup>27</sup> Article 26 of the VCLT, in particular, states that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."

10. Moreover, there is a widely accepted rule of customary international law that a State is obligated to cease an ongoing breach of its international law obligations. Article 30 of the ILC Articles provides "[t]he State responsible for the internationally wrongful act is under an obligation: (a) To cease that act, if it is continuing."<sup>28</sup> The ILC Articles have been heavily relied on and applied by investment tribunals to determine cases involving claims made by investors against States.

11. In the case of a treaty obligation, the concomitant obligation to cease an ongoing breach of a treaty should be considered an essential part of the treaty obligation

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<sup>25</sup> The weight of NAFTA authority provides that the distinct act need not rise to the level of a separate breach. Whether the current Tribunal applies a "distinct act" or "separate breach" standard, either threshold is met by the facts of the present case. See the discussion of *Bilcon, Apotex, and Grand River* supra ¶¶ 4-6.

<sup>26</sup> Day 4 Hearing Transcript at 131:16-21: "PRESIDENT GREENWOOD: ... Any State that concludes a treaty has an obligation to perform that Treaty in good faith; is that right? You would agree with that proposition? / MR. DOUGLAS: I would agree with that."

<sup>27</sup> See, e.g., **RL-23**, *Canadian Cattlemen for Fair Trade v. United States of America*, Award on Jurisdiction of 28 January 2008, ¶ 116: "It is also common cause that the VCLT provides the applicable rules of international law governing the interpretation of the NAFTA."

<sup>28</sup> **CL-69**, U.N. Articles on the Responsibility of States for Internationally Wrongful Acts, December 12, 2001, Article 30.

itself, especially where international law is expressly used to provide content to a State's obligations under the NAFTA as explained above.

12. This obligation to cease a continuing breach has been widely recognized in the context of a State's treaty obligations;<sup>29</sup> for example:

- The Tribunal in *LG&E v. Argentina* stated: “the Tribunal notes that it agrees with Claimants that the abrogation of the basic guarantees of the gas tariff regime constitutes a continuous breach that extends to the entire period during which such abrogation continues and remains not in conformity with the Treaty (except during the State of Necessity period that justifies such breach). During this period and provided that the obligation is still in force, the State is under a duty to perform the obligation breached. **It is also obliged to cease the wrongful act.**”<sup>30</sup>
- The International Court of Justice (“ICJ”) in the *Military and Paramilitary Activity in and against Nicaragua (Nicaragua v United States of America)* case, after having found the U.S. in breach of a number of treaty and other obligations under international law, went on to find that there was a separate obligation of the U.S. relating to cessation of breaches. The ICJ decided: “that the United States of America is under a **duty immediately to cease and to refrain** from all such acts as may constitute breaches of the foregoing legal obligations.”<sup>31</sup>
- The ICJ in *United States Diplomatic and Consular Staff in Tehran (United States of America v Islamic Republic of Iran)*, held that Iran's continued detention of U.S. Embassy officials constituted a “continuing breach” of the 1961 Vienna Convention on Diplomatic Relations,<sup>32</sup> and yet the ICJ also went on to find that the Iranian Government was obligated separately to cease such breaches.<sup>33</sup>

13. In the same way, Article 1106(1) incorporates and contains within it an inherent obligation that if a State is in breach of the obligation not to enforce a law or regulation (such as the Guidelines) and the State continues to do so, then the State is also in breach of the obligation to cease under Article 1106(1). On account of the Mobil I Decision, Canada now knew that its performance requirements were not a reserved measure and thus unlawful under Article 1106(1). Indeed Canada accepted at the Hearing that the Guidelines were unlawful under Article 1106(1) as declared by the Mobil I Decision.<sup>34</sup> Accordingly, following the Mobil I Decision, Canada was required to cease enforcing the Guidelines as part of its obligations under Article 1106(1). But it did not. Following the Mobil I Decision

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<sup>29</sup> See also, **CL-99**, *The United States of America v. The Islamic Republic of Iran* (hereafter, “Iran-U.S. Cl. Trib. 9 Sept. 2004”), n. 18, quoting Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, p. 339: “In the case of a judgment declaring an act to be unlawful, this decision entails an obligation on the State which has committed the act to put an end to the illegal situation created thereby.”

<sup>30</sup> **CL-56**, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, Award of 25 July 2007, ¶ 85 (emphasis added).

<sup>31</sup> **CL-103**, *Military and Paramilitary Activity in and against Nicaragua (Nicaragua v United States of America)* case, Judgment of 27 June 1986, p. 149 (¶ 292(12)).

<sup>32</sup> **CL-104**, *United States Diplomatic and Consular Staff in Tehran (United States of America v Islamic Republic of Iran)*, Judgment of 24 May 1980, ¶¶ 77-78 and 95(1).

<sup>33</sup> *Id.* at ¶ 95(3).

<sup>34</sup> Day 4 Hearing Transcript at 147:12-16.

in May 2012, the Board responded to Mobil's query as to whether the Board would cease enforcing the Guidelines as follows on 9 July 2012:

"In response to your correspondence of July 5, 2012, the validity of the Board's guidelines have been affirmed by the Courts and we will continue to verify an Operator's obligation . . . There is no intention to 'waive' in whole or in part any of the Operator's obligations respecting research and development or education and training for any of the projects that fall under the Board's jurisdiction."<sup>35</sup>

14. This act by Canada constituted a breach of its obligation to cease ongoing breaches and apply Article 1106(1) in good faith. Canada's failure to cease enforcement following the Mobil I Decision constituted a distinct breach of Article 1106(1) that triggered the limitations period under Articles 1116(2) and 1117(2).

15. This conclusion finds support from similar cases in which tribunals have considered a State's non-compliance with an obligation **after** a prior tribunal found that State's non-compliance to be in breach of a treaty obligation. For example, the ICJ commented in the *Haya de la Torre* case as follows:

"In its Judgment of November 20th, the Court held that the grant of asylum by the Government of Colombia to Haya de la Torre was not made in conformity with . . . the Convention. **This decision entails a legal consequence**, namely that of **putting an end to an illegal situation**: the Government of Colombia which had granted the asylum irregularly is bound to terminate it. As the asylum is still being maintained, the **Government of Peru is legally entitled to claim that it should cease.**"<sup>36</sup>

16. In a case before the Iran-U.S. Claims Tribunal, the Claims Tribunal concluded that Iran's failure to cease its non-compliance with the requirement to replenish the Security Account—after a competent tribunal had determined Iran's non-compliance was unlawful in a prior case (No. A28)—was a fact sufficiently distinct for the purpose of supporting a new claim by the U.S. against Iran, notwithstanding Iran's argument that such a claim was barred by the doctrine of *res judicata*. The Claims Tribunal stated:

". . . the United States is **entitled to assert a new claim** based on Iran's non-compliance, since December 2000, with its Paragraph 7 obligation and to request that Iran's non-compliance cease. The United States' right to assert **this new claim was not extinguished** by the Tribunal's Decision in Case No. A28 - which, in any event, only addressed Iran's non-compliance from late 1992 until December 2000 . . . the Tribunal concludes that the United States' claim in the present Case and its claim in Case No. A28 are **not identical**. Iran's argument to the contrary is therefore dismissed."<sup>37</sup>

17. The above reasoning is applicable in the present case for the purpose of identifying a distinct breach of Article 1106(1) given Canada's failure to cease enforcing the Guidelines in 2012—which, after the Mobil I Decision, it knew were unlawful.

18. This conclusion also finds support in Canada's remarks at the hearing. In the context of arguing that Canada's failure to cease is not properly before this Tribunal, Canada

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<sup>35</sup> C-176, Letter from J. Bugden, CNLOPB, to P. Sacuta, ExxonMobil Canada Ltd., 9 July 2012.

<sup>36</sup> CL-98, *Haya de la Torre Case (Colombia v. Peru)*, (I.C.J. 13 June 1951), p.82.

<sup>37</sup> CL-99, Iran-U.S. Cl. Trib. 9 Sept. 2004, ¶ 35.

also articulated its view that a failure to cease enforcement after the Mobil I Decision should be treated as distinct from Canada's enforcement of the Guidelines before the Mobil I Decision. As counsel for Canada stated: "We do not see how the failure to cease equates with the enforcement of the Guidelines. **The two are distinguishable**, in my mind."<sup>38</sup>

19. Given that the enforcement of the Guidelines before the Mobil I Decision in May 2012 cannot be equated with Canada's obligation to cease enforcement following that Decision, the circumstances of Canada's enforcement of the Guidelines after the Mobil I Decision are both new and distinct. Accordingly, Mobil's claim for damages for the 2012-2015 period falls within the three year limitations period of Articles 1116(2) and 1117(2).

**B. Canada has breached its Article 1106(1) obligation not to "enforce any commitment or undertaking" based on Operations Authorizations that were obtained within three years**

20. Article 1106(1), in terms, imposes a further obligation on Canada not to enforce a "commitment or undertaking" made by an investor that would otherwise be contrary to Canada's commitments relating to performance requirements. As President Greenwood noted during the hearing: "If you parse the sentence [in Article 1106(1)], you've got several different prohibitions there: A prohibition on imposing one of these requirements, a prohibition on enforcing it, [and] **a prohibition on enforcing any commitment or undertaking relating to them ....**"<sup>39</sup> As shown below, this latter obligation was distinctly breached during the three-year window preceding the 16 January 2015 Request for Arbitration, based on commitments or undertakings contained in new Operations Authorizations ("OAs") that were obtained within that time frame.

21. For background, OAs (which were previously known as Production Operations Authorizations, or "POAs") are authorizations applied for by operators and issued by the Board pursuant to the Accord Acts.<sup>40</sup> As Mr. Phelan relates, "[p]roject operators such as HMDG and Suncor must hold a valid OA from the Board to be able to produce oil."<sup>41</sup> In recent years, OAs have been respectively issued for the Hibernia and Terra Nova Projects approximately once every three years.<sup>42</sup> By operating pursuant to the OAs, operators necessarily commit to fulfil the conditions contained therein "or risk suspension or non-renewal of their respective OAs from the Board."<sup>43</sup>

22. The Board has required that conditions be inserted into successive OAs under which the respective operators specifically undertake to comply with the Guidelines during the term of the relevant OA.<sup>44</sup> These conditions represent a commitment or undertaking

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<sup>38</sup> Day 4 Hearing Transcript at 117:13-16.

<sup>39</sup> Day 4 Hearing Transcript at 142:15-20 (emphasis added).

<sup>40</sup> **CL-1**, Canada-Newfoundland and Labrador Atlantic Accord Implementation Act, S.C., 1987, c. 3, March 25, 1987, § 138; **CL-3**, Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act, R.S.N.L. 1990, c. 2, 1990, § 134.

<sup>41</sup> **CW-1**, Phelan Statement I, ¶ 25.

<sup>42</sup> Mobil's Memorial, ¶¶ 118-120 (including tables).

<sup>43</sup> **CW-1**, Phelan Statement I, ¶ 34.

<sup>44</sup> Mobil's Memorial, ¶¶ 119-120 (tables). *Note also* **CW-1**, Phelan Statement I, ¶ 25; **CW-2**, O'Keefe Statement I, ¶ 24-25.



within the meaning of Article 1106(1) because the operator commits to those conditions by operating pursuant to the OA.<sup>45</sup>

23. Two OAs were issued within three years of Mobil's present claim: one OA for the Hibernia Project, which was valid between 1 November 2012 and 28 January 2016 (the "Hibernia 2012 OA"),<sup>46</sup> and a second OA for the Terra Nova Project, which was issued with validity from 31 December 2014 and is expected to remain valid until 4 October 2017 ("Terra Nova 2014 OA").<sup>47</sup> Both the Hibernia 2012 OA and the Terra Nova 2014 OA provide an identical commitment or undertaking to comply with the Guidelines: "The Operator shall comply with the *Guidelines for Research and Development Expenditures* as issued by the Board November 5, 2004 and with effect from April 1, 2004[.]"<sup>48</sup>

24. Because each OA is issued for a discrete time period, they are separate and analytically distinct events under the alternative approach to limitations that is described in Part II. The losses incurred by Mobil by reason of the Board's enforcement of the commitments in Hibernia 2012 OA and the Terra Nova 2014 OA comprise the majority of Mobil's claimed losses in this arbitration. Mobil's claim based on these losses is not time barred under Articles 1116(2) and 1117(2), because Mobil first acquired knowledge of the relevant enforcement actions upon or after issuance of the OAs containing those commitments. Therefore, the Tribunal should award compensation for losses incurred by reason of the enforcement of the distinct commitments or undertakings in these OAs.

#### IV.

#### MOBIL'S ALTERNATIVE ARGUMENTS ON LIMITATIONS ARE BEFORE THIS TRIBUNAL

##### A. Canada has had ample opportunity to be heard on Mobil's alternative arguments regarding limitations

25. Canada has contended that Mobil's alternative arguments on limitations should not be considered because they "allege an entirely new breach of the NAFTA for the first time in [Mobil's] Reply Memorial."<sup>49</sup> On its face, Canada's complaint that Mobil did not make arguments on limitations until the Reply Memorial is untenable, given that at no time before the Counter-Memorial—including during the first telephonic session held on 3 November 2015—did Canada indicate it would raise limitations as a defense.

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<sup>45</sup> The Oxford English Dictionary (**CL-105**) reveals the related nature of "commitment" and "undertaking." It defines "commitment" in relevant part as follows: "6. a. The action or an act of obligating or binding oneself or another to a particular course of action, policy, etc.; the action of giving an undertaking, either explicitly or by implication. Also: an undertaking or pledge of this kind... b. An act or course of action to which a person is bound or obligated; an obligation, responsibility; a liability; an engagement." It defines "undertaking" in relevant part as follows: "3. A pledge or promise; a guarantee or surety."

<sup>46</sup> **C-146**, CNLOPB Operations Authorization Form for HMDC (November 1, 2012 – October 28, 2015), dated 1 November 2012; **C-147**, Letter from S. Tessier, CNLOPB, to J. Walck, HMDC (extending Hibernia OA from October 28, 2015 to January 28, 2016), dated 28 October 2015.

<sup>47</sup> **C-152**, Letter from S. Tessier, CNLOPB, to B. Janke, Suncor Energy Inc., transmitting Terra Nova OA (December 31, 2014 – October 4, 2017), dated 1 October 2014.

<sup>48</sup> **C-146**, CNLOPB Operations Authorization Form for HMDC (1 November 2012 – 28 October 2015), Condition 8; **C-152**, Letter from S. Tessier, CNLOPB, to B. Janke, Suncor Energy Inc., transmitting Terra Nova OA (31 December 2014 – 4 October 2017), Condition 6.

<sup>49</sup> Canada's Rejoinder Memorial (16 December 2016), ¶ 65.

26. In any event, Canada's attempt to foreclose consideration of Mobil's alternative arguments on limitations and Canada's good faith is improper. To start, Mobil's arguments on limitations do not raise a new claim. The basis of Mobil's claim has remained the same since the start of this arbitration: The enforcement of the Guidelines during the 2012-2015 period is in breach of Canada's obligations under NAFTA Article 1106(1), for which Canada must make full reparation.<sup>50</sup> Mobil's arguments on limitations merely respond to a defense raised by Canada in its Counter-Memorial; such legal arguments are properly admitted at any stage of the proceeding.<sup>51</sup>

27. Further, Mobil's arguments on limitations are purely legal and based on undisputed facts that have been established since the filing of the Memorial. These undisputed facts include the Mobil I Decision itself, the Board's 9 July 2012 letter, and the Board's actions to enforce the Guidelines and related commitments or undertakings. Canada cannot contend that Mobil's legal arguments require new or different evidence than what is already on the record.

28. Indeed, as evinced by the voluminous counter-arguments advanced by Canada, it has had ample opportunity to be heard on these legal arguments. In its Rejoinder Memorial, Canada presented eight separate arguments in response to Mobil's alternative argument on limitations. At the hearing, Canada presented six further arguments on the same topic.<sup>52</sup> Moreover, Canada has the opportunity to make additional arguments on these limitations issues in two post-hearing briefs.

29. Finally, when (as here) a tribunal has requested further arguments on a subject, it is necessarily proper for the parties to present their arguments and for the tribunal to consider them. In Mobil I, the Tribunal invited multiple rounds of post-hearing briefs on questions of interpretation, which resulted in the filing of five post-hearing briefs by each side.<sup>53</sup> The first Tribunal went on to consider the legal arguments in those post-hearing briefs, including new legal arguments. It is likewise proper for this Tribunal to consider the parties' legal arguments.

**B. Even if Mobil's alternative arguments on limitations raised an additional or incidental claim, they are properly before this Tribunal**

30. Even if Mobil's legal arguments raised an additional or incidental claim, the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings support a conclusion that such claims are properly before this Tribunal. Article 46 of the ICSID Convention states that "the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre." This provision is effectively restated in Rule 40(1) of the ICSID Rules of Procedure for Arbitration Proceedings.

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<sup>50</sup> Mobil's Request for Arbitration (16 January 2015), ¶¶ 52-53; Mobil's Memorial (11 March 2016), ¶ 323; Mobil's Reply Memorial (23 September 2016), ¶ 179.

<sup>51</sup> See **CL-106**, Gary Born, *International Commercial Arbitration* (2014), p. 2252 (parties may "be continuing to develop legal argument" in post-hearing briefings).

<sup>52</sup> Day 4 Hearing Transcript at 135:11-13.

<sup>53</sup> **C-1**, Mobil I Decision, ¶¶ 28-32, 128-134, 320-323 (recounting and examining post-hearing briefs on questions posed by Tribunal during hearing and after hearing).

31. As explained by Christoph Schreuer, “the point of this Article [46] was to obviate separate proceedings for incidental claims and to make it unnecessary for parties who have additional claims or counterclaims to start new procedures.”<sup>54</sup> Relatedly, “[t]he ancillary claim must be closely related to the primary claim.”<sup>55</sup> Here, Mobil’s alternative arguments on limitations are closely related to Mobil’s primary claim that Canada’s enforcement of the Guidelines breaches Article 1106(1). Therefore, they should be determined in this proceeding.

32. Additionally, Rule 40(2) of the ICSID Arbitration Rules states that “[a]n incidental or additional claim shall be presented not later than in the reply ... unless, the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding.” This timing requirement is likewise satisfied. Mobil’s alternative arguments regarding limitations and abuse of right based on continuing enforcement of the Guidelines after the Mobil I Decision were stated in the Reply Memorial.<sup>56</sup>

33. If this Tribunal determines that its leave is required under ICSID Arbitration Rule 40(2) to present any part of Mobil’s alternative arguments on limitations, then Mobil requests such leave be granted after consideration of any objections by Canada. Justice requires that such leave, if necessary, be granted as the alternative arguments are so closely related to Mobil’s claim and Canada’s limitations defense. *See, e.g., RL-3, Grand River*, ¶¶ 95-102 (granting an oral motion—which motion was made during claimants’ rebuttal arguments during the final presentation at the hearing—to amend the claim so as to add related measures falling within NAFTA’s three-year limitations provision).

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<sup>54</sup> **CL-107**, Christoph H. Schreuer, *The ICSID Convention: A Commentary* (2d ed. 2009), p. 732.

<sup>55</sup> *Id.* at 751.

<sup>56</sup> Claimant’s Reply Memorial, ¶¶ 74-83.

Respectfully submitted,



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