INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Mobil Investments Canada Inc.

v.

Canada

(ICSID Case No. ARB/15/6)

PROCEDURAL ORDER NO. 3 ON THE PRODUCTION OF DOCUMENTS

Members of the Tribunal
Sir Christopher Greenwood QC, President
Dr. Gavan Griffith QC, Arbitrator
Mr. J. William Rowley QC, Arbitrator

Secretary of the Tribunal
Ms. Martina Polasek

Assistant Secretary of the Tribunal
Ms. Kendra Magraw

February 10, 2016

Order

1. The Tribunal has received and considered the following submissions of the parties:
   i. The Claimant's requests for the production of documents of December 4, 2015;
   ii. The Respondent's objections to Mobil's requests of December 18, 2015;
   iii. The Claimant's responses to Canada's objections of January 8, 2016; and
   iv. The Respondent's reply to Mobil's responses of January 21, 2016.

2. The Tribunal's decisions on the Claimant's document requests are set forth in the last column of the Redfern Schedule incorporated as Annex A to this Order.

3. In accordance with the time limit established with Annex A to Procedural Order No. 1, the Respondent shall produce the documents ordered by the Tribunal by February 24, 2016.

[Signed]

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On behalf of the Tribunal
Sir Christopher Greenwood QC
President of the Tribunal
Date: February 10, 2016

ANNEX A

MOBIL'S REQUESTS FOR DOCUMENT PRODUCTION
December 4, 2015

CANADA'S OBJECTIONS TO MOBIL'S DECEMBER 4, 2015 REQUESTS FOR DOCUMENT PRODUCTION
December 18, 2015

MOBIL'S RESPONSES TO CANADA'S DECEMBER 18, 2015 OBJECTIONS
January 8, 2016

CANADA'S REPLY TO MOBIL'S JANUARY 8, 2016 RESPONSES
January 21, 2016

1. Pursuant to Procedural Order No. 1 of the Arbitral Tribunal dated November 24, 2015, and in conformity with Article 3(3) of the IBA Rules on the Taking of Evidence in International Arbitration (the "IBA Rules"), Claimant Mobil Investments Canada Inc. ("Mobil") hereby requests that Respondent Canada produce for examination, inspection and copying the documents described below on or before January 22, 2016.

2. Mobil uses certain terms and abbreviations in its requests for documents, which have the following meanings:

   a) "Accord Acts" means the Federal Accord Act and the Provincial Accord Act;

   b) "and" means "and/or";

   c) "Board" means Canada-Newfoundland and Labrador Offshore Petroleum Board and Canada-Newfoundland Offshore Petroleum Board, including the Board's past and present members, officers, employees, directors, or other representatives, to the extent they presently possess or control responsive material;

   d) "CRA" means the Canada Revenue Agency;

   e) "concerning" means addressing, relating to, referring to, describing, discussing, identifying, evidencing, constituting, and recording;

   f) "Documents" is used in the broadest sense possible and includes, without limitation, all originals, non-identical copies (whether different from the original because of underlining, editing marks, notes made on or attached to such copy, or otherwise), and drafts, whether printed or recorded (through a sound, video or other electronic, magnetic or digital recording system) or reproduced by hand, including but not limited to writings, recordings, and photographs, letters, correspondence, purchase orders, invoices, telegrams, telexes, memoranda, records, summaries of personal conversations or interviews, minutes or records or notes of meetings or conferences, note pads, notebooks, postcards, "Post-It" notes, stenographic or other notes, opinions or reports of consultants, opinions or reports of experts, projections, financial or statistical statements or compilations, checks (front and back), contracts, agreements, appraisals, analyses, confirmations, publications, articles, books, pamphlets, circulars, microfilm, microfiche, reports, studies, logs, surveys, diaries, calendars, appointment books, maps, charts, graphs, bulletins, photostats, speeches, data sheets, pictures, illustrations, blueprints, films, drawings, plans, tape recordings, videotapes, disks, diskettes, data tapes or readable computer-produced interpretations or transcriptions thereof, electronically transmitted messages ("e-mail"), voice mail messages, inter-office communications, advertising, packaging and promotional materials, and any other writings, papers and tangible things of whatever description whatsoever, including but not limited to all information contained in any computer or electronic data processing system, or on any tape, whether or not already printed out or transcribed;

   g) "E&T" means education and training;

   h) "Federal Accord Act" means the Canada-Newfoundland Atlantic Accord Implementation Act;

   i) "Guidelines" means the 2004 Canada-Newfoundland and Labrador Offshore Petroleum Board Guidelines for Research and Development Expenditures;

   j) "Hibernia" means the Hibernia oil field located in the North Atlantic Ocean, 315 kilometers east-southeast of St. John's, Newfoundland;

   k) "HMDC" means the Hibernia Management and Development Company Ltd.;

   l) "NAFTA" means the North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America;

   m) "including" means "including, but not limited to";

n) "or" means "and/or";

o) "Province" means the Province of Newfoundland and Labrador;

p) "Provincial Accord Act" means the Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act;

q) "SR&ED" means Scientific Research and Experimental Development;

r) "R&D" means research and development; and

s) "Terra Nova" means the Terra Nova oil field located in the North Atlantic Ocean, 350 kilometers east-southeast of St. John's, Newfoundland.

3. The use of the singular form of any word includes the plural and vice versa.

4. For convenience, Mobil has organized its requests for documents under the headings in the schedule below. A request for documents or categories of documents may be relevant to more than one heading. These headings are not intended to limit the documents or categories of documents that are to be produced pursuant to the requests in the schedule.

5. With regard to some of the requests, none of the documents requested are in the possession, custody or control of Mobil. With regard to other categories, although Mobil may already possess some of the documents described by those categories, without knowing the full universe of documents that exist, it is impossible to state whether Mobil possesses all such documents, or whether some are in the exclusive possession, custody or control of Canada. Accordingly, Mobil believes it has a good faith basis for requesting all of the documents described below. Moreover, Mobil has a reasonable and good faith belief that the documents requested exist and are in the possession, custody and control of Canada, as the Canadian government or the government of the Province of Newfoundland and Labrador and/or the Canada-Newfoundland and Labrador Offshore Petroleum Board was involved in the creation or maintenance of many of these documents. Canada is instructed to search for documents in whichever units of the federal and provincial governments (including the Board) are reasonably likely to have responsive documents.

6. Mobil reserves the right to request the production of additional documents at a later date, including but not limited to documents whose existence and/or relevance becomes known to Mobil on the basis of documents that are produced by Canada. As set forth in Procedural Order No. 1, Mobil may also request Canada to produce documents based upon the contents of Canada's Counter-Memorial.

7. Additionally, as set forth in Procedural Order No. 2, all documents produced in *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* (ICSID Case No. ARB(AF)/07/4) ("Mobil I Arbitration") may be used by the disputing parties in this arbitration. For that reason, the following requests do not seek documents produced by Canada to Mobil in the course of the Mobil I Arbitration, except to the extent that these documents were subsequently modified or supplemented.

Canada's General Reply to Mobil's January 8, 2016 Responses: *Claimant's Request for Arbitration ("RFA")* states at ¶ 27 that *"[t]he key issue in dispute is the amount of damages that Claimant has incurred since April 1, 2012 (at Hibernia) and January 1, 2012 (at Terra Nova)." At this stage of the proceedings, the Tribunal should assess the Claimant's document requests in light of whether Claimant has established that they are relevant and material to the outcome of this "key issue." In an effort to reduce the need for the Tribunal to rule on all disputed requests, Canada has modified or withdrawn certain of its objections with respect to those requests which appear to be reasonably grounded in Claimant's alleged damages at Hibernia and Terra Nova during the time periods set out in its RFA. On the other hand, requests for documents which are not linked to Claimant's Hibernia and Terra Nova damages claim and are premised on assumptions about what Canada will argue in its Counter-Memorial regarding the binding status of the Mobil I Award should be denied or, as proposed by Canada with respect to certain of Claimant's requests, deferred until the second round of document production when it will be clear whether the request(s) are relevant and material in light of defences raised in Canada's Counter-Memorial.*

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	CANADA'S OBJECTIONS	MOBIL'S RESPONSE TO CANADA'S OBJECTIONS	DECISION OF THE TRIBUNAL
Legal Instruments					
1.	Documents concerning the drafting and negotiating history of paragraph 2 of Annex I of the NAFTA and Canada's Annex I reservation to the NAFTA for the Federal Accord Act, including documents concerning the rationale for including the description of the R&D and E&T provisions in Annex I.	These documents may be relevant and material to determining the intent, scope, and significance of Canada's Annex I reservation, which Mobil anticipates Canada to invoke in this arbitration with respect to Mobil's claims under NAFTA Article 1106(1). Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("VCLT") provide that "recourse … to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion" may be appropriate, e.g., "in order to confirm the meaning resulting from the application of article 31[.]"	Canada objects to the production of the requested documents on the following grounds: First and foremost, it is premature and inappropriate for Claimant to request documents based on what it "anticipate(s)" Canada will "invoke in this arbitration" when Canada has not yet filed its Counter-Memorial or otherwise taken a position on "the intent, scope and significance of Canada's Annex I reservation" in this arbitration. Second, this request is overly speculative because it seeks documents which, in Claimant's own words, only "*may be* relevant or material" and fails to establish how they are relevant and material to its claim within the meaning of IBA Rules 9(2)(a). Third, the production of the requested documents would be unreasonably burdensome under IBA Rule 9(2)(c). Canada would have to search for and organize a large quantity of documents involving treaty negotiations with the United States and Mexico from more than 20 years ago. The time required and cost involved is unduly burdensome in light of the lack of relevance and materiality of the requested documents.	<u>(1) Ripeness</u> Relevance and materiality can be assessed against "factual allegations to be made in future submissions," especially where document production occurs prior to the first full memorials.[3] Additionally, under § 15.2 of Procedural Order No. 1 (proposed by Canada[4]), Mobil is required to request documents that are reasonably foreseeable at this juncture. Given that Canada has not filed any pleadings in this arbitration, but has done so in earlier proceedings involving the same legal issues between the same parties, reasonable foreseeability must be informed by Canada's positions and arguments in the Mobil I Arbitration. In its Counter-memorial in the Mobil I Arbitration, Canada devoted approximately ten pages to addressing whether "the Guidelines Fall Within the Scope of Canada's Annex I Reservation to Article 1106." For the purposes of Procedural Order No. 1, the requested documents are reasonably foreseeable as relevant to points of contention between the parties in this arbitration. The interpretation and application of Annex I, para. 2 is material to the outcome of this case, as Mobil's claims, *inter alia*, are based on Article 1106. <u>(2) Relevance & Materiality</u> Mobil's Request for Arbitration contends that "the Guidelines are prohibited	1. The request is denied as premature. 2. Once the respondent has filed its Counter-Memorial, the Claimant is free to make a fresh request based on the arguments actually raised in the Counter-Memorial. 3. Should such a request be made, any claim that documents requested are privileged must be accompanied by a privilege log.

[3] As one NAFTA tribunal held in a dispute involving Canada, "[t]he request for production must establish the relevance and materiality of each document or of each specific category of documents sought … in such a way that the other Party and the Tribunal are able to refer to allegations of facts in the submissions filed by the Parties to date or factual allegations to be made in future submissions, provided that such factual allegations are made or at least summarized in the request for production of documents." *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Procedural Order No. 4, 12 July 2013 at ¶ 28(b), *available at* http://www.italaw.com/sites/default/files/case-documents/italaw1576.pdf. Indeed, "[i]n specifying the relevance and materiality standard in this manner, the Tribunal wishes to avoid adopting too formalistic a view that may excessively restrict disclosure of documents, **taking especially into consideration that, according to the schedule in this arbitration, the document production phase takes place prior to the first full memorials**." *Id.* at ¶ 40 (emphasis added).

[4] See Canada's letter to M. Polasek (ICSID) dated November 11, 2015.

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	CANADA'S OBJECTIONS	MOBIL'S RESPONSE TO CANADA'S OBJECTIONS	DECISION OF THE TRIBUNAL
			Fourth, any documents responsive to this request are solicitor-client and/or attorney work product privileged, within the meaning of IBA Rule 9(2)(b), or fall within political or institutional sensitivity within the meaning of IBA Rule 9(2)(f). Canada notes that it already undertook to search for the requested documents in the Mobil I Arbitration and no relevant non-privileged documents were found (*see* Mobil I Arbitration, Canada's Further Comments of March 2, 2010 to Claimant's December 15, 2009 Request for Documents). ***Canada's Reply:*** *The same document request by Claimant was already rejected by the Mobil I tribunal on March 27, 2010.[1] Claimant provides no explanation as to why the outcome should be any different in this case. The Mobil I tribunal also emphasized that the VCLT places priority on the ordinary meaning of the treaty, taken in its context, and that supplementary means of interpretation would only be called for when a term is ambiguous, obscure or manifestly absurd or unreasonable if interpreted in accordance with ordinary treaty interpretation principles (Mobil I Decision ¶ 231-232). The Methanex v. United States tribunal made the same point in rejecting the claimant's request for the NAFTA negotiating history and declining to follow the Canfor decision relied on by*	performance requirements that are not exempted by Canada's Annex I reservation." Canada unsuccessfully contested this interpretation in the Mobil I Arbitration. The scope of Annex I, para. 2 may be at issue in this case, as that provision determines the scope and nature of Canada's Annex I reservation vis-à-vis Mobil's claims under Article 1106. As such, the requested documents are both relevant and material.[5] <u>(3) Burden</u> As one NAFTA tribunal observed with respect to Canada, the "issue of whether a request should be rejected as unduly burdensome must … take into account both the time and effort required to produce the requested documents and the prospect that these documents will have probative value."[6] Canada does not address the extent of its alleged burden, nor does it balance that burden with the probative value of the requested documents. Given that the nature and scope of the Annex I reservation formed the heart of Canada's defenses in the Mobil I Arbitration, and thus are reasonably foreseeable to play a significant role in its defenses before this tribunal with respect to the same "continuing breach" of the NAFTA, the requested documents' probative value significantly outweighs Canada's unquantified burden in producing them. In any event, Canada's burden is unlikely to be substantial, given that it "already	

[1] *Mobil/Murphy arbitration*, Updated Redfern Schedule attached to Tribunal's Letter of March 27, 2010, p. 6 ("The Tribunal refuses to grant the order to produce Canada's documents to reconstruct the scope Canada intended to give its Annex I reservation to the NAFTA. The Tribunal has taken note of the fact that Canada itself has stated that '[n]o inquiry into 'subjective intent' need be undertaken" and that there is no need to examine documents concerning the drafting and negotiating history of Canada's Annex I reservation to the NAFTA for the Accord Act.' The Tribunal moreover reminds the Parties that Articles 31 and 32 of the Vienna Convention on the Law of Treaties attach the greatest importance for the interpretation to the ordinary meaning of the treaty provisions, taken in their context. In view of the above, the Tribunal does not envisage to take into account unilateral "travaux préparatories" to interpret Canada's reservation.").

[5] Another NAFTA tribunal has granted similar requests for travaux préparatoires of the treaty, such as requests for "communications, explication notes, position papers or memoranda which, to the extent they exist, were shared among the three NAFTA Parties with respect to the relevant portions of the NAFTA" at dispute in that case. See *Canfor Corporation v. United States of America, UNCITRAL ("Canfor")*, Procedural Order No. 5, 28 May 2004 at ¶¶ 16 and 21, *available at* http://www.state.gov/documents/organization/33109.pdf.

[6] *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon Delaware Inc. v. Government of Canada*, PCA Case No. 2009-04 ("*Bilcon*"), Procedural Order No. 8, 25 November 2009 at ¶ 1(d), *available at* http://www.italaw.com/sites/default/files/case-documents/italaw1153_0.pdf.

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	CANADA'S OBJECTIONS	MOBIL'S RESPONSE TO CANADA'S OBJECTIONS	DECISION OF THE TRIBUNAL
			Claimant.[2] Claimant also omits to mention that the Bilcon v. Canada tribunal – cited by Claimant itself here – rejected the claimant's request for NAFTA negotiating history because the probative value of documents could not outweigh the burden of searching for and producing them (see ¶ 1(e) of Bilcon Procedural Order No. 8, 25 November 2009 cited by Claimant above).Other NAFTA tribunals have also rejected such requests (e.g., Merrill & Ring v. Canada; Mesa v. Canada). *Claimant already has voluminous materials relating to the interpretation of Annex I and Canada's reservation in its possession and has not alleged that they are somehow incomplete or insufficient for it to make its claims. Claimant simply speculates that additional discovery is necessary without explaining what gaps remain to be filled.* *Canada also notes that it already asserted privilege over the twelve responsive documents Canada was able to uncover six years ago and received no protest from the Claimant or the Mobil I tribunal (See Mobil I, Updated Redfern Schedule*	undertook to search for the requested documents in the Mobil I Arbitration" and found responsive materials. (4a) Legal Privilege Canada has not met its burden of establishing the applicability and scope of all alleged privileges under the NAFTA and the IBA Rules.[7] Other NAFTA tribunals have held that Canada must establish four separate requirements in order to invoke solicitor-client privilege.[8] Attorney work product privilege has its own requirements. Canada does not discuss or establish these factors, nor distinguish between the type of privilege ("solicitor-client and/or attorney work product privileged") on which it relies. (4b) Political/institutional Sensitivity The Confidentiality Order (Procedural Order No. 2) adequately addresses Canada's concerns about political or institutional sensitivity. Additionally, Article 9(2)(f) of the IBA Rules requires a balancing exercise for which Canada bears the burden of proof.[9] As Canada conceded in another NAFTA case, "a mere assertion of sensitivity is not enough to sustain a privilege claim."[10] Canada does not	

[2] *Methanex Corporation v. United States*, Final Award of the Tribunal on Jurisdiction and Merits, August 3, 2005, Part II, Chapter H, pages 9, paras. 19-20. Available at: http://www.state.gov/documents/organization/51052.pdf

[7] See *Bilcon*, Procedural Order No. 13, 11 July 2012 at ¶¶ 24-25, *available at* http://www.italaw.com/sites/default/files/case-documents/italaw1164.pdf (holding that "for a party to assert privilege on grounds of political and institutional sensitivity in the context of NAFTA Chapter Eleven proceedings, it must first demonstrate that it carried out the requisite balancing exercise" and placing the "burden of establishing the validity of a [privilege] claim . . . on the party asserting it"); also note *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order on Privileged Document Production, 5 July 2013 at ¶¶ 33 and 42, *available at* http://www.italaw.com/sites/default/files/case-documents/italaw1575.pdf (in NAFTA case applying IBA Rules, placing the burden of demonstrating the attorney-client privilege and the attorney work product protection on the party asserting it).

[8] *Vito G. Gallo v. Government of Canada*, UNCITRAL ("*Gallo*"), Procedural Order No. 3, 8 April 2009 at ¶ 47, *available at* http://www.uncitral.org/res/transparency-registry/registry/data/can/v_g__gallo_html/gallo-po-12.pdf ("In general, a document needs to meet the following requirements in order to be granted special protection under solicitor-client privilege: [t]he document has to be drafted by a lawyer acting in his or her capacity as lawyer; [a] solicitor-client relationship based on trust must exist as between the lawyer (in-house or external legal advisor) and the client; [t]he document has to be elaborated for the purpose of obtaining or giving legal advice; [t]he lawyer and the client, when giving and obtaining legal advice, must have acted with the expectation that the advice would be kept confidential in a contentious situation"); also note *Bilcon*, Procedural Order No. 12, 2 May 2012 at ¶ 21, *available at* http://www.italaw.com/sites/default/files/case-documents/italaw1163.pdf (affirming application of *Gallo* factors to Canada's claim of solicitor-client privilege).

[9] *Bilcon*, Procedural Order No. 13, 11 July 2012 at ¶¶ 22-26, *available at* http://www.italaw.com/sites/default/files/case-documents/italaw1164.pdf ("any refusal to produce documents based on their political or institutional sensitivity requires a balancing process, weighing, on the one hand, the compelling nature of the requested party's asserted sensitivities and, on the other, the extent to which disclosure would advance the requesting party's case. This balancing requirement distinguishes absolute privileges from qualified privileges, such as the one at issue here"); *Gallo*, Procedural Order No. 3, 8 April 2009 at ¶ 54, *available at* http://www.uncitral.org/res/transparency-registry/registry/data/can/v_g__gallo_html/gallo-po-12.pdf; *Merrill & Ring Forestry L. P. v. Government of Canada*, UNCITRAL, ICSID Administered, Decision of the Tribunal on Production of Documents, 18 July 2008 at ¶ 19, *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/merrill-po-16.pdf.

[10] *Bilcon*, Procedural Order No. 13, 11 July 2012 at ¶ 28, *available at* http://www.italaw.com/sites/default/files/case-documents/italaw1164.pdf.

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	CANADA'S OBJECTIONS	MOBIL'S RESPONSE TO CANADA'S OBJECTIONS	DECISION OF THE TRIBUNAL
			attached to tribunal's Letter of March 27, 2010, p. 11.). *If the Tribunal is not inclined to deny the request, Canada proposes that it be postponed until the second round of document production after Canada's Counter-Memorial when the relevance and materiality of the request can be properly assessed. Claimant's sole justification for the request is that it "anticipates Canada to invoke in this arbitration" certain defences based on what Canada argued in the Mobil I arbitration and that "the scope of Annex I, para. 2 may be at issue in this case." Claimant has no basis upon which to make such speculative assumptions. Canada has taken no position on the status of the Mobil I Award and will not do so until its Counter-Memorial (as is its right to do under the ICSID Arbitration Rules). Canada's defenses with respect to the binding status of the Award with respect to Articles 1106(1), 1108(1), Annex I paragraph 2 and Canada's reservation for the Accord Act are therefore not "reasonably foreseeable" and requests #1, 2 and 3 need not be filed at this juncture in order to comply with the standard in Procedural Order No. 1 § 15.2.*	identify the nature of the alleged sensitivity (political or institutional) or demonstrate why the sensitivity is "compelling." <u>(4c) Canada's Prior Search</u> As to Canada's point about previously searching for but not finding "relevant non-privileged documents," Canada has not demonstrated the applicability of any legal privilege, as required by IBA Rules, Article 9(2)(b).	
2.	Documents concerning the drafting and negotiating history of Article 1108(1) of the NAFTA.	These documents may be relevant and material to determining the intent, scope, and significance of Article 1108(1) and its potential interaction with the Article 1106(1) claims in this arbitration. Articles 31 and 32 of the VCLT provide that "recourse … to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion" may be appropriate, e.g., "in order to confirm the meaning resulting from the application of article 31[.]"	Canada objects to the production of the requested documents on the same grounds set out in its response to Request #1 above. Canada further notes that the draft negotiating texts of Chapter Eleven produced between 1991 and 1993 by the NAFTA investment negotiating group are available online at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/trilateral_neg.aspx?lang=eng.	<u>(1) Repeated Objections</u> Mobil repeats its responses to Canada's repeated objections to request no. 1. <u>(2) Publicly Available Documents</u> Canada's hyperlink is only a partial response. As one NAFTA tribunal observed in granting a similar request, "[t]o the extent they exist, negotiating records such as communications, explication notes, position papers or memoranda established during the negotiation of the Agreement and which were circulated among, discussed by or relied upon by the	1. The request is denied as premature. 2. Once the respondent has filed its Counter-Memorial, the Claimant is free to make a fresh request based on the arguments actually raised in the Counter-Memorial. 3. Should such a request be made, any claim that documents requested are privileged must be accompanied by a privilege log.

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	CANADA'S OBJECTIONS	MOBIL'S RESPONSE TO CANADA'S OBJECTIONS	DECISION OF THE TRIBUNAL
			Claimant has not established why any documents beyond those which are already publically available are relevant and material to its claim. ***Canada's Reply:*** *See reply above to Request #1*	negotiating teams or by the drafting teams of the NAFTA Parties may well be pertinent to the issue of the common intention of the NAFTA Parties in suggesting a particular draft and in adopting, or rejecting, a particular provision. The Tribunal notes in this respect that the Respondent has neither confirmed nor denied the existence of such documents."[11] So too here. The hyperlinked documents provided by Canada do not contain such negotiating material and likely represent a narrow portion of all responsive documents.[12] Mobil requests that Canada produce all responsive documents not found at the hyperlink. <u>(3) Relevance & Materiality</u> A central issue in this arbitration is Canada's liability under Article 1106(1) for imposing and implementing the Guidelines. Canada alleged in the Mobil I Arbitration, and can reasonably be anticipated to allege in this arbitration, that the Guidelines are exempted from Article 1106 by way of Article 1108(1). As such, determining the scope and interpretation of Article 1108(1) is, as it was in the Mobil I Arbitration with respect to the very same "continuing breach," of relevance. These documents could be material to the outcome of the case, as well, given the centrality of Article 1108(1). Finally, another NAFTA tribunal granted a similar request with respect to Article 1108.[13]	

[11] *Canfor*, Procedural Order No. 5, 28 May 2004 at ¶ 20, *available at* http://www.state.gov/documents/organization/33109.pdf.

[12] According to that hyperlink (last accessed on December 31, 2015), "[w]ith the exception of the initial draft text, dated December 1991 which contains initial proposals, these drafts represented the status of the investment negotiations at the conclusion of each of the negotiating group's meetings and, upon circulation to all three Parties, provided the starting point for discussion at the next meeting."

[13] *Canfor*, Procedural Order No. 5, 28 May 2004, *dispositif*, *available at* http://www.state.gov/documents/organization/33109.pdf ("invit[ing] the Respondent to file … any materials such as communications, explication notes, position papers or memoranda which were shared among the three NAFTA Parties with respect to the relevant portions of the NAFTA as identified in the Claimant's request for documents of March 8, 2004 (**Articles 1101 and 1108 insofar as they relate to scope and coverage (including reservations and exceptions**), Articles 1901 through 1904 and 1911, and Article 2004)") (emphasis added).

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	CANADA'S OBJECTIONS	MOBIL'S RESPONSE TO CANADA'S OBJECTIONS	DECISION OF THE TRIBUNAL
3.	Documents concerning the drafting and negotiating history of Article 1106(1) of the NAFTA.	These documents may be relevant and material to determining the intent, scope, and significance of Article 1106(1), which Mobil anticipates will be in dispute in this arbitration. Articles 31 and 32 of the VCLT provide that "recourse … to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion" may be appropriate, e.g., "in order to confirm the meaning resulting from the application of article 31[.]"	Canada objects to the production of the requested documents on the same grounds set out in its response to Request #1 above. Canada further notes that the draft negotiating texts of Chapter Eleven produced between 1991 and 1993 by the NAFTA investment negotiating group are available online at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/trilateral_neg.aspx?lang=eng. Claimant has not established why any documents beyond those which are already publically available are relevant and material to its claim. ***Canada's Reply:*** *See reply above to Request #1*	(1) Repeated Objections Mobil repeats its responses to Canada's repeated objections to request no. 1. (2) Publicly Available Documents Mobil repeats its response to Canada's similar objection to request no. 2. (3) Relevance & Materiality Mobil repeats its response to Canada's similar objection to request no. 2.	1. The request is denied as premature. 2. Once the respondent has filed its Counter-Memorial, the Claimant is free to make a fresh request based on the arguments actually raised in the Counter-Memorial. 3. Should such a request be made, any claim that documents requested are privileged must be accompanied by a privilege log.
Benefits Reporting					
4.	Documents from December 15, 2009[14] to the present concerning the Board's consideration, analysis, or evaluation of the R&D or E&T expenditures reported pursuant to Decision 86.01 approving the Hibernia Benefits Plan, including communications from the Board responding to the submission of such reports by HMDC or Mobil Oil Canada.	These documents are relevant and material to determining the Board's understanding of the reporting and monitoring function and the manner in which it received, considered, and determined reports submitted pursuant to Decision 86.01.	Canada objects to the production of the requested documents on the following grounds: First, "communications from the Board responding to the submission of [R&D or E&T] reports by HMDC or Mobil Oil Canada" are already in the possession of the Claimant. Second, the request fails to comply with IBA Rule (9)(2)(a). Claimant's statement of relevance and materiality has no relationship to any aspect of its claim as set out in its Request for Arbitration.	(1) Documents in Claimant's Possession Mobil does not seek documents transmitted to it or its affiliates. (2 & 3) Relevance & Materiality This request is material to the case because it addresses the implementation and imposition of the Guidelines, held to be a "continuing breach" of Article 1106 as to Hibernia (and Terra Nova) in the Mobil I Arbitration. In this arbitration, Mobil seeks damages related to that ongoing breach. Responsive documents could go to both (i) Canada's liability under Article 1106 as well as (ii) the extent of Mobil's damages	1. The request is allowed with regard to documents concerning the period after 1 April 2012 for the Hibernia field and 1 January 2012 for the Terra Nova field. 2. The request is otherwise denied. 3. Any claim that documents subject to paragraph (1), above, are privileged must be accompanied by a privilege log.

[14] I.e., from the date of Claimants' requests for document production in the Mobil I Arbitration.

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	CANADA'S OBJECTIONS	MOBIL'S RESPONSE TO CANADA'S OBJECTIONS	DECISION OF THE TRIBUNAL
			Third, Claimant fails to establish how internal documents concerning "the Board's consideration, analysis, or evaluation of R&D and E&T expenditures reported pursuant to Decision 86.01" are related to "determining the Board's understanding of [its] reporting and monitoring function." The Board's reporting and monitoring function is set out in the Guidelines, The Accord Acts, and benefits plans for the Hibernia Project (and Terra Nova). Finally, a request for production of documents concerning the Board's evaluation of R&D and E&T under the Guidelines when such evaluations are not at issue or challenged in the Request for Arbitration is unfair within the meaning of IBA Rule 9(2)(g). If the Claimant has specific questions about the Board's evaluations, then it should pursue those questions through the normal administrative channels. Circumventing these ordinary channels through sweeping document requests in a NAFTA arbitration would subvert the ordinary regulatory process. If regulators must disclose documents which evidence their internal deliberations concerning decisions which are not at issue in the arbitration, those deliberations will be chilled and the Board's ability to properly exercise its legislative mandate will be undermined. ***Canada's Reply:*** *Canada objected to Requests #4 and 5 because, among other reasons, Claimant*	for the time periods at issue in this arbitration. <u>(4) Unfairness</u> The Confidentiality Order (Procedural Order No. 2) adequately addresses Canada's concerns about protecting the internal deliberations of the Board. Additionally, Canada's objection is inconsistent with the Board's own avowed commitment to, and "ongoing focus on[,] improved openness and transparency."[15] With respect to any "chill[ing]" effect on the Board's activities and deliberations, a NAFTA tribunal has remarked that such concerns by Canada are outweighed when the responsive documents concern the regulator's own misconduct in breach of the NAFTA.[16] The Board's approach to, analysis of, and decisions on Mobil's R&D and E&T expenditures are directly implicated as breaches of the NAFTA. The tribunal should not accept Canada's invitation to deny production of documents for conduct that was determined in the Mobil I Arbitration to be a "continuing breach" of the NAFTA.	

[15] See, e.g., C-NLOPB new releases 2011, *available at* http://www.cnlopb.ca/news/nr20110420.php.

[16] See *Bilcon*, Procedural Order No. 13, 11 July 2012 at ¶ 42, *available at* http://www.italaw.com/sites/default/files/case-documents/italaw1164.pdf ("Should the available evidence indicate that the JRP proceedings were tarnished by bias or misconduct, the value of preserving its deliberational secrecy diminishes, considering that the protection of its internal deliberations is intended to ensure the very soundness of its proceedings. Put differently, any argument to protect certain elements of institutional proceedings in the interest of preserving the sound administration of justice loses value where the proceedings have been shown to be tainted").

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	CANADA'S OBJECTIONS	MOBIL'S RESPONSE TO CANADA'S OBJECTIONS	DECISION OF THE TRIBUNAL
			made no attempt to explain how the Board's "understanding of [its] reporting and monitoring function and the manner in which it received, considered and determined reports" for Hibernia and Terra Nova is linked to its RFA or any other argument it anticipates making in its Memorial. Claimant's new justification that the documents could go to the issue of a "continuing breach" of Article 1106 is unavailing. Canada has taken no position on the status of the Mobil I Award and will not do so until its Counter-Memorial. Canada's defenses are therefore not "reasonably foreseeable" and these request # 4 and 5 need not be filed at this juncture in order to comply with the standard in Procedural Order No. 1 § 15.2. *Canada maintains its objection that requests for explanations of why expenditures were denied R&D and E&T credits should be first directed to the Board. The Claimant cites the Bilcon tribunal to suggest that the Board's "consideration, analysis, or evaluation of the R&D or E&T expenditures reported pursuant to Decision 86.01" was somehow "tainted" and that documents should be produced on that basis. However, Claimant has never alleged, and does not say it will allege, that the Board's internal deliberations were tainted. The integrity of the Board's internal deliberations were not at issue in Mobil I and thus cannot be characterized as "conduct that was determined in the Mobil I Arbitration to be a "continuing breach" of the NAFTA" as Claimant alleges.* *However, and without prejudice to the above objections, because Claimant has belatedly said that such documents may be relevant to "the extent of Mobil's damages*		

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			for the time periods at issue in this arbitration," and notwithstanding the fact that Claimant does not challenge the Board's "consideration, analysis, or evaluation of the R&D or E&T expenditures reported pursuant to Decision 86.01" in its RFA, Canada agrees to produce responsive documents for the time periods set out in its RF: since April 1, 2012 (at Hibernia) and January 1, 2012 (at Terra Nova). Canada maintains its objection with respect to documents prior to the above dates given that Claimant is not seeking damages for the period 2009-2012 in this arbitration.		
5.	Documents from December 15, 2009 to the present concerning the Board's consideration, analysis, or evaluation of the R&D or E&T expenditures reported pursuant to Decision 97.02 approving the Terra Nova Benefits Plan, including communications from the Board responding to the submission of such reports by Petro-Canada and Suncor.	These documents are relevant and material to determining the Board's understanding of the reporting and monitoring function and the manner in which it received, considered, and determined reports submitted pursuant to Decision 97.02.	Canada objects to the production of the requested documents on the same bases as set out in Canada's objections to Request #4. In addition, any "communications from the Board responding to the submission of [R&D or E&T] reports by Petro-Canada and Suncor" are either already in the possession or control of the Claimant or are more easily obtained directly from Petro-Canada and Suncor pursuant to Claimant's right to request documents relating to the Terra Nova project. *See e.g.,* Amended and Restated Terra Nova Development and Operating Agreement § 12.8(d) (Mobil I Arbitration, CE-14). Claimant has given no indication that Petro-Canada/Suncor is unwilling or unable to provide the requested documents. ***Canada's Reply:*** *See reply to Request #4 above.*	(1a) Repeated Objections Mobil repeats its response to Canada's objection to request no. 4. (1b) Relevance & Materiality The requested documents may address the implementation and imposition of the Guidelines, held to be a "continuing breach" of Article 1106, to Terra Nova, since the Mobil I Arbitration. In this arbitration, Mobil seeks damages related to that breach, and responsive documents may go to both (i) the Board's liability under Article 1106 as well as (ii) the extent of Mobil's damages for the time periods at issue in this arbitration. (2) Petro-Canada/Suncor Mobil does not seek documents transmitted to it or its affiliates, or that were otherwise transmitted to Petro-Canada/Suncor.	1. The request is allowed with regard to documents concerning the period after 1 April 2012 for the Hibernia field and 1 January 2012 for the Terra Nova field. 2. The request is otherwise denied. 3. Any claim that documents subject to paragraph (1), above, are privileged must be accompanied by a privilege log.
Promulgation of the Guidelines					

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	CANADA'S OBJECTIONS	MOBIL'S RESPONSE TO CANADA'S OBJECTIONS	DECISION OF THE TRIBUNAL
6.	Documents created or modified from November 2004 to the present concerning the Board's rationale for promulgating the Guidelines, including any documents concerning the sufficiency of the levels of R&D and E&T expenditures reported for Hibernia and Terra Nova at any point prior to November 2004.	These documents are relevant and material to determining the purpose for which the Guidelines were developed and whether, as Mobil anticipates Canada to allege, the sufficiency of the R&D and E&T expenditures reported at Hibernia and Terra Nova was a factor in the rationale for the promulgation of the Guidelines.	Canada objects to the production of the requested documents on the following grounds: First, it is premature and inappropriate for Claimant to request documents based on what it "anticipate(s)" Canada will "allege" in this arbitration when Canada has not yet filed its Counter-Memorial or otherwise taken a position regarding "the sufficiency of the R&D and E&T expenditures reported at Hibernia and Terra Nova [as] a factor in the rationale for the promulgation of the Guidelines." Second, Canada has already produced to the Claimant all documents relevant to this request in the Mobil I arbitration. The Guidelines were promulgated in November 2004 and Canada previously produced to the Claimant all documents "concerning the Board's rationale for promulgating the Guidelines." Claimant is also in possession of relevant documents as a result of the domestic litigation in Canadian courts which upheld the 2004 Guidelines as valid under Canadian law. Claimant has failed to establish why any documents that were created post-November 2004 (if any exist) are relevant and material to its claim as per IBA Rule 9(2)(a). ***Canada's Reply:*** *Claimant's rationale for this request is unavailing. There is no probative value in requesting documents relating to the promulgation of the Guidelines after they were promulgated. Even if such documents existed, their probative value could not possibly outweigh the burden of searching twelve years of records for responsive*	(1) Ripeness As discussed in Mobil's response to Canada's objections to request no. 1, the relevance and materiality of the requested documents should be judged against Canada's pleadings, and the tribunal's holdings, in the Mobil I Arbitration, as well as against reasonably foreseeable "factual allegations to be made in future submissions" in this arbitration. In the Mobil I Arbitration, Canada argued that the sufficiency of the levels of R&D and E&T expenditures at Hibernia and Terra Nova motivated the Board's decision to impose and apply the Guidelines. See, e.g., Canada's Counter-memorial at Section II.H ("The Board Intervened When Reporting Indicated that the Operators Were Not Fulfilling their Commitment to Expend on R&D and E&T") and Section II.I ("When Monitoring Revealed a Significant Decline in Expenditures on R&D and E&T in 2001, the Board Quickly Described its Expectations"). The Board's imposition and application of the Guidelines were found to be a "continuing breach" of the NAFTA in the Mobil I Arbitration for which Mobil seeks compensation in this arbitration. As such, the requested documents are relevant to a central issue in dispute between the parties. (2a) Mobil I Production Canada's objection with respect to its production in the Mobil I Arbitration is irrelevant. Request no. 20 dated December 15, 2009 in the Mobil I Arbitration sought documents "from January 2001 to November 2004."[17] This request seeks	1. The request is denied as premature. 2. Once the respondent has filed its Counter-Memorial, the Claimant is free to make a fresh request based on the arguments actually raised in the Counter-Memorial. 3. Should such a request be made, any claim that documents requested are privileged must be accompanied by a privilege log.

[17] Mobil I Redfern Schedule for Claimants' Requests for Document Production of December 15, 2009 through Canada's Objections of January 22, 2010, p. 17.

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	CANADA'S OBJECTIONS	MOBIL'S RESPONSE TO CANADA'S OBJECTIONS	DECISION OF THE TRIBUNAL
			documents. In Mobil I, Canada produced substantial documentation to Claimant relating to the promulgation of the Guidelines and Claimant has not shown that what it already has is insufficient or incomplete. Claimant merely asserts such documents are relevant and material without any explanation of what it has to do with the key issue of damages at Hibernia and Terra Nova. *Moreover, Claimant notes that its Mobil I Request No. 20 on December 15, 2009 only requested documents up until November 2004. Claimant obviously could have requested documents from November 2004 to December 15, 2009 at that time but did not do so, presumably because it believed such documents were not relevant or material to its claims. Claimant fails to explain why documents that were irrelevant and immaterial in the Mobil I arbitration are suddenly relevant and material now.* *If the Tribunal is not inclined to deny the request, Canada proposes that it be postponed until the second round of document requests. Claimant's sole justification for this request was that it "anticipates Canada to allege the sufficiency of the R&D and E&T expenditures reported at Hibernia and Terra Nova was a factor in the rationale for the promulgation of the Guidelines." It is premature and speculative to assume that Canada will make any such argument in this arbitration. Accordingly, Request #6 need not be filed at this juncture in order to comply with the standard set out in Procedural Order No. 1 § 15.2.*	documents "created or modified from November 2004 to the present." <u>(2b) Relevance & Materiality</u> The Board's rationale for promulgating the Guidelines is relevant and material to this case. The fact that responsive documents may have been generated or modified after November 2004 does not deprive them of relevance and materiality to the parties' dispute over a "continuing breach" of the NAFTA extending to the present day.	

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	CANADA'S OBJECTIONS	MOBIL'S RESPONSE TO CANADA'S OBJECTIONS	DECISION OF THE TRIBUNAL
7.	Documents prepared by or in the possession of the Board concerning the preparation of the benchmarks, including the factors thereof, for R&D and E&T spending under the Guidelines for 2012-2015, including documents concerning the Board's consideration of reports by Statistics Canada on average R&D expenditures by oil and gas companies and the decision to use these reports to establish the benchmarks for R&D and E&T spending under the Guidelines.	These documents are relevant and material to determining the manner in which the benchmarks were ascertained and how Mobil's expenditure requirements were calculated for the years at issue in this arbitration.	Canada objects to the production of the requested documents on the following grounds: First, the Claimant fails to explain how documents "concerning the preparation of the benchmarks" are relevant or material within the meaning of IBA Rule 9(2)(a). Claimant's Request for Arbitration does not challenge the manner in which the benchmarks were developed nor how the Claimant's expenditure requirements under the Guidelines were calculated. Claimant's statement of relevance and materiality makes no link between the requested documents and its claim for damages since April 1, 2012 (with regard to Hibernia) and January 1, 2012 (with regard to Terra Nova). Second, Canada notes that the details of the annual benchmarks created by Statistics Canada and relied upon by the Board are available online at: http://www.statcan.gc.ca/bsolc/olc-cel/olc-cel?catno=88-202-X&CHROPG=1&lang=eng Claimant has not established why any documents beyond those which are already publically available are relevant and material to its claim. Finally, a request for production of documents concerning the manner in which the Claimant's expenditure requirements were calculated when such calculations are not at issue or challenged in the Request for Arbitration is unfair within the meaning of IBA Rule 9(2)(g). If the Claimant has specific questions about the Board's calculations, then it should pursue those questions through the normal administrative channels. Circumventing	<u>(1) Relevance & Materiality</u> The required amount of R&D expenditures under the Guidelines for a specific period is determined on the basis of a benchmark derived from Statistics Canada reports on R&D spending by oil and gas companies in Canada. Requiring a fixed amount of expenditures on R&D services amounts to a "continuing breach" of the NAFTA. As such, the way in which the Board ascertains that mandatory expenditure may be an important factor in analyzing Canada's ongoing failure to comply with Article 1106. The requested documents could be, moreover, material to the outcome of Mobil's damages claims concerning those forced expenditures, to the extent they address the nature and scope of the required R&D and E&T expenditures for which Mobil seeks compensation in this arbitration. <u>(2) Publicly Available Documents</u> Mobil does not seek responsive documents that are publicly available. Mobil observes that Canada does not allege that all responsive documents are (i) public and (ii) available at the hyperlink it provides. To the contrary, Mobil's request seeks, *inter alia*, documents that may be internal to, amongst others, the Board, and not published at that hyperlink. <u>(3) Unfairness</u> Mobil repeats its response to Canada's objections to request no. 4. The requested documents directly address the Board's calculation of Mobil's liability under the Guidelines for the time periods at issue in this arbitration and may be significant in establishing or ascertaining Mobil's damages claims. Mobil's request does not circumvent "normal administrative channels;" rather, it is duly made in accordance with § 15 of Procedural Order	1. No order is required in light of the final paragraph of the Respondent's reply. 2. Any claim that documents subject to paragraph (1), above, are privileged must be accompanied by a privilege log.

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	CANADA'S OBJECTIONS	MOBIL'S RESPONSE TO CANADA'S OBJECTIONS	DECISION OF THE TRIBUNAL
			these ordinary channels through sweeping document requests in a NAFTA arbitration would subvert the ordinary regulatory process. If regulators must disclose documents which evidence their internal deliberations concerning decisions which are not at issue in the arbitration, those deliberations will be chilled and the Board's ability to properly exercise its legislative mandate will be undermined. ***Canada's Reply:*** *Canada maintains its objections as they apply to Claimant's justification that the requested documents are related to a "continuing breach" of Article 1106. As stated above, Canada has taken no position on the status of the Mobil I Award and will not do so until its Counter-Memorial. Canada's defenses with respect to the binding status of the Award regarding Article 1106 is thus not "reasonably foreseeable" and this request need not be filed at this juncture in order to comply with the standard in Procedural Order No. 1 § 15.2.* *However, because Claimant's January 8, 2015 responses belatedly state that the requested documents "could be" material to the outcome of Mobil's damages claims for the period Mobil seeks compensation, Canada agrees to produce non-privileged responsive documents.*	No. 1 and Article 3 of the IBA Rules. Additionally, the Confidentiality Order (Procedural Order No. 2) protects documents that are exchanged between the parties in the course of this arbitration if properly designated.	
8.	Documents prepared by or relied upon by Statistics Canada in the preparation of the information relied upon by the Board in developing its benchmarks for R&D and E&T spending under the Guidelines for 2012-2015, including (i) documents concerning data on upstream oil and gas companies used in the Statistics Canada reports and (ii) documents showing the	These documents are relevant and material to determining the manner in which the information provided by Statistics Canada and used to develop the Board's benchmarks was ascertained. This request is also relevant and material to understanding Statistics Canada's methodology, assumptions, and calculations used in preparing information	Canada objects to the production of the requested documents on the same grounds as set out in response to Request #7. Furthermore, the request calls for the production of confidential and sensitive information belonging to third-parties and as such is contrary to IBA Rule 9(2)(e).	(1) Repeated Objections Mobil repeats its responses to Canada's objections to request no. 7. (2) Third-party Information Canada does not show why production and appropriate redaction in accordance with the Confidentiality Order (Procedural Order No. 2), which protects third-party	1. The request is denied as premature. 2. Once the respondent has filed its Counter-Memorial, the Claimant is free to make a fresh request based on the arguments actually raised in the Counter-Memorial. 3. Should such a request be made, any claim that documents requested are

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	Statistics Canada data relied upon by the Board to develop the Guidelines benchmark broken down according to the project stage (i.e., exploration, development or production) to which the data relates.	and assertions that were ultimately used by the Board under the Guidelines.	***Canada's Reply:*** *Claimant fails to explain how documents "prepared by or relied upon by Statistics Canada in the preparation of the information relied upon by the Board in developing its benchmarks" is relevant or material within the meaning of IBA Rule 9(2)(a). Claimant merely asserts that the data underlying the benchmark "may be an important factor" to its claim under Article 1106. However, the data underlying the benchmark has no correlation whatsoever to whether the Guidelines require Mobil to accord a preference to local goods and services. Claimant also states that the data "could be" material to the outcome of Claimant's damages case. However, nowhere in its RFA does Claimant contest the manner in which the benchmarks were determined, not does it say that it will make that allegation in its Memorial.* *Claimant was fully able to brief the Mobil I tribunal on the relevance of the benchmark without having access to <u>any</u> of the Statistics Canada data that it is now requesting Canada to produce. The make-up of the Statistics Canada data had no impact on the outcome of the Mobil I arbitration. If the requested data was not relevant or material then, it cannot be relevant or material now. Claimant has not alleged that the requested documents will fill in any gaps not dealt with in the Mobil I arbitration or provide any further information of probative value.* *In any event, Claimant's request calls for the production of privileged, confidential and sensitive information belonging to third parties contrary to IBA Rule 9(2)(e). Claimant argues that in order to invoke this rule Canada must provide reasons that*	confidential information (see § 1(c)(ii) of that Order), is not possible. Additionally, withholding documents containing third-party information is disproportionate and moreover inconsistent with Canada's redaction of third-party confidential information in documents it disclosed in the Mobil I Arbitration. Additionally, under Article 9(2)(e) of the IBA Rules, Canada must establish "grounds … that the Arbitral Tribunal determines to be compelling." The assertion that some responsive documents might contain third-party information is not "compelling." For example, responsive documents may contain information aggregated for third-parties in such a way that any particular third party's information is not ascertainable. Such documents would, amongst others, be relevant and material for the reasons explained in Mobil's response to Canada's objections to request no. 7.	privileged must be accompanied by a privilege log.

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	CANADA'S OBJECTIONS	MOBIL'S RESPONSE TO CANADA'S OBJECTIONS	DECISION OF THE TRIBUNAL
			are "compelling." To explain briefly, in order to determine the benchmark, companies operating in the oil and gas extraction sector in Canada selected for the sample are required by law to answer an annual survey issued by Statistics Canada. The survey requires companies by law to disclose sensitive commercial and financial information pertaining to its research and development. It is the data compiled from these surveys that ultimately comprise the benchmark and which Claimant seeks to have produced pursuant to its request. The data, however, concerns entirely third party information. There are no documents that "may contain information aggregated for third-parties in such a way that any particular third party's information is not ascertainable" as Claimant imagines. *Moreover, the data is protected by statute. Section 18 of the Canada Statistics Act, Revised Statutes of Canada, 1985, Chapter s-19states:* *18 (1) Except for the purposes of a prosecution under this Act, any return made to Statistics Canada pursuant to this Act and any copy of the return in the possession of the respondent* ***is privileged and shall not be used as evidence in any proceedings whatever****.* *(2) No person sworn under section 6 shall by an order of any court, tribunal or other body be required in any proceedings whatever to give oral testimony or to produce any return, document or record with respect to any information obtained*		

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			in the course of administering this Act. [18] *The Canada Statistics Act makes clear that the requested documents are automatically privileged and confidential and none of it can be used in any proceeding whatsoever and no person can be compelled to disclose the data. Not only is production of such material contrary to IBA Rule 9(2)(b),(e) and (f), but by demanding production of such data by Statistics Canada, Claimant is in effect asking Canada (and the Tribunal) to break the law.* *Finally, the Claimant already has access to copious public information concerning how the benchmark is derived, which Statistics Canada publishes annually. These publications detail, among other things, the concepts employed by Statistics Canada, the methods used and how information is verified. Claimant fails to explain why this publically available information is insufficient for it to make its claim.*		
9.	Documents prepared by or relied upon by the Board in developing its benchmarks for R&D and E&T spending under the Guidelines for 2012-2015.	These documents are relevant and material to determining the manner in which Mobil's expenditure requirements were calculated for the years at issue in this arbitration.	Canada objects to the production of the requested documents on the same grounds as set out in response to Request #7. ***Canada's Reply:*** *As per Canada's reply to Request #7, while Canada maintains its objections with respect to any presumptive relevance the requested documents have to establishing a "continuing breach" of Article 1106, Canada will produce non-privileged responsive documents.*	<u>Repeated Objections</u> Mobil repeats its responses to Canada's objections to request no. 7.	1. No order is required in light of the final paragraph of the Respondent's reply. 2. Any claim that documents subject to paragraph (1), above, are privileged must be accompanied by a privilege log.

[18] Canada Statistics Act available at: http://laws-lois.justice.gc.ca/eng/acts/S-19/FullText.html (emphasis added). *See also* subsection 17(1) (Secrecy) and section 34 (the associated penalty provision for wrongful disclosure).

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	CANADA'S OBJECTIONS	MOBIL'S RESPONSE TO CANADA'S OBJECTIONS	DECISION OF THE TRIBUNAL
Enforcement of the Guidelines at Hibernia and Terra Nova and Damages					
10.	Documents from 2004 to present concerning whether the Board construed the R&D and E&T expenditures provisions in the Guidelines to be mandatory with respect to all existing or planned projects subject to the Guidelines, including any documents concerning the conditions to be imposed upon issuance of Production Operations Authorizations with respect to the Guidelines.	These documents are relevant and material to the claims under Article 1106 concerning the imposition and enforcement of performance requirements and, therefore, to the alleged violation of Article 1106.	Canada objects to the production of documents concerning "existing or planned projects" other than Terra Nova or Hibernia. The Claimant has not established how documents concerning other Projects is relevant and material to its claims within the meaning of IBA Rule 9(2)(a). Second, the request is overbroad and unduly burdensome because it commences from 2004 but fails to exclude documents which were already produced in the Mobil I Arbitration that cover the same subject matter. Claimant fails to establish why any documents created since the Mobil I Arbitration (if any exist) are relevant and material to its claim. Third, Claimant has not established how any documents prior to April 1, 2012 (with regard to Hibernia) and January 1, 2012 (with regard to Terra Nova) are relevant and material to its damages claim as described in its Request for Arbitration. Canada agrees to produce non-privileged and responsive documents since April 1, 2012 with regard to Hibernia and January 1, 2012 with regard to Terra Nova that are not already in the custody and control of Claimant. ***Canada's Reply:*** *The Mobil I tribunal specifically disavowed any relevance of its ruling to projects other than Hibernia and Terra Nova: "We have not been asked to address the implications for other investors in these [Hibernia and Terra Nova] projects, for other investment projects, or the White Rose project, which*	<u>Canada's Voluntary Production</u> Mobil notes Canada's agreement to produce documents while reserving Canada's objections. It is not clear if Canada intends to withhold certain documents on the basis of its objections. Canada's voluntary production does not include a significant time period for which Mobil requests documents (i.e., 2004-2012). Additionally, Canada intends to exclude "privileged" documents without indicating the type, nature, or extent of the privilege claimed. As discussed above in, e.g., Mobil's response to Canada's objections to request no. 1, Canada must establish the applicability of any claimed privilege, which it has not done. <u>(1) Other Projects</u> To the extent that Canada seeks to withhold documents based on its stated objections, Mobil responds as follows. Given that the Guidelines are not limited to Hibernia or Terra Nova, documents concerning other existing or planned projects subject to the Guidelines could be relevant to demonstrating the Guidelines' compulsory nature and thus material to demonstrating their "continuing breach" of Article 1106. <u>(2) Mobil I Production</u> Mobil does not seek any documents produced to it in the Mobil I Arbitration (see § 7 of the Preamble to Mobil's Requests for Document Production of December 4, 2015 above). Additionally, Canada's objection does not reach documents that were created or modified after Canada's production in the Mobil I	1. The request is allowed with regard to documents concerning the period after 1 April 2012 for the Hibernia field and 1 January 2012 for the Terra Nova field. 2. The request is otherwise denied as premature. 3. Once the respondent has filed its Counter-Memorial, the Claimant is free to make a fresh request based on the arguments actually raised in the Counter-Memorial. 4. Any claim that documents subject to paragraph (1), above, or which might be requested pursuant to paragraph (3) above, are privileged must be accompanied by a privilege log.

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	CANADA'S OBJECTIONS	MOBIL'S RESPONSE TO CANADA'S OBJECTIONS	DECISION OF THE TRIBUNAL
			could have a different set of applicable measures, and hence we do not do so […] This Decision only addresses the damages suffered by the Claimants and does not address the application of the 2004 Guidelines to other investors and to other projects."[19] *Other projects are governed by entirely different benefits plans and agreements. Just as they were irrelevant in the Mobil I arbitration, the requested documents are irrelevant now.* *In any event, Claimant is a participant in other existing and planned projects and already has access to documents setting out the conditions imposed upon Production Operation Authorizations pursuant to the Guidelines for those projects.* *As for the relevant date period, given that Claimant only seeks damages for Hibernia and Terra Nova starting in 2012, any documents outside that range are irrelevant and immaterial. This is further evidenced by the fact that Claimant could have easily sought such documents from 2004-2009 in the Mobil I arbitration but did not do so. If such documents were irrelevant then, they are irrelevant now. The burden of searching twelve years of records for responsive documents outweighs the probative value of such documents given that Claimant is not claiming damages for this period.* *Finally, Claimant's January 8, 2015 response states that "documents concerning other existing or planned projects subject to the Guidelines could be relevant to demonstrating the Guideline's compulsory nature and thus material to*	Arbitration, which are responsive to this request and should therefore be produced. (3) Relevance & Materiality As described in its Request for Arbitration, Mobil's damages claims are premised on the Guidelines being a "continuing breach" of the NAFTA since their imposition in 2004 and, in particular, during the time period for which Mobil claims damages in this arbitration. As such, documents concerning the Board's interpretation of the expenditures provisions as mandatory could influence the interpretation and application of Article 1106(1)(c), which prohibits Canada from "impos[ing] or enforc[ing] any of the following requirements, or enforce[ing] any commitment or undertaking[.]" Documents concerning Canada's breach of Article 1106 have been generated since the promulgation of the Guidelines in 2004. The fact that Mobil claims damages in this arbitration for the periods beginning in 2012 does not render the requested documents irrelevant or immaterial, as they go to Canada's continuing breaches under Article 1106 since 2004, not merely to the quantification of Mobil's loss. Furthermore, responsive documents have been created since the Mobil I Arbitration. For example, the Board recently conditioned renewal of Hibernia's Operations Authorization on meeting R&D expenditure obligations and demanded letters of credit to secure shortfall amounts assessed as of April 30, 2015.	

[19] Decision, ¶ 412 and fn. 432, p. 179.

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			demonstrating their 'continuing breach' of Article 1106." Claimants have themselves demonstrated that this request is purely speculative – any request that merely "could be relevant" fails to establish sufficient relevance and materiality. Canada maintains its objection to justifications which speculate on Canada's position regarding a "continuing breach" of Article 1106. Canada's defenses with respect to the binding status of the Mobil I Award are not "reasonably foreseeable" and requests related thereto need not be filed at this juncture in order to comply with the standard in Procedural Order No. 1 § 15.2.		
11.	Documents from February 26, 2009 to present concerning the Board's rationale for applying the Guidelines to Hibernia, including documents concerning the applicability of the Guidelines to Hibernia in light of its Decision 86.01 approving the Hibernia Benefits Plans.	These documents are relevant and material to ascertaining whether the Board or other entities of the Canadian or Provincial government interpreted the Accord Acts or the Board's Decision 86.01 approving the Hibernia Benefits Plan as reserving authority to stipulate mandatory expenditure levels after having approved the Benefits Plan. These documents also are relevant and material to understanding what, if any, consideration was given to the appropriateness of promulgating and continuing to maintain the Guidelines in light of Canada's obligations under the NAFTA as well as pursuant to (i) the Decision on Liability and on Principles of Quantum and (ii) the Award issued in the Mobil I Arbitration.	Canada objects to the production of the requested documents on the following grounds: First, Canada already produced to the Claimant in the Mobil I Arbitration all documents "relevant and material to ascertaining whether the Board or other entities of the Canadian or Provincial government interpreted the Accord Acts or the Board's Decision 86.01 approving the Hibernia Benefits Plan as reserving authority to stipulate mandatory expenditure levels after having approved the Benefits Plan." These documents are thus already in the Claimant's possession, custody and control. Second, the Claimant fails to explain how documents concerning consideration by the Board or other entities of the Canadian or Provincial government of the Decision and Award are relevant and material within the meaning of IBA Rule 9(2)(a). In its Request for Arbitration the Claimant does not challenge the consideration given by the Board or other entities to the Decision or Award, nor has Claimant established	<u>(1) Mobil I Production</u> Mobil does not seek any documents produced to it in the Mobil I Arbitration (see § 7 of the Preamble above). Canada's objection does not address documents that were created or modified after Canada's production in the Mobil I Arbitration. <u>(2) Relevance & Materiality</u> Canada's objection addresses "documents concerning consideration by the Board or other entities of the Canadian or Provincial government of the Decision and Award," which are only part of Mobil's request. Canada appears not to object otherwise to the relevance and materiality of the request. In any event, these documents are relevant to the case. The application of the Guidelines, and the Board's rationale therefor, directly implicate various elements of Article 1106's prohibition on performance requirements. Unless Canada agrees to abide by the holdings in the Mobil I Arbitration concerning Article	1. The request is denied as premature. 2. Once the respondent has filed its Counter-Memorial, the Claimant is free to make a fresh request based on the arguments actually raised in the Counter-Memorial. 3. Should such a request be made, any claim that documents requested are privileged must be accompanied by a privilege log.

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			how any documents, if any, that were created after February 26, 2009 are relevant and material to the claims set forth in its Request for Arbitration. Third, the request calls for documents that are solicitor-client, attorney work product or litigation privileged, within the meaning of IBA Rule 9(2)(b). Any "consideration given to the appropriateness of promulgating and continuing to maintain the Guidelines in light of Canada's under NAFTA as well as pursuant to (i) the Decision on Liability and on Principles of Quantum and (ii) the Award issued in the Mobil I Arbitration" would be obviously privileged. ***Canada's Reply:*** *Claimant has made no linkage between the requested documents and the "key issue" of quantum of damages at Hibernia and Terra Nova since April 1, 2012 and January 1, 2012, respectively, as described in its RFA, presumably because the requested documents have nothing to do with how Claimant intends to argue its damages case.* *If the Tribunal is not inclined to deny the request at this time, Canada proposes that it be postponed until the second round of document requests when it can be determined whether these requests are relevant or not. Claimant's January 8, 2016 responses state that "Unless Canada agrees to abide by the holdings in the Mobil I Arbitration concerning Article 1106's breach, which it has not done, such issues remain in dispute." As stated above, Canada has not taken any position on the binding status of the Award and need not do so until its Counter-Memorial.*	1106's breach, which it has not done, such issues remain in dispute. <u>(3) Legal Privilege</u> By asserting three types of legal privilege without discussing each's distinct requirements, Canada does not carry its evidentiary burden (as discussed above in Mobil's response to Canada's objections to request no. 1). While some responsive documents may well be privileged, it is unlikely, absent documents or information from Canada, that all responsive documents are privileged.	

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			Accordingly, Canada's defences are not "reasonably foreseeable" and Requests #11-12 need not be filed at this juncture in order to comply with the standard set out in Procedural Order No. 1 § 15.2.		
12.	Documents from March 3, 2009 to present concerning the Board's rationale for applying the Guidelines to Terra Nova, including documents concerning the applicability of the Guidelines to Terra Nova in light of its Decision 97.02 approving the Terra Nova Benefits Plan.	These documents are relevant and material to ascertaining whether the Board or other entities of the Canadian or Provincial government interpreted the Accord Acts or the Board's Decision 97.02 approving the Terra Nova Benefits Plan as reserving authority to stipulate mandatory expenditure levels after having approved the Benefits Plan. These documents also are relevant and material to understanding what, if any, consideration was given to the appropriateness of promulgating and continuing to maintain the Guidelines in light of Canada's obligations under the NAFTA as well as pursuant to (i) the Decision on Liability and on Principles of Quantum and (ii) the Award issued in the Mobil I Arbitration.	Canada objects to the production of the requested documents on the same grounds described in response to Request #11 above. ***Canada's Reply:*** *See reply to Request #11*	<u>Repeated Objections</u> Mobil repeats its responses to Canada's objections to request no. 11.	1. The request is denied as premature. 2. Once the respondent has filed its Counter-Memorial, the Claimant is free to make a fresh request based on the arguments actually raised in the Counter-Memorial. 3. Should such a request be made, any claim that documents requested are privileged must be accompanied by a privilege log.
13.	Documents reflecting the Board's reasons and analysis for denying R&D or E&T expenditures claimed with respect to Hibernia or Terra Nova for 2012-2015 and, in particular, concerning directly or indirectly the Board's reasons for rejecting these expenditures as ineligible for R&D and E&T credit under the Guidelines.	These documents are relevant and material to determining whether R&D and E&T expenditures made by the Hibernia and Terra Nova operators during 2012-2015 were eligible for R&D and E&T credit under the Guidelines, notwithstanding a contrary decision by the Board.	Canada objects to the production of the requested documents on the following grounds: First, the Claimant fails to explain how documents "reflecting the Board's reasons and analysis for denying R&D or E&T expenditures" are relevant and material within the meaning of IBA Rule 9(2)(a). In its Request for Arbitration the Claimant does not challenge the manner in which the Board assessed R&D and E&T expenditures submitted for acceptance under the Guidelines during 2012-2015. Second, Claimant has failed to identify which of its claimed R&D and E&T expenditures were actually denied by the Board with respect to Hibernia or Terra Nova for 2012-2015 and how those expenditures are relevant to its claim.	<u>(1) Relevance & Materiality</u> As set out above in Mobil's response to Canada's objections to request no. 1, Canada's arguments and the tribunal's holdings in the Mobil I Arbitration can be used to determine relevance and materiality of documents in this arbitration. The Board requires projects governed by the Guidelines to make fixed amounts of expenditures on R&D and E&T services in the Province. Each project operator is required to submit a report in the first quarter of each calendar year describing its R&D and E&T expenditures in the previous year. The Board then reviews these submitted expenditures and determines their eligibility or ineligibility under the Guidelines. The Board's denial of expenditures as ineligible results in a deficit for which the project remains liable.	No order is required, since the request was withdrawn; see letter from Claimant's counsel of 26 January 2016.

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			Canada should not be required to undertake a general search for documents which may not even exist or be relevant or material. Third, even if such documents do exist, a request for documents reflecting the Board's reasons and analysis for denying R&D or E&T expenditures claimed with respect to Hibernia or Terra Nova for 2012-2015 as ineligible for R&D and E&T credit under the Guidelines when such evaluations are not at issue or challenged in the arbitration is unfair within the meaning of IBA Rule 9(2)(g). If the Claimant has specific questions about the Board's evaluation of expenditures, then it should pursue those questions through the normal administrative channels. Circumventing these channels through sweeping document production in a NAFTA arbitration would subvert the regulatory process. If regulators must disclose documents which evidence their internal deliberations concerning decisions which are not challenged in the arbitration, those deliberations will be chilled and the Board's ability to properly exercise its legislative mandate will be undermined. ***Canada's Reply:*** *Claimant belatedly states that it intends to challenge decisions of the Board to not accept certain expenditures as "research and development" or "education and training" under their meaning in the Guidelines (January 8, 2016 was the first time Claimant explained that it would make this allegation). Claimant could have easily identified which Hibernia and Terra Nova expenditures from 2012-2015 it believes were wrongly rejected by the Board and intends to challenge in its Memorial, but*	The associated deficit would be recoverable *pro rata* to Mobil as a participant in the Hibernia and Terra Nova projects. In this connection, the Board's reasons for denying expenditures are relevant and material to determining the propriety of its denials and, by extension, to quantifying Mobil's damages. (2) Precision of Request Following its annual review of submitted R&D and E&T expenditures, the Board informs the respective project operators which expenditures were determined eligible or ineligible under the Guidelines. As to all those denied expenditures for Hibernia (from May 1, 2012 through the present) and Terra Nova (from January 1, 2012 through the present), Mobil requests "[d]ocuments reflecting the Board's reasons and analysis for denying R&D or E&T expenditures claimed . . . and, in particular, concerning directly or indirectly the Board's reasons for rejecting these expenditures as ineligible for R&D and E&T credit under the Guidelines." Contrary to Canada's suggestion, this request identifies with sufficient particularity the documents requested. (3) Unfairness As a preliminary matter, Canada's suggestion that alternative "administrative channels" exist for obtaining these documents is incorrect. The Guidelines provide no procedure by which to request clarification of any eligibility determination. In any event, the Confidentiality Order (Procedural Order No. 2) addresses Canada's concerns about protecting the internal deliberations of the Board. Additionally, Canada's objection is inconsistent with the Board's own avowed	

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			declined Canada's invitation to do so. Canada is thus left to conclude that the Claimant's unspecific request constitutes an improper fishing expedition from which it hopes to make an argument depending on the content of produced documents. *While Canada maintains its objection that requests for explanations of why expenditures were not accepted by the Board should be first directed to the Board rather than using an arbitration document production process to subvert normal procedure, if the Tribunal is inclined to grant the request, it should require the Claimant to specifically identify which of its rejected R&D and E&T expenditures applications from 2012-2015 it intends to challenge in its Memorial.*	commitment to, and "ongoing focus on[,] improved openness and transparency."[20] Finally, as discussed above in Mobil's response to Canada's objections to request no. 4, another NAFTA tribunal has considered that such concerns by Canada may be displaced where the responsive documents concern the regulator's own misconduct in breach of the NAFTA.[21] The Board's denials of R&D and E&T expenditures submitted under the Guidelines are challenged by Mobil in this arbitration.	
14.	To the extent not privileged by virtue of the solicitor-client relationship, internal Board documents, or correspondence by or to the Board, concerning the interpretation, scope, and effects of the Decision on Liability and on Principles of Quantum and the Award issued in the Mobil I Arbitration, including the impact thereof on the Board's application of the Guidelines.	These documents are relevant to the scope and effect in this arbitration of (i) the Decision on Liability and on Principles of Quantum and (ii) the Award issued in the Mobil I Arbitration. They also address the Board's and Canada's understanding of Canada's obligations under the NAFTA, as well as steps, if any, taken by the Board and Canada to remedy the "continuing breach resulting in ongoing damage to the Claimants' interests in the investment" (Decision on Liability and on Principles of Quantum, Mobil I Arbitration, ¶ 429).	Canada objects to the production of the requested documents on the following grounds: First, documents concerning the Board's "interpretation, scope and effects" of the first NAFTA tribunal's Decision on Liability and Award are not relevant or material within the meaning of IBA Rule 9(2)(a). The "scope and effect" of the Decision and Award in this arbitration is a legal question for this Tribunal to determine pursuant to the NAFTA and international law. The "Board's and Canada's understanding of Canada's obligations under the NAFTA" are also not relevant to any claim the Claimant advances in its Request for Arbitration.	<u>(1) Relevance & Materiality</u> The Board's and Canada's understandings of the Mobil I Decision and Award may be relevant and material to this arbitration, which is a continuation of the Mobil I Arbitration. For the reasons set out in Mobil's response to Canada's objections to request no. 1, the Mobil I Arbitration's pleadings and holdings inform relevance and materiality in this arbitration. <u>(2) Legal Privilege</u> First, this request expressly excludes documents to the extent they are "privileged by virtue of the solicitor-client relationship." Second, Canada has not established the "applicability" of any putative privilege, as required by it under IBA Rules, Article 9(2)(b). Mobil requests that the tribunal order Canada to produce	1. The request is denied as premature. 2. Once the respondent has filed its Counter-Memorial, the Claimant is free to make a fresh request based on the arguments actually raised in the Counter-Memorial. 3. Should such a request be made, any claim that documents requested are privileged must be accompanied by a privilege log.

[20] See, e.g., C-NLOPB new releases 2011, available at http://www.cnlopb.ca/news/nr20110420.php.

[21] See *Bilcon*, Procedural Order No. 13, 11 July 2012 at ¶ 42, *available at* http://www.italaw.com/sites/default/files/case-documents/italaw1164.pdf ("Should the available evidence indicate that the JRP proceedings were tarnished by bias or misconduct, the value of preserving its deliberational secrecy diminishes, considering that the protection of its internal deliberations is intended to ensure the very soundness of its proceedings. Put differently, any argument to protect certain elements of institutional proceedings in the interest of preserving the sound administration of justice loses value where the proceedings have been shown to be tainted").

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			Second, documents responsive to this request would, in any event, be solicitor-client, attorney work product, litigation and/or settlement privileged within the meaning of IBA Rule 9(2)(b). Third, there are compelling reasons of political and institutional sensitivity (IBA Rule 9(2)(f)) why such documents (if they exist) should not be produced even if they do not specifically benefit from legal privilege under IBA Rule 9(2)(b). The disclosure of the requested documents would not only prejudice Canada's legal defence in this arbitration, but it would also cause prejudice to Canada, the Province and/or the Board vis á vis third parties. ***Canada's Reply:*** *Claimant has made no linkage between the requested documents and the quantum of damages at Hibernia and Terra Nova since April 1, 2012 and January 1, 2012, respectively, presumably because the requested documents are unrelated to how Claimant intends to argue its damages case. The request should be rejected because of lack of relevance and materiality in respect of the "key issue" in this arbitration as described in Claimant's RFA.* *Claimant's other justifications are unavailing. As described in Canada's response to request #1, it is premature and inappropriate to rely on Canada's pleadings in the Mobil I arbitration as a basis for relevance and materiality in this arbitration since Canada has not yet taken a position vis á vis the Mobil I Award and need not do so until its Counter Memorial.*	all responsive documents that are not subject to the solicitor-client privilege as defined vis-à-vis Canada by prior NAFTA tribunals (see Mobil's response to Canada's objections to request no. 1). (3) Political/institutional Sensitivity The Confidentiality Order (Procedural Order No. 2) adequately addresses Canada's concerns about political or institutional sensitivity. Furthermore, as Canada conceded in another NAFTA case, "a mere assertion of sensitivity is not enough to sustain a privilege claim."[22] Canada does not carry its burden of proof, summarized above by Mobil in its response to Canada's objections to request no. 1, with respect to political and institutional sensitivity. Additionally, Canada's argument that documents concerning its and the Board's understandings of the legal effects of the Mobil I Decision and Award will "only prejudice Canada's legal defence" is irrelevant, as prejudice to a party's position in the arbitration is not a recognized or compelling reason for denying production of relevant and material documents.	

[22] *Bilcon*, Procedural Order No. 13, 11 July 2012 at ¶ 28, *available at* http://www.italaw.com/sites/default/files/case-documents/italaw1164.pdf.

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			Furthermore, the internal views of the Board and Canada regarding the Mobil I Award are not relevant for establishing whether the Guidelines require the purchase and use of local goods and services under Article 1106, whether the Guidelines fall within Canada's Annex I reservation for the Accord Acts, or whether there is a "continuing breach" of Article 1106. This request is calculated solely to gain an advantage over Canada in this arbitration by demanding the disclosure of documents relating to Canada's views on the Mobil I award in advance of Canada filing its Counter Memorial.		
15.	Internal Board documents, or correspondence by or to the Board, concerning the Board's position on the status of the pre-approval R&D and E&T applications submitted with respect to Hibernia or Terra Nova during 2015, including documents concerning its consideration of, and position on, pre-approval of such applications, as well as its anticipated timeline for determining any applications that are outstanding as of the date of this request.	These documents are relevant and material to determining the compliance by the Hibernia and Terra Nova operators and owners with the Guidelines, as well as the Board's administration and application of the Guidelines following (i) the Decision on Liability and on Principles of Quantum and (ii) the Award issued in the Mobil I Arbitration.	Canada objects to the production of the requested documents on the following grounds: First, Claimant fails to explain how documents "concerning the Board's position on the status of the pre-approval R&D and E&T applications submitted with respect to Hibernia and Terra Nova during 2015" are relevant or material to its claim within the meaning of IBA Rule 9(2)(a). For example, the Claimant fails to explain how "compliance by the Hibernia and Terra Nova operators and owners with the Guidelines" is relevant to any claim in its Request for Arbitration. Second, documents concerning the Hibernia and Terra Nova operators' compliance with the Guidelines are already in the possession, custody and control of the Claimant. Third, this request is unfair within the meaning of IBA Rule 9(2)(g) because it subverts the Claimant's current regulatory relationship with the Board without a	(1) Relevance & Materiality The information sought by this request is relevant and material as it goes to quantifying the Hibernia and Terra Nova projects' liability under the Guidelines during 2015 and, by extension, Mobil's damages incurred during that year. By way of background, the Guidelines request operators to file a Work Expenditure Application Form for each R&D and E&T activity before commencement of the activity, and further require the Board to review such applications within five working days from receipt. However, on April 13, 2015, the Board announced by email to Hibernia that it would suspend this pre-approval process pending its review of the Mobil I Award.[23] Since then, the Board has not indicated whether it ever completed its review. Its suspension of the pre-approval process continues. As the Hibernia operator explained in a letter to the Board on June 23, 2015, seven applications dating from first quarter 2015 have remained pending since the Board's suspension, which correspond to an	The request is allowed.

[23] Email from M. Baker (C-NLOPB) to K. Sampath (HMDC) dated April 13, 2015.

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			relevant and material link to Claimant's Request for Arbitration. If the Claimant has specific questions about the Board's pre-approval of such applications and anticipated timelines for approval thereof, those questions should be pursued through normal administrative channels. Circumventing these ordinary channels through a sweeping document request in a NAFTA arbitration would subvert the ordinary regulatory process. If regulators must disclose documents which evidence their internal deliberations concerning decisions which are not at issue or challenged in the arbitration, those deliberations will be chilled and the Board's ability to properly exercise its legislative mandate will be undermined. ***Canada's Reply:*** *Canada understands that the Board has been in recent contact with Claimant regarding the status of forthcoming pre-approvals for R&D and E&T expenditures in question. Accordingly, Canada assumes that this request is no longer relevant or required.*	estimated $22.5 million in R&D and E&T expenditures. <u>(2) Documents in Mobil's Possession, Custody, or Control</u> Canada's suggestion that Mobil already has all documents concerning the Hibernia and Terra Nova operators' compliance with Guidelines is incorrect. As explained above, the Board suspended the pre-approval process required by the Guidelines in response to the Mobil I Award. The Board's internal documents concerning the Hibernia and Terra Nova projects' compliance or non-compliance with the Guidelines after the suspension, which are relevant to this case and material to its outcome, are not in the possession of Mobil. <u>(3) Unfairness</u> Canada's suggestion that Mobil can obtain answers to specific questions about the Board's pre-approval of such applications through normal administrative channels is incorrect. As explained above, Mobil reminded the Board in a letter dated June 23, 2015 that seven applications for R&D and E&T projects worth $22.5 million remain outstanding, while the Board has issued no determinations on these applications nor indicated when, if ever, it will issue determinations. Thus, "normal administrative channels" have not yielded the documents or the information sought by this request. As to the alleged chilling effect of producing the requested documents, Mobil reiterates the sufficiency of the processes contained in the Confidentiality Order (Procedural Order No. 2). Furthermore, given that the Board's deliberations and acts are directly challenged in this arbitration as a "continuing breach" of the	

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				NAFTA, they are not entitled to protection from disclosure. See Mobil's response to Canada's objections to request no. 4, above.	
16.	Documents from December 15, 2009 to the present concerning the Board's assessments, analyses or other consideration of the ability, capacity and availability of institutions, entities and persons within the Province to perform R&D and E&T activities, including any related calculations or projections.	These documents are relevant and material to understanding the scope of expected expenditures relative to the capacity of the local R&D and E&T community to absorb those expenditures.	Canada agrees to produce non-privileged documents responsive to this request.	<u>Canada's Voluntary Production</u> Mobil notes Canada's agreement to produce responsive documents.	1. No order is required in light of the Respondent's agreement to produce documents. 2. Any claim that documents subject to paragraph (1), above, are privileged must be accompanied by a privilege log.
17.	Documents from December 15, 2009 to the present concerning the manner in which any determinations by the CRA as to the SR&ED eligibility of the claimed expenses factored into the Board's decisions with respect to expenditures required under the Guidelines for Hibernia or Terra Nova.	These documents are relevant and material to understanding the manner in which the Board applies or applied the Guidelines to the Hibernia and Terra Nova projects, including the significance it accorded to determinations by the CRA as to SR&ED eligibility.	Canada objects to the production of the requested documents as they are not relevant or material within the meaning of IBA Rule 9(2)(a). The Claimant's Request for Arbitration does not challenge "the manner in which the Board applies or applied the Guidelines to the Hibernia or Terra Nova projects." In any event, the Guidelines expressly state the definition of R&D "includes, but is not limited to section 248(1) of the *Income Tax Act*," which is a reference to the SR&ED tax credit program. To Canada's knowledge, no expenditure for which the Claimant has been found eligible for SR&ED tax credits has been denied by the Board as an eligible expense since December 15, 2009. Claimant has failed to specify otherwise.	Mobil will not pursue this request further.	No order is required in light of the Claimant's withdrawal of the request.
18.	Documents from 2004 to the present, to the extent not produced in response to document request number 17 herein, concerning the Board's consideration, development or espousal of any formal or informal policy, practice, or course of conduct concerning any relationship or dependency between the eligibility for the	These documents are relevant and material to the Board's understanding and implementation of the Guidelines with respect to R&D expenditures in light of the SR&ED program administered by the CRA.	Canada objects to the production of the requested documents on the same bases described in response to Request #17 above. ***Canada's Reply:*** *This request calls for the production of the same documents that Claimant requested*	<u>Relevance & Materiality</u> Canada's acknowledgement in its objections to request no. 17 (i.e., that the Guidelines provide that the definition of R&D for purposes of the Guidelines includes activities that satisfy the statutory definition of R&D of the SR&ED tax-incentive program) is irrelevant. This request seeks documents concerning the	1. The request is denied as premature. 2. Once the respondent has filed its Counter-Memorial, the Claimant is free to make a fresh request based on the arguments actually raised in the Counter-Memorial.

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	CANADA'S OBJECTIONS	MOBIL'S RESPONSE TO CANADA'S OBJECTIONS	DECISION OF THE TRIBUNAL
	SR&ED program and eligibility for R&D credit under the Guidelines.		*and Canada produced in the Mobil I arbitration.*[24] *Canada thus understands this request # 18 to only cover documents from December 15, 2009 (i.e., the same time period as request #17 above). But even documents from 2009-2012 are not material or relevant to Claimant's damages at Hibernia and Terra Nova during the periods described in its RFA since Claimant is not claiming damages from this period.* *Furthermore, Claimant's January 8, 2016 response is unavailing. Whether a R&D or E&T expenditure is eligible under the SR&ED program and/or the Guidelines has no connection to the issue of whether the Guidelines require Mobil to accord a preference to local goods and services as per Article 1106.* *If the Tribunal is not inclined to deny this request, Canada proposes that it be postponed until the second round after Canada's Counter-Memorial when relevance and materiality can be properly assessed. Claimant's January 8, 2015 responses explain that the requested documents are only relevant to demonstrating that the Guidelines are applied as prohibited performance requirements under Article 1106. As stated above, Canada has taken no position on this issue and is not required by the ICSID Rules to do so until its Counter-Memorial. Canada's defenses are therefore not "reasonably foreseeable" and this request need not be filed at this juncture in order to comply with the standard set out in Procedural Order No. 1 § 15.2.*	Board's formal or informal policy, practice, or course of conduct concerning any relationship or dependence between SR&ED eligibility and Guidelines R&D eligibility—that is, the manner in which the Board applies the Guidelines. These documents would be relevant to the case if they demonstrate that the challenged measures (i.e., the Guidelines) are applied in such a way that they constitute prohibited performance requirements within the meaning of Article 1106 of the NAFTA. Given that the core of Mobil's claims, as set forth in the Request for Arbitration, concern Article 1106, these documents could also be material to the outcome of this dispute.	3. Should such a request be made, any claim that documents requested are privileged must be accompanied by a privilege log.

[24] See Request #36, Mobil I Redfern Schedule for Claimants' Requests for Document Production of December 15, 2009 through Canada's Objections of January 22, 2010, p. 17.

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	CANADA'S OBJECTIONS	MOBIL'S RESPONSE TO CANADA'S OBJECTIONS	DECISION OF THE TRIBUNAL
19.	Documents from 2009 to the present concerning the Province's assessment and consideration of R&D expenditures for deduction from royalty obligations owed to the Province by law or agreement, including with respect to Hibernia and Terra Nova.	These documents are relevant and material to the Province's understanding of the deductibility from Provincial royalties for R&D expenditures associated with offshore projects and, relatedly, the economic impact upon Mobil due to the implementation of the Guidelines.	Canada understands that the Province's royalty audits for the requested time period are either ongoing or not yet commenced, hence, production of the requested documents is premature or not possible. Canada will nevertheless search for responsive documents without prejudice to any objection it may subsequently raise with respect to specific documents or categories thereof under IBA Rule 9(2). ***Canada's Reply:*** *Canada has been informed that Newfoundland and Labrador has not commenced and/or finalized its assessment and consideration of R&D expenditures for deductions from royalty obligations owed to the Province by law or agreement arising from the Hibernia and Terra Nova projects for the years 2009-2015. Accordingly, Canada cannot produce any documents at this time given that consideration of any claimed royalty deductions are still ongoing.*	Canada's Voluntary Production Mobil notes Canada's agreement to produce responsive documents while reserving its objections. Mobil reserves the right to respond to any such objections in due course.	1. The documents requested should be produced as soon as the Province has finished its assessment. 2. Any claim to privilege must be accompanied by a privilege log.
20.	Documents created by or for the Board concerning the Board's expenditures and related costs in connection with the administration of the R&D and E&T expenditure requirements of the Guidelines from 2004 to present, to the extent such expenditures and costs are covered in whole or in part by contributions from the operators of Hibernia and Terra Nova.	These documents are relevant and material to determining the portion of contributions made by the Hibernia and Terra Nova operators to the Board's expenditures and costs that are utilized to administer the R&D and E&T expenditure requirements of the Guidelines.	Canada objects to this request because of its lack of relevance and materiality pursuant to IBA Rule 9(2)(a). Claimant has not established how such documents are related to the claims set forth in its Request for Arbitration or how these documents relate to damages arising out of the Guidelines since April 1, 2012 (with regard to Hibernia) and January 1, 2012 (with regard to Terra Nova). ***Canada's Reply:*** *Claimant's January 8, 2016 response states that the requested documents are relevant to "a discrete issue of quantum"*	Relevance & Materiality The requested documents are relevant and material to a discrete issue of quantum, that is, Mobil's share of the Board's expenditures and costs to administer the Guidelines' R&D and E&T requirements. The Board recovers a significant proportion of its operating costs in accordance with a 1999 cost-recovery agreement with the industry, as represented by the Canadian Association of Petroleum Producers.[25] Under this arrangement, Mobil, as an investor in the Hibernia and Terra Nova projects, is required to contribute to the Board's operating costs, including the costs of enforcing the	1. The request is allowed with regard to documents concerning the period after 1 April 2012 for the Hibernia field and 1 January 2012 for the Terra Nova field. 2. The request is otherwise denied. 3. Any claim that documents subject to paragraph (1), above, are privileged must be accompanied by a privilege log.

[25] Canada Gazette Part I, Vol. 149, No. 28 (July 11, 2015), p. 1804, *available at* http://www.gazette.gc.ca/rp-pr/p1/2015/2015-07-11/pdf/g1-14928.pdf ("In 1999, after the Accord Acts were established and offshore oil and gas activity began in the Accord areas, the federal and provincial governments established a voluntary cost-recovery agreement with industry, as represented by the Canadian Association of Petroleum Producers (CAPP). The CNLOPB currently recovers approximately 75% of its costs from industry[.]").

NO.	DOCUMENT OR CATEGORY OF DOCUMENTS REQUESTED	STATEMENT OF RELEVANCE AND MATERIALITY	CANADA'S OBJECTIONS	MOBIL'S RESPONSE TO CANADA'S OBJECTIONS	DECISION OF THE TRIBUNAL
			and represent "cognizable damages." It is difficult to comprehend how the Board's expenditures and costs in connection with the administration of the Guidelines bears any genuine relation to Claimant's "actual" damages, which it defines as consisting of "incremental expenditures" (i.e., those not required in the ordinary course of business) and any shortfall in spending obligations stipulated by the Board (RFA ¶¶ 51-52). Nor is it understandable how such documents between 2004 and 2012 are at all relevant given that damages for these years are not at issue in this arbitration (Claimant only seeks damages for Hibernia and Terra Nova since April 1, 2012 and January 1, 2012, respectively). *Canada maintains its objection with respect to documents outside this time frame because (i) Claimant does not seek damages for the period 2004-2012, and (ii) the probative value of such documents cannot possibly outweigh the burden of searching through twelve years of records.* *Notwithstanding the obtuse relationship of this request to Claimant's damages claim, Canada agrees to produce documents responsive to this request for the time periods at issue in Claimant's RFA.*	Guidelines against these projects. The portion of Mobil's contributions applied to administration of the Guidelines, as costs associated with Canada's "continuing breach" of the NAFTA, represents cognizable damages.	