IN THE ARBITRATION
UNDER CHAPTER ELEVEN OF THE NAFTA
AND THE ICSID ARBITRATION (ADDITIONAL FACILITY) RULES

BETWEEN:

MOBIL INVESTMENTS CANADA INC. &
MURPHY OIL CORPORATION

Claimants

AND

GOVERNMENT OF CANADA

Respondent

ICSID Case No. ARB(AF)/07/4

CLAIMANTS' REPLY TO CANADA'S POST-HEARING SUBMISSION

ARBITRAL TRIBUNAL:

Professor Hans van Houtte, President
Professor Merit Janow
Professor Philippe Sands

January 31, 2011

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I.

INTRODUCTION

1. This submission (*i*) responds to Canada's initial post-hearing brief; (*ii*) provides an update as to Claimants' efforts to propose a formula for the award of future damages; and (iii) provides an update as to the Board's decision on the eligibility of Hibernia's 2009 R&D expenditures under the Guidelines. For convenience, we have organized this submission to be consistent with the organization of Canada's submission, which tracks the questions posed by the Tribunal at the hearing. We respond here only to those questions that Canada addressed in its brief.

2. Canada's brief is notable in several respects. *First*, Canada has fundamentally changed its position as to the scope of the NAFTA Parties' Annex I reservations. Having argued previously that only subordinate measures adopted under the authority of a *non-conforming* aspect of a listed measure are covered by a reservation, Canada is now forced to abandon that position to support its other arguments. *Second*, Canada's brief rests heavily on Section 3 of the Interpretative Note to Annex I, which has little relevance where, as here, there is no discrepancy between the various elements of a listed measure. *Third*, despite having acknowledged the applicability of the VCLT principles of treaty interpretation to the interpretation of the NAFTA Annexes, Canada completely ignores these principles and their implications for this dispute. *Fourth*, Canada's brief fails to view Annex I in light of what it is: a listing of measures covered by Article 1108(1)'s exception to the Treaty regime, and not itself a rule or an exception.

II.

CLAIMANTS' COMMENTS ON CANADA'S RESPONSES TO THE TRIBUNAL'S QUESTIONS

A. Question 4: What principles should the Tribunal take into account in interpreting a reservation made to Article 1106 of the NAFTA?

3. At the hearing, Claimants explained why the principles to be applied in interpreting a reservation to Article 1106 of the NAFTA are those set forth in the Vienna Convention on the Law of Treaties ("VCLT").[1] In its Post-Hearing Submission, Canada concedes, as it must, that the interpretive rules embodied in Articles 31 and 32 of the VCLT constitute customary international law and "must be applied to the NAFTA Annexes since they are a part of the treaty."[2] However, Canada has made no real attempt to apply the VCLT principles or to answer Claimants' showing under the

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[1] Tr. 1124:12-21, 1126:18-1128:1. As we noted, the cardinal rule of treaty interpretation is that of VCLT Article 31(1), which requires that a treaty be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." **CA-9**, Vienna Convention on the Law of Treaties, May 23, 1969, 1115 U.N.T.S. 31 (entered into force January 27, 1980), art. 31(1).

[2] Canada's Post-Hearing Submission, ¶ 3; *see also* Counter-Memorial, ¶ 221 ("In section 3, the note provides rules of interpretation applicable to the Annex I reservations. However, nowhere in that section is a tribunal directed to ignore the VCLT and interpret reservations narrowly.").

VCLT as to the relevant context of its reservation to Article 1106 or the object and purpose of the NAFTA.[3]

4. To the extent that Canada does purport to consider object and purpose, it makes the mistake of focusing on the purpose of specific provisions of the NAFTA, rather than looking to the object and purpose of the Treaty as a whole. That is, Canada looks only to the purpose of Section 2(f)(ii) of the Interpretative Note to Annex I, which together with Canada's Annex I reservation for the Federal Accord Act, creates an exemption from the requirements set forth elsewhere in the Treaty.[4] What the VCLT instead requires is to read the relevant language in the way that best conforms with the object and purpose of the NAFTA as a whole. This is why, as Claimants have explained, the words "consistent with" as used in Section 2(f)(ii) of the Interpretative Note must be read in the context of the substantive goals of Articles 1106 and 1108(1)(c) and accorded a meaning that supports the overall objectives of the Treaty, including to eliminate

[3] As Claimants explained at the hearing, the relevant context to be considered is NAFTA Article 1108(1), the operative provision to which Annex I relates. That provision prevents Parties from avoiding their Treaty obligations by unilaterally expanding the scope of their reservations beyond what specifically has been agreed to in the Annex. NAFTA Article 1106, the provision against which the reservation for the Accord Act was taken, also forms part of the relevant context. As to the object and purpose of the Treaty, Claimants referred the Tribunal to the objectives set forth in NAFTA Article 102, which include elimination of barriers to trade and facilitation of cross-border movement of goods and services between the territories. Tr. 1124:22-1126:1.

[4] *See* Canada's Post-Hearing Submission, ¶ 41; Counter-Memorial, ¶ 232; Rejoinder, ¶¶ 5, 106-107.

barriers to trade in, and to facilitate cross-border movement of, good and services between the territories of the Parties.[5]

5. Instead of engaging in this analysis, Canada devotes nearly half of its Post-Hearing Submission to an extended discussion of Section 3 of the Interpretative Note to Annex I, which is largely irrelevant to this case. The only aspect of Section 3 that has bearing here is the chapeau, which provides that:

> In the interpretation of a reservation, all elements of the reservation shall be considered. A reservation shall be interpreted in the light of the relevant provisions of the Chapters against which the reservation is taken.[6]

This language directs the Tribunal to interpret the scope of Canada's reservation for the Accord Act in light of Article 1106, which, in addition to Article 1108(1), forms part of the context in the VCLT analysis. It also counsels the Tribunal to take account of *all elements* of the reservation — not to disregard the Description element, as Canada suggests.

6. Claimants addressed the irrelevance of the remainder of Section 3 in our Post-Hearing Brief and will not repeat that

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[5] *See* Claimants' Submission on the US and Mexico's Article 1128 Submissions, ¶ 40; Tr. 1124:22-1126:1, 1131:15-1132:5. As the United States noted in its second Article 1128 submission, the consistency of a subordinate measure is determined *inter alia* by reference to "the NAFTA obligation from which the listed measure is reserved and the degree of the reserved measure's and subordinate measure's non-conformity with that obligation." Second Submission of the United States of America, ¶ 9; *see also id*. ¶ 10. Claimants will comment more fully on the Article 1128 submissions made by the United States and Mexico in their response to be filed on February 7, 2011.

[6] **CA-6**, NAFTA, Annex I, Interpretative Note, § 3.

analysis here.[7] We simply remind the Tribunal that Section 3 does not address subordinate measures, but rather discrepancies between various elements of a reservation,[8] and no such inconsistency is present here. Indeed, Canada has never suggested a discrepancy.[9] Canada's approach therefore falsely positions the analysis as a choice between application of Section 3(b) or 3(c), when in fact, neither provision applies. That Canada continues to advance this line of argument, inviting the Tribunal into a convoluted and ultimately baseless discussion of qualified and unqualified measures — and, moreover, that it positions the argument as a foundation for its other arguments — underscores the weakness of its position.[10]

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[7] Claimants' Post-Hearing Brief (Redacted), ¶ 15.

[8] As the United States noted, Section 3 "sets out certain rules of interpretation for construing reservations, *including rules of priority for considering the different elements*, specifying that 'all elements of the reservation shall be considered' and that the 'reservation shall be interpreted in light of the relevant provisions of the Chapters against which the reservation is taken.'" Second Submission of the United States of America, ¶ 8 (emphasis added). Of course, rules of priority are pertinent only insofar as discrepancies exist between different elements.

[9] Indeed, there appears to be an implicit acknowledgement in Canada's argument that none exists. To justify its invocation of Section 3(b) of the Interpretative Note to Annex I, Canada is forced to admit that there is no discrepancy between the Measures element and the other elements of the reservation so substantial and material as to prevent consideration of all elements of the reservation. *See* Canada's Post-Hearing Submission, ¶ 11 ("Neither party in this dispute has suggested that there is a discrepancy that prevents the Measures element from prevailing."). The problem with Canada's approach is that it assumes that either 3(b) or 3(c) must apply, when in fact, neither does.

[10] Canada's Post-Hearing Submission, ¶ 1. For the avoidance of doubt, Claimants do not accept Canada's view that a reservation

7. It is telling that, in order to make the argument, Canada is forced to contradict a position that it took previously in this case. In its Rejoinder, Canada argued unambiguously — and correctly — that only subordinate measures adopted under the authority of and consistent with *non-conforming aspects* of a measure listed in Annex I are reserved.[11] By Canada's own admission, "if a NAFTA Party has described the non-conforming aspect of its measure under the 'Description' heading in Annex I, only subordinate measures which address that aspect of the measure will be reserved."[12] Now, in an effort to avoid the implications of this analysis, Canada invokes Section 3 to argue that the Tribunal should ignore the Description altogether and thereby expand the scope of the reservation beyond that agreed by the Treaty Parties. This bold and contradictory argument demonstrates the shortcomings of Canada's position as to authority and consistency, which we address in detail below.

8. Canada attempts to justify its new position by arguing that it would be left without the ability to implement the listed measure (i.e., Section 45(3)(c) of the Accord Act) unless the Description element is read out of the reservation.[13] This is incorrect. Section 45(3)(c) of the Accord Act itself provides the means of its implementation: through the Board's approval of benefits plans.[14] This is clear not only from the

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must state on its face that it is qualified in order to be such. However, given the irrelevance of the issue to the case, Claimants will not engage in an extended analysis of the point.

[11] Rejoinder, ¶¶ 109-114.

[12] *Id.* ¶ 109.

[13] Canada's Post-Hearing Submission, ¶ 12.

[14] Indeed, as we have noted, the Board acknowledged that it did just that when it approved the Hibernia and Terra Nova Benefits Plans. **CE-47**, CNLOPB, Hibernia Decision 86.01, § 2.1 (June 18, 1986) ("The Board's primary purpose in reviewing the Hibernia

plain language of Section 45, but also from the Description element of Canada's reservation for the Act, which highlights the requirement to have an approved benefits plan as a precondition to authorization to proceed with any oil and gas development project in the Province.[15]

9. The only reason why Canada must now look to Section 151.1(1), which is not reserved under Canada's Annex I reservation for the Accord Act, to justify its imposition of the Guidelines on Hibernia and Terra Nova is that both projects already have in place approved Benefits Plans that make no provision for application of the Guidelines requirements.[16] This resort to Section 151.1 as a means to impose new substantive requirements was not contemplated by the previously existing legal regime for the two projects and therefore is impermissible under the NAFTA, even if Section 151.1(1) otherwise might provide a means to implement the requirements of Section 45(3)(c) for projects with benefits plans to be approved following the Guidelines.[17]

Benefits Plan was to ensure that it adequately met the requirements of the implementing legislation."); **CE-57**, CNLOPB, Terra Nova Decision 97.02, § 3.5 (Dec. 1997) ("The Board's assessment of [the Terra Nova Benefits] Plan was guided by the requirements of the Accord Acts, specifically Section 45 dealing with the Canada-Newfoundland Benefits Plan."); *id*. § 3.5 ("This section describes the Board's assessment of the Proponent's plans to satisfy the requirement of the Accord Acts that the Benefits Plan contain provisions for expenditures on research and development and education and training in the Province.").

15 **CA-7**, NAFTA, Annex I, Schedule of Canada.

16 *See infra* ¶¶ 25-26, 31, 33.

17 For projects such as the Hibernia Southern Extension without previously approved benefits plans, the Board has required a commitment to comply with the Guidelines as a condition to its approval of the project. *See* Tr. 25:18-26:4.

Indeed, as Claimants have explained repeatedly with no meaningful response from Canada, the Guidelines do not enforce the terms of the approved Hibernia and Terra Nova Benefits Plans; rather, they impose new and fundamentally different requirements, and that is why they are not covered by the reservation.[18]

10. Canada's eleventh hour attempt to rely on the Provincial Accord Act also must fail. At the hearing, for the very first time,[19] Canada relied on its reservation for "all existing non-conforming measures of all provinces and territories" as support for its argument that a Party's Annex I reservation covers all subordinate measures adopted under a listed measure, even where that measure is explicitly qualified by a description of its non-conforming aspects.[20] In its Post-Hearing Brief, Canada raised yet another new argument based on the Provincial Accord Act — that even if the Guidelines are not reserved as a subordinate measure under the Federal Accord Act, they are reserved under the Provincial Accord Act because there is no description limiting the scope of its

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[18] *See* Reply, ¶¶ 107-110; Claimants' Submission on the US and Mexico's NAFTA Article 1128 Submissions, ¶¶ 40-43; Tr. 111:2-6, 1086:15-16; 1143:18-1144:4.

[19] Prior to the hearing, Canada's had referred specifically to its reservation for the Provincial Accord Act on only two occasions, neither of which is relevant to the arguments it now seeks to raise. *See* Counter-Memorial, ¶ 223 & n. 348; Rejoinder, ¶ 113 & n. 134. In its Counter-Memorial, Canada simply noted the fact that the Provincial Accord Act is reserved from Article 1106. In its Rejoinder, Canada cited to its exchange of letters with other NAFTA Parties as support for its argument that "Annex I only reserves 'existing non-conforming measures of the provinces.'" Rejoinder, ¶ 113.

[20] Tr. 268:11-269:13.

reservation for the latter.[21] As an initial matter, a post-hearing submission clearly is an inappropriate time to raise a completely new legal position; this argument based on the Provincial Act therefore is procedurally barred. In any event, as we explained in our closing argument in response to Canada's first attempt to rely on the Provincial Accord Act, Canada's general exception for state and provincial measures was a discreditable and aberrant episode inconsistent with what the NAFTA contemplated, and is therefore inappropriate for the purposes Canada invoked.[22]

11. Claimants also demonstrated at length at the hearing that reading the subordinate measures clause to encompass even conforming aspects of state and provincial measures would lead to unreasonable and absurd results.[23] Canada has presented no answer to that showing. Moreover, it makes no sense, as a matter of policy or law, for precisely the same measure to fail the test established by the NAFTA when specifically listed in the Annex (as is the Federal Accord Act) but somehow magically to conform with the Treaty when not mentioned (as is the Provincial Accord Act). The specific controls the general, not the other way around.

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21 Canada's Post-Hearing Submission, ¶¶ 16-22.

22 Tr. 1120:5-1122:5.

23 Tr. 1122:22-1124:4.

B. Question 2(a): As a matter of law, is the determination of whether a subordinate measure is "consistent with the measure" to be assessed by reference to (i) the national law governing the measure under the authority of which the subordinate measure has been adopted, or (ii) the law of the NAFTA, or (iii) both?

12. Canada accepts that NAFTA Article 1131 directs this Tribunal to apply the NAFTA and the applicable rules of international law to decide the issues in dispute in this case.[24] However, Canada proceeds to argue that Section 2(f)(ii) of the Interpretative Note to Annex I implicitly requires the application of domestic law to determine whether a subordinate measure was adopted under the authority of and consistent with a measure listed in the Party's Annex I Schedule. This is incorrect and without foundation in the VCLT.

13. *First*, the authority on which Canada relies to urge deference to domestic law is inapposite.[25] Professor Brownlie states that "[t]he dicta of international tribunals (already cited) rest to some extent on the assumption that, *for any domestic issue of which a tribunal is seized*, there must always be some applicable rule of municipal law, which will be ascertainable in the same way as other 'facts' in the case."[26] This raises, rather than answers, the question of whether the Tribunal is seized of a domestic or international law issue. Here, the

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[24] Canada's Post-Hearing Submission, ¶¶ 2-3, 23-24. *See also* **CA-3**, NAFTA, art. 1131.

[25] Canada's Post-Hearing Submission, n. 14.

[26] **RA-6**, Brownlie, I., *Principles of Public International Law*, 7th ed. (Oxford University Press: 2008), p. 39 (emphasis added).

meaning of Annex I is undisputedly a question of international law to be answered by reference to the VCLT.[27]

14. *Second*, Canada's argument that consistency "can only be determined under domestic law" is unsubstantiated.[28] As noted above, Canada concedes the applicability of international law to interpret the Annex,[29] and nothing in Section 2(f)(ii) — or any other provision, for that matter — indicates that domestic law should supplant international law on the question of consistency. It therefore comes as no surprise that Canada presents no support whatsoever for its view that international law has no role here.

15. *Third*, Canadian administrative law does not address whether, for purposes of the NAFTA, a measure was adopted under the authority of and consistent with a listed measure. Rather, as Claimants demonstrated at the hearing, Canadian administrative law and the rules governing NAFTA Annex I reservations have very different purposes and apply very different standards.[30] The two do not, as Canada suggests, "mirror" each other. Canada's reference to the *Dunsmuir* case, its sole authority on this issue, does not advance its argument. Nowhere in *Dunsmuir* did the Supreme Court of Canada determine whether the measure at issue was

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[27] *See* Canada's Post-Hearing Submission, ¶¶ 2-3.

[28] *Id.* ¶ 26.

[29] *See supra* ¶ 3.

[30] Tr. 1132:17-1133:3, 1135:3-1137:8; Claimants' Closing Presentation, Slide 76. Canada's argument that "[n]either the 'law of the NAFTA,' nor other 'applicable rules of international law,' provides the means to determine if a domestic measure is subordinate to its domestic enabling law," *see* Canada's Post-Hearing Submission, ¶ 26, misstates the problem. Section 2(f)(ii) of the Interpretative Note to Annex I is not concerned with the validity of a measure under domestic administrative law.

authorized by or consistent with the enabling statute. Instead, as in the domestic court cases at issue here, the Court asked whether the measure at issue was "reasonable."[31] Furthermore, the Court's description of the "reasonableness" test reveals that it has nothing to do with the inquiry that this Tribunal must undertake as to consistency:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.[32]

16. Indeed, even the *Dunsmuir* passage cited by Canada makes reference to a "reasonableness" test rather than a test for "consistency."[33] While the Court in *Dunsmuir* does address the jurisdictional question of "whether or not the tribunal had the authority to … decide a particular matter," [34] this issue is treated in a separate part of the Court's judgment, and the idea that a subordinate measure must be "consistent with" the authorizing statute is nowhere to be found. The domestic court decisions at issue in this arbitration provide no further support for Canada's argument because, as Canada has

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[31] **RA-159**, *Dunsmuir v. New Brunswick,* Supreme Court of Canada, 2008 CarswellNB 124, ¶ 71.

[32] *Id.* ¶ 47.

[33] *See* Canada's Post-Hearing Submission, n. 15.

[34] **RA-159**, *Dunsmuir v. New Brunswick,* Supreme Court of Canada, 2008 CarswellNB 124, ¶ 59.

conceded, they applied the "reasonableness" test to the Guidelines.[35]

17. *Fourth*, a proper application of the VCLT to Section 2(f)(ii) requires that consistency be assessed under the law of the NAFTA. As noted above, the VCLT requires that Section 2(f)(ii) be interpreted in its context and in the light of the NAFTA's object and purpose. Such interpretation compels the conclusion that a future subordinate measure cannot be consistent with a reserved measure for the purposes of Annex I if it decreases the conformity of that measure with the Treaty.[36] This conclusion is dictated by the fact that NAFTA Article 1108(1), together with Annex I, creates limited exceptions to certain Chapter 11 obligations, including Article 1106. It is therefore necessary to read the scope of these exceptions in the context of what the operative provisions of the Treaty (i.e., Articles 1106 and 1108) seek to accomplish — not what Canadian administrative law does. An interpretation of the term "consistency" that expands the scope of the Annex I exceptions beyond that envisioned by Articles 1106 and 1108 would not accord with the context of the term as it is used in the Interpretative Note or with the object and purpose of the Treaty.[37]

18. *Finally*, the context of the subordinate measures clause in Annex I dictates that international law should be applied to determine whether a subordinate measure is "consistent with" the listed measure. Annex I sets out a fully

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[35] *See* Tr. 224:18-20. *See also* Claimants' Submission on the US and Mexico's NAFTA Article 1128 Submissions, ¶¶ 44-47; Tr. 88:12-18, 97:15-98:9, 1137:9-1139:5; Claimants' Post-Hearing Brief (Redacted), ¶¶ 17-20.

[36] Tr. 1131:6-1132:5, 1141:13-19, 1142:1-5. *See also* Second Submission of the United States of America, ¶¶ 9-10.

[37] Tr. 1124:22-1126:1, 1128:20-1129:12, 1131:6-1132:5.

transparent, negative list of those non-conforming measures that the NAFTA Parties agreed could be reserved from some investment-chapter obligations.[38] The function of the subordinate measures clause in the Interpretative Note to Annex I is not to ensure compliance with domestic administrative law as an abstract goal, but rather to ensure that there are no surprises with regard to the measures that a Party may claim to be covered by its reservations. None of the Treaty Parties can be expected to be expert in the others' administrative law.[39] The function of the subordinate measures clause is thus to ensure a high correlation between the reserved measure that the NAFTA Parties were aware of, and agreed to, and any subordinate measures covered. It does not make sense for this correlation to be different for each Party, or for each Party to have the power and the ability to lessen its Treaty obligations through changes in its administrative law. Instead, it is more in line with the function of the subordinate measures clause to view "consistent with" as implying an international law standard

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[38] *See* Second Submission of the United States of America, ¶ 8 (citing NAFTA Article 102(1) and observing that transparency is "one of the key objectives of the NAFTA"). *See also* **CA-263**, Bernard Hoekman, Aaditya Mattoo and Philip English, *Glossary of Trade-Related Terms*, in *Development, Trade and the WTO: A Handbook*, p. 599 (defining "negative list" as "a list of those items, entities, products, and so on [in an international agreement] to which the agreement will *not* apply, the commitment being to apply the agreement to everything else").

[39] *See* Second Submission of the United States of America, ¶ 4 (observing that NAFTA Article 1132 contemplates that the NAFTA Free Trade Commission may issue a "binding interpretation on the issue of whether a challenged measure in a NAFTA Chapter 11 arbitration falls within the scope of a reservation or exception under Annex I"; the FTC is composed of the Ministers of Trade of the three NAFTA parties, and not legal experts).

that does not vary according to changing and changeable national law. "Consistency" therefore should be understood in reference to the ratchet rule established by Article 1108(1)(c).[40]

19. In this respect, it is notable that on its face, Section 151.1 of the Accord Act does not purport to confer authority on the Board to adopt new substantive obligations, but merely "guidelines and interpretation notes."[41] On its face, the Guidelines as applied to Hibernia and Terra Nova are not consistent with the Accord Act.

C. Question 2(b): If it includes the law of NAFTA, what is the standard by which such assessment is made, and the available sources thereof?

20. It is rather astonishing that, having conceded the applicability of international law to the interpretation of Annex I, Canada answers the Tribunal's request for relevant international law standards by which to interpret a term in that Annex with a total denial that any such standards exist.[42] As demonstrated above, a proper analysis under the VCLT provides the standards by which to asses the consistency of a subordinate measure with the listed measure to which it relates.[43]

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[40] *See infra* ¶¶ 23-24, 27-32.

[41] **CA-11**, *Canada-Newfoundland Atlantic Accord Implementation Act*, S.C., 1987, c. 3, s. 151.1(1).

[42] *See* Canada's Post-Hearing Submission, ¶ 31.

[43] *See supra* ¶¶ 3-5, 17-18.

D. Question 2(c): If it is or includes 'the national law governing the measure,' what is the standard of review to be adopted by the Tribunal in assessing 'consistency' in circumstances where a national court may have addressed issues of 'authority' and / or 'consistency' by reference to that national law?

21. Canada makes several inappropriate inferential leaps when it counsels the Tribunal to rely on the decisions of the Canadian courts. Without explanation or citation to any authority, Canada claims that, simply because a NAFTA tribunal can consider domestic court decisions as relevant facts, domestic court decisions automatically resolve a NAFTA tribunal's inquiry absent their being tainted by a denial of justice.[44] Canada's approach is incorrect and leaves no space at all between domestic court decisions and international law.[45] Indeed, in taking this position, Canada asks this Tribunal to refrain from conducting any analysis at all as to authority and consistency, and instead to supplant the conclusions of the Canadian courts as to a matter of domestic administrative law for its own judgment. This level of deference goes beyond consideration of domestic decisions as *facts* and plainly is inconsistent with NAFTA Article 1131, which, as Canada acknowledges, requires the Tribunal to

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[44] *See* Canada's Post-Hearing Submission, ¶ 32.

[45] *See* Reply, n. 184; Claimants' Submission on the US and Mexico's NAFTA Article 1128 Submissions, ¶ 48; Tr. 98:10-16, 1132:6-1137:15, 1139:6-1141:12; Claimants' Post-Hearing Brief (Redacted), ¶ 21. Indeed, Canada acknowledges that decisions of domestic courts are *facts* that the Tribunal may consider. *See* Canada's Post-Hearing Submission, ¶¶ 24, 30, 32.

resolve this dispute in accordance with the Treaty and applicable rules of international law.[46]

22. Furthermore, as Claimants have explained, the Canadian courts did not consider the issues of authority or consistency within the meaning of the Treaty.[47] Even though domestic court decisions can *in appropriate circumstances* be considered as relevant facts to guide in a NAFTA tribunal's analysis, the Canadian courts did not address the issues before this Tribunal and their decisions are neither binding nor persuasive here. As a result, the Tribunal should not defer to the decisions for its determination as to authority or consistency.

E. Question 2(d): As a matter of (i) national law, and (ii) the law of NAFTA, can a subordinate measure be "consistent with the measure" if it imposes additional and / or more onerous burdens on a legal or natural person who is subject to the subordinate measure?

23. Canada elevates form over substance when it argues that the ratchet rule test established by Article 1108(1)(c) has no bearing on the meaning of "consistency" in the subordinate measures clause.[48] Canada does not dispute that, had it framed the Guidelines requirement as a formal amendment to the Accord Act, that requirement would have to be judged under the ratchet rule. Canada further concedes that the imposition of additional or more onerous burdens informs the

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[46] **CA-3**, NAFTA, art. 1131 ("A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."); Canada's Post-Hearing Submission, ¶¶ 2-3, 23-24.

[47] *See supra* n. 35.

[48] *See* Canada's Post-Hearing Submission, ¶¶ 33-36.

question of conformity (which governs amendments to listed measures),[49] yet it supplies no principled basis why the same considerations should not guide the Tribunal's analysis of consistency (which governs subordinate measures).

24. Even if the starting place for the analysis is different for amendments and subordinate measures, both inquiries reach the same result. In both instances, the question is whether new requirements that a Party seeks to bring into the ambit of an Annex I reservation properly fall within the scope of that reservation. Canada's attempt to draw a distinction based on the operation of its domestic law fails for the reasons set forth above.[50] It is the law of the NAFTA that governs here, and as a matter of that law, a subordinate measure that imposes additional and/or more onerous burdens prohibited by Article 1106 cannot be consistent with a listed measure. To interpret the reservation otherwise would ignore the object and purpose of the Treaty.[51]

25. It is patently absurd for Canada to argue in the alternative that the Guidelines do not impose more onerous burdens on the Claimants than the pre-existing regime (i.e., the Accord Acts and the Hibernia and Terra Nova Benefits

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[49] *Id.* ¶ 35.

[50] *See supra* ¶¶ 12-18, 21-22. Indeed, domestic law is irrelevant to the operation of both Article 1108(1)(c) and Section 2(f)(ii) of the Interpretative Note to Annex I.

[51] *See* Second Submission of the United States of America, ¶ 9 (listing relevant considerations in determining whether a subordinate measure is "consistent" with the measure listed in Annex I as "the context of the reservation the Parties negotiated, including the NAFTA obligation from which the listed measure is reserved and the degree of the reserved measure's and subordinate measure's non-conformity with that obligation, in light of the other elements of the reservation that would be relevant").

Plans as approved by the Board).[52] Throughout this arbitration, Claimants repeatedly have highlighted the ways in which the Guidelines are indeed more burdensome.[53] Yet, as we noted in our Post-Hearing Brief, Canada failed to answer this showing.[54] And with good reason: it cannot. The most that Canada has been able to do is point to the provision in the Atlantic Accord calling upon the Board to approve R&D and E&T expenditures. However, as we noted at the hearing, that provision has no continuing legal effect now that the federal and provincial legislatures have enacted implementing statutes that did not carry the provision forward.[55] For much the same reason, Canada's reliance on Section 17(1) of the Accord Acts is also misplaced.[56]

26. To repeat the litany of additional burdens one more time, among other requirements, the Guidelines: (*i*) prescribe

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[52] *See* Canada's Post-Hearing Submission, ¶ 37.

[53] Memorial, ¶¶ 179-192; Reply, ¶¶ 107-110; Claimants' Submission on the US and Mexico's NAFTA Article 1128 Submissions, ¶¶ 38, 40, 42; Tr. 62:6-65:14, 1142:22-1143:7; Claimants' Opening Presentation, Slide 31; Claimants' Closing Presentation, Slide 33; Claimants' Post-Hearing Brief (Redacted), ¶¶ 6-7, 23.

[54] *See* Claimants' Post-Hearing Brief (Redacted), ¶ 23.

[55] Tr. 1073:13-1074:15; Claimants' Post-Hearing Brief (Redacted), ¶ 7.

[56] Canada has never explained how the general language of Section 17(1) can overcome the express decision of both the federal and provincial legislatures to write the relevant language of Section 55 of the Atlantic Accord out of the statutory scheme. Nor has it tried to explain why, if Section 17(1) of the Accord Acts did, as it suggests, carry forward the directive for the Board to approve R&D and E&T expenditures, the Board failed to do so for approximately fourteen years — from the time the Hibernia Benefits Plan took effect in 1990 until the Board issued the Guidelines in 2004.

an arbitrary level of expenditures on R&D/E&T that in practice amounts to approximately $147 million in forced spending, in addition to the estimated $146 million that Hibernia and Terra Nova already expect to spend in the Province, over the remaining life of the projects;[57] (*ii*) require the project operators to submit individual R&D/E&T spending decisions to the Board for pre-approval; (*iii*) require the project operators to submit a detailed accounting to the Board at the end of each calendar year and empower the Board to assess whether each reported expenditure is eligible under the Guidelines; (*iv*) require the project operators to submit work plans and financial instruments to address any spending shortfall assessed by the Board; and (*v*) condition Board authorization to continue operating the investments on compliance with the Guidelines.[58] None of these burdens is reflected in — or equivalent to — Claimants' prior commitments to make some unspecified amount of expenditures on R&D/E&T and to report those expenditures to the Board. Each decreases the conformity of the pre-existing measures by magnifying in both quantity and quality the requirements to purchase, use or accord a preference to local R&D and E&T services.

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[57] *See* Claimants' Opening Presentation, Slide 29; *see also infra* ¶ 33.

[58] *See supra* n. 53.

F. Question 3(a): Did the drafters of the NAFTA intend there to be any difference between a standard of "consistent with" (Section 2(f) of Annex I) and "not decreasing the conformity of" (Article 1108(1)(c))? And if so, what is the difference and what sources can be relied upon for identifying the meaning of these terms?

27. For the reasons already explained, the drafters of the NAFTA could not have intended for there to be any substantive difference between the "consistent with" standard (in Section 2(f)(ii) of the Interpretative Note to Annex I) and the "not decreasing the conformity of" standard (in Article 1108(1)(c)).[59] Canada's assertion that the two tests cannot be conflated because "[t]he purposes behind the Articles are fundamentally different" is patently false.[60] The function of both provisions is to limit the universe of subsequent measures that will be covered by a Party's Annex I reservation in a manner that makes sure that the object and purpose of the NAFTA are met. While the language may be slightly different, both require the subsequent measure to meet certain requirements: an amendment will only be covered by the reservation if it "does not decrease the conformity of the [listed] measure," and a subordinate measure will only be covered if it is adopted "under the authority of and consistent with the [listed] measure."[61]

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[59] *See supra* ¶¶ 17-18, 23-24.

[60] *See* Canada's Post-Hearing Submission, ¶ 41.

[61] For the avoidance of doubt, Claimants maintain their argument that Annex I reserves only subordinate measures that were existing when the NAFTA entered into force, except for those subsequent subordinate measures explicitly contemplated by the listed measure for the purposes of its implementation.

28. The four textual differences between the provisions that Canada cites fail to serve its argument as to the substantive standard to be applied under Section 2(f)(ii). *First*, Canada takes too narrow a view when it looks only to Subsection (f)(ii) of Section 2 to find the word "amendment."[62] Section 2 does mention amendments, in the phrase immediately before the subordinate measures clause, and these two clauses are part of the same sentence. Nothing suggests an intent to treat subordinate measures differently from any other form of measure in this regard. Furthermore, Canada is disingenuous in suggesting that Claimants accept that the Guidelines are not an amendment. We have made clear that although the Guidelines are not styled as an amendment, they effectively amend the pre-existing regime and therefore must satisfy the ratchet rule to fall within the reservation.[63] Canada has never responded to this point.

29. *Second*, Canada's attempt to place the Section 2(f)(ii) analysis in domestic administrative law fails for the reasons already described.[64] Substantive NAFTA law is not mentioned in the Interpretative Note to Annex I because it does not address whether a measure falls within a reservation; Article 1108(1) does that. Further, the fact that Section 2 requires a comparison between two domestic measures does not necessarily entail the application of a domestic law test. Indeed, the ratchet rule set forth in Article 1108(1)(c) also requires in part a comparison between two domestic measures, and Canada does not argue that domestic law has any application to that analysis.

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62 *See* Canada's Post-Hearing Submission, ¶ 43.

63 *See supra* n. 18.

64 *See* Canada's Post-Hearing Submission, ¶ 44. *See also supra* ¶¶ 12-18, 21-22.

30. *Third*, in making its third textual argument, Canada changes its theory yet again as to how the subordinate measures clause works. Now it asserts that the clause requires a comparison of the subordinate measure only to the part of the main measure that grants rulemaking authority to the regulator.[65] How this can be reconciled with the "consistent with" language or Canada's prior position that the comparison is to the non-conforming aspects of the main measure is impossible to understand. The case that Claimants have to meet seems to change with every new submission by Canada. Canada's latest argument is inadmissible and also unmeritorious.

31. Indeed, as Canada rightly concedes, Article 1108(1)(c) calls for a comparison between an amendment and the entire listed measure as it existed immediately before the amendment.[66] In this case, the entire listed measure is the measure itself (i.e., the Accord Act) together with the subordinate measures adopted thereunder prior to the adoption of the Guidelines (i.e., the Hibernia and Terra Nova Benefits Plans and the Board's decisions approving them). Even the domestic court decisions upon which Canada relies to establish authority and consistency recognized that the Guidelines imposed a substantive change from this pre-existing regulatory regime.[67] Canada's argument therefore depends entirely on the form of the Guidelines and not on their substance as an amendment to the prior legal regime. In other words, Canada argues that it gets a free pass under the ratchet rule because it did not acknowledge that the Guidelines were amending the approved benefits plan

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[65] *See* Canada's Post-Hearing Submission, ¶ 45.

[66] *Id.*

[67] *See* Reply, ¶ 174; Claimants' Submission on the US and Mexico's NAFTA Article 1128 Submissions, ¶ 47; Tr. 66:1-67:7.

regimes. International law, however, favors substance over form.

32. *Finally*, Canada's argument that the two provisions use different words is not convincing.[68] Even if the words are not identical, Canada has made no coherent case that the meaning is different. Although it tries in its most recent submission to overcome the fact that the French language version of the Treaty, drafted by Canada, uses two forms of the same word — *conformément* and *conformité* — the distinction that it attempts to draw between those terms is without a difference. Both words have the same root: *conforme*. It is therefore as if Canada were urging the Tribunal to accord a fundamentally different meaning to the words "consistent" and "consistently" simply because one has a different suffix than the other. Canada supplies no principled basis for such a reading. Indeed, Canada even acknowledges that one meaning of the word *conforme* is "consistent with."[69] For the reasons already explained, this equivalency of terms is clearly the meaning intended by the drafters of the NAFTA.[70]

33. Claimants already have addressed Canada's alternate argument that the Guidelines do not decrease the conformity of the pre-existing measure with its Article 1106 obligations and will not repeat that analysis here.[71] We will simply note the absurdity of Canada's suggestion that the Guidelines merely quantify, but do not increase, Claimants' obligation under the Accord Acts and the approved Hibernia and Terra Nova Benefits Plans to make expenditures on R&D and E&T.

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[68] *See* Canada's Post-Hearing Submission, ¶ 46.

[69] *Id.* ¶ 46 & n. 27.

[70] *See supra* ¶¶ 17-18, 23-24, 27-31.

[71] See Canada's Post-Hearing Submission, ¶¶ 48-50. *See also supra* ¶¶ 25-26.

On an annual basis, during the first three full years of the Guidelines' application to Hibernia (i.e., 2005-2007), the Board required the project to spend an average of five times more on R&D and E&T than HMDC had reported prior to the introduction of the Guidelines, to the Board's evident satisfaction as demonstrated by its renewal of the Hibernia POA in June 2000.[72] Over the remaining life of the oil fields, the Guidelines will force Hibernia and Terra Nova to spend double what they otherwise would on R&D and E&T.[73] That is not mere quantification. That is a substantial increase.

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[72] *Compare* **CE-71**, Hibernia 1999 Benefits Report, § 5.0 (reporting average annual R&D expenditures of [redacted] for the period 1997-1999) *with* **CE-116**, Letter from F. Smyth, CNLOPB, to P. Sacuta, HMDC (Feb. 26, 2009) (requiring average expenditures of $15 million per year for the period 2005 through 2007 under the Guidelines). This comparison demonstrates Hibernia's pre-Guidelines R&D spend and post-Guidelines obligations over two periods of time of equivalent length: the three years preceding the Board's June 2000 renewal of Hibernia's POA, and the first three full years in which Claimants were subject to the Guidelines. Claimants selected the 1997-1999 period, rather than the three-year period immediately preceding the imposition of the Guidelines, because the Board's renewal of the Hibernia POA in 2000 was a significant event that confirmed the Board's satisfaction with Hibernia's reported R&D/E&T expenditures up until that point. *See* Tr. 767:6-10 (Way) ("In order to issue a POA, the Board had to be comfortable that the Proponent was in compliance with all applicable legislative and regulatory requirements and their own Benefits Plan; correct? A. Yes."); Tr. 493:20-494:2 (Fitzgerald) ("And similarly, if a POA is granted, the Board can only do that if it feels that the Proponent is in compliance with its Benefits Plan's obligations; right? A. At that point, yes."); Tr. 1095:17-1097:2.

[73] *See* Claimants' Opening Presentation, Slide 29.

G. Question 3(b): Do the words "consistent with" imply any requirement that there should be no decrease in the conformity of a new subordinate measure with the measure that is the subject of the reservation, as compared with the situation that existed prior to the adoption of the new subordinate measure?

34. The Tribunal by now will be well aware that Claimants view the words "consistent with" as implying a requirement that there be no decrease in a reserved measure's conformity with the Treaty as a result of a new subordinate measure. As Canada's response to this particular question does not raise any new issues, we simply refer the Tribunal to our prior comments in this submission and at the hearing.[74]

III.

CLAIMANTS' FURTHER COMMENTS ON A FORMULA FOR FUTURE DAMAGES

35. Consistent with the pledge made in paragraph 83 of Claimants' Redacted Post-Hearing Brief, Claimants sought to discuss with Canada the possibility of jointly proposing a formula for the award of future damages should the Tribunal find Canada to be in breach of its Treaty obligations. Canada has refused to pursue any such discussions.

36. Claimants subsequently asked Canada to provide the confirmation sought as to the two legal issues set forth in paragraph 82 of our Redacted Post-Hearing Brief. Canada has not responded to this request. Absent the confirmation sought, Claimants are not sufficiently comfortable

[74] *See supra* ¶¶ 17-18, 23-24, 27-32; Tr. 1130:9-1132:5, 1141:13-1142:5.

recommending the use of a formula for future damages, given the possibility that Canada ultimately may oppose its enforceability and subject the parties to further contentious proceedings. Claimants therefore ask that the Tribunal not use such a formula and instead award the full measure of damages upfront in order to ensure adequate compensation for Canada's breach.

IV.

THE BOARD'S DECISION ON THE ELIGIBILITY OF HIBERNIA'S 2009 R&D AND E&T EXPENDITURES

37. On November 1, 2010, the Board notified HMDC of its decision on the eligibility of Hibernia's 2009 R&D and E&T expenditures under the Guidelines. HMDC had submitted expenditures totaling [redacted] to the Board in March 2010,[75] of which the Board approved [redacted] (the final figure may be higher as the Board is still considering two items worth [redacted].[76] Mr. Rosen had projected that the Board would approve [redacted] in R&D and E&T expenditures for 2009.[77] This projection comes within 10 percent of the amount actually approved by the Board, thus demonstrating the reliability of the normalized average used to calculate Claimants' future R&D expenditures in the ordinary course of business.

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[75] **CE-186**, Letter from P. Phelan, HMDC, to J. Bugden, CNLOPB (Mar. 31, 2010), *attaching* Hibernia Project – R&D / E&T Expenditure Submission (2009).

[76] **CE-248**, Letter from J. Bugden, CNLOPB, to P. Phelan, HMDC (Nov. 1, 2010).

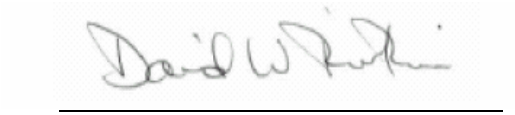
[77] Third Expert Report of Howard N. Rosen, Schedule 2.

V.

CONCLUSION

38. For all the reasons stated here and in prior oral and written submissions by the Claimants, we respectfully urge the Tribunal to hold that the Guidelines violate Canada's obligations under Articles 1105 and 1106 of the NAFTA and to award Claimants full damages to compensate for this violation.

Respectfully submitted,



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