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

BETWEEN:

MOBIL INVESTMENTS CANADA INC.

Claimant

AND

GOVERNMENT OF CANADA

Respondent

ICSID Case No. ARB/15/6

CLAIMANT'S REPLY MEMORIAL

ARBITRAL TRIBUNAL:

Sir Christopher Greenwood QC

Mr. J. William Rowley QC

Dr. Gavan Griffith QC

September 23, 2016

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I.

INTRODUCTION

1. The Mobil I Arbitration confirmed that Canada's application of the Guidelines to Mobil violates the NAFTA. Under international law, Canada is required to cease this wrongful conduct and to offer appropriate assurances of non-repetition.[1] Canada has done neither of these things. To date, it continues to illegally enforce the Guidelines against Mobil, and, in fact, is preparing to perpetuate their unlawful elements in the proposed revisions to the Guidelines issued in 2016.[2] As the Mobil I Majority recognized, Canada's recalcitrance makes this dispute unique:

> The situation in these proceedings is a novel one. The regulatory regime from which the Claimants' alleged losses flow continues to operate. Thus, the situation involves a continuing or ongoing breach as applied to these Claimants, and (to the Majority's knowledge) has not been litigated before a NAFTA arbitral tribunal previously.[3]

2. In its Counter Memorial, Canada does not contest that the Guidelines as applied to Mobil breach the NAFTA. Instead, it constructs two defenses to Mobil's claim. Both must fail.

3. Canada first argues that this claim is time-barred. Canada continues to enforce the Guidelines against Mobil to date and its time bar argument conflicts with the "cogent and directly relevant authority" that confirm that a time bar limitation does not preclude a claim in relation to a continuing breach.[4] Further, Canada incorrectly dresses up its argument on this point as one of jurisdiction, instead of admissibility, even though it is clear that the issue whether a time bar applies relates to whether or not a claim should be permitted to be brought and

[1] **CL-69**, U.N. Articles on the Responsibility of States for Internationally Wrongful Acts, Article 30: "The State responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing; (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require." This position was confirmed in the investor-state context by **CL-56**, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*, ICSID Case No. ARB/02/1, Award of July 25, 2007, ¶ 85: "During this period and provided that the obligation is still in force, the State is under a duty to perform the obligation breached. It is also obliged to cease the wrongful act."

[2] **C-383**, C-NLOPB, Draft Benefits Plan Guidelines (January 2016), Appendix 2 Research and Development and Education and Training Expenditures.

[3] **C-2**, Mobil I Award, ¶ 32.

[4] **CE-1**, Expert Report by Professor Dan Sarooshi ("Sarooshi Report I"), ¶ 8.

does not concern the "distinct issue of the Tribunal's jurisdiction to hear the claims."[5]

4. Canada then argues that Mobil's claims in this arbitration are barred by the principle of *res judicata*. In the Mobil I Arbitration, Canada strenuously argued that the claim for *any* future damages had been brought *too early*, arguing that Mobil was precluded from claiming any damages incurred after its 2007 Request for Arbitration. It failed in this argument, but the Mobil I Tribunal established a clear cut-off date for the recovery of damages. Now that the claim for expenditures incurred in 2012 through 2015 is ripe, Canada asserts that Mobil is barred from recovery on the ground that this claim has been brought *too late*, contending that the losses suffered by Mobil from 2012 through 2015 were finally determined by the Mobil I Tribunal and cannot be "re-litigated" now. In fact, claims for losses incurred in subsequent time periods, under principles defined in the Mobil I Decision, were *not* decided in that arbitration. The Mobil I Majority refused to "engage in speculative predictions of the future"[6] and instead expressly directed Mobil to file further arbitrations to recover these losses. Mobil has done precisely that in this case.

5. Canada's two defenses must fail and this tribunal should therefore make Mobil whole for the damages it has incurred due to Canada's ongoing breach of the NAFTA. Since 2012, in excess of [redacted] of incremental expenditures have been spent at Hibernia and Terra Nova in order to comply with the Guidelines.[7] In this arbitration, Mobil claims its portion of the losses, or $19,883,897, plus interest, as compensation for the losses it has incurred to comply with the Guidelines for incremental expenditures made at Hibernia between May 1, 2012 and December 31, 2015 and at Terra Nova between January 1, 2012 and December 31, 2015.[8]

6. The principle that Mobil is entitled to full compensation for its losses is not in dispute. Yet Canada seeks to chip away at the quantification of Mobil's losses in hopes that it can pay less than the full amount it is responsible for. This attempt cannot succeed. Canada's alternative model of damages is irreparably flawed; having disregarded the Mobil I Decision's principles of quantum, Canada's remaining attacks on Mobil's compensation are a cocktail of second-guessing of the witness testimony, rehashed arguments that the Mobil I Majority did not accept, and just plain misdirection.

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[5] *Id.*

[6] **C-2**, Mobil I Award, ¶ 166.

[7] **CW-9**, Second Witness Statement of Paul Phelan ("Phelan Statement II"), Annex A, Table "Summary of Mobil Investments' Claim for Incremental Expenditures (2012-2015)," Reference G.

[8] *Id.* at Reference Q. Mobil may receive over the course of this proceeding emerging information pertaining to the quantum of its damages, and if so, it will update this Tribunal accordingly.

7. This Reply Memorial is accompanied by Appendices A and B, an expert report submitted by Professor Dan Sarooshi, exhibits, further witness statements, and legal authorities. Exhibits have been given the designation "C-," witness statements have been given the designation "CW-," the expert report has been given the designation "CE-1" and legal authorities have been given the designation "CL-," in accordance with Procedural Order No. 1. All references to dollars in this Reply Memorial are in Canadian currency. Capitalized terms in this Reply Memorial have the same meaning ascribed to them in the Memorial.

II.

CANADA CONCEDES THAT IT IS BOUND BY THE MOBIL I DECISION AND AWARD BUT MISREPRESENTS OR IGNORES THE CLAIMS DECIDED THEREIN

A. Canada concedes that it is bound by the Mobil I Decision and Award

8. Four years after the Mobil I Majority determined that the Guidelines were unlawful vis-à-vis Mobil, and over a year after Canada was ordered to pay Mobil compensation for its losses suffered up to 2012, Canada has finally conceded that the Mobil I Decision and Award is "binding as between the Claimant and Canada."[9] This concession follows the rejection of Canada's challenge to the Decision and Award by the Ontario Superior Court of Justice as no more than an attempt "to re-litigate the merits of the case."[10] Canada did not appeal this ruling, and finally paid the Award in April 2016.[11] Given that the Mobil I Award awarded damages incurred up to early 2012, and that Canada has not ceased the application of the Guidelines to Mobil, additional losses have since been incurred and must be adjudicated in this arbitration.

9. Despite its acceptance that it is bound by the Mobil I Decision and Award, Canada nonetheless dedicates over fifty pages of its Counter Memorial to criticizing the findings of the Mobil I Majority, and urging this tribunal to disregard the approach taken by the Mobil I Majority so as to avoid financial liability for a clear and ongoing legal wrong.

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[9] Counter Memorial, ¶ 7. Also note Counter Memorial, ¶ 8 ("the final ruling by the Mobil/Murphy Majority … is binding as between Claimant and Canada") and ¶ 110 ("the final ruling by the Mobil/Murphy Majority that the 2004 Guidelines are not covered by the Annex I Accord Act reservation, and hence not exempt from Article 1106(1)(c), is binding as between the Claimant and Canada").

[10] **C-173**, Set Aside Decision, ¶ 43. See Mobil's Memorial, ¶¶ 155 *et seq*.

[11] **C-391**, Global Affairs Canada, "Update on Mobil Investments Canada Inc. and Murphy Oil Corp." (Apr. 4, 2016), available at http://news.gc.ca/web/article-en.do?nid=1046199&_ga=1.41051175.464175185.1422289006; **C-9**, Phelan Statement II, ¶ 27.

10. As part of this wrongheaded effort, Canada accuses Mobil of having presented "false" evidence to show the increased expenditure burden imposed by the Guidelines, thereby misleading the Mobil I Tribunal into its finding of liability under the NAFTA.[12] Mr. Phelan thoroughly debunks this accusation.[13] As he shows in his second witness statement, "the historical evidence bears out that the Guidelines in fact forced the operators to spend substantially more on R&D and E&T than they otherwise would in the ordinary course."[14] As an investor in the Projects, Mobil incurs this increased spending.[15]

11. The graphs prepared by Mr. Phelan below show that between 2004 and 2008—years during which the Board refrained from actively enforcing the Guidelines[16]—the Projects' annual expenditures on R&D and E&T were substantially lower than the annual expenditure obligation under the Guidelines. After the Board began enforcing the Guidelines in 2009,[17] the annual expenditure levels increased dramatically at both Projects. This clear shift in the expenditure profiles of both Projects shows the impact of the Guidelines.

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[12] Counter Memorial, ¶¶ 72-77.

[13] **CW-9**, Phelan Statement II, ¶ 82. See also *id.*, ¶¶ 76-82.

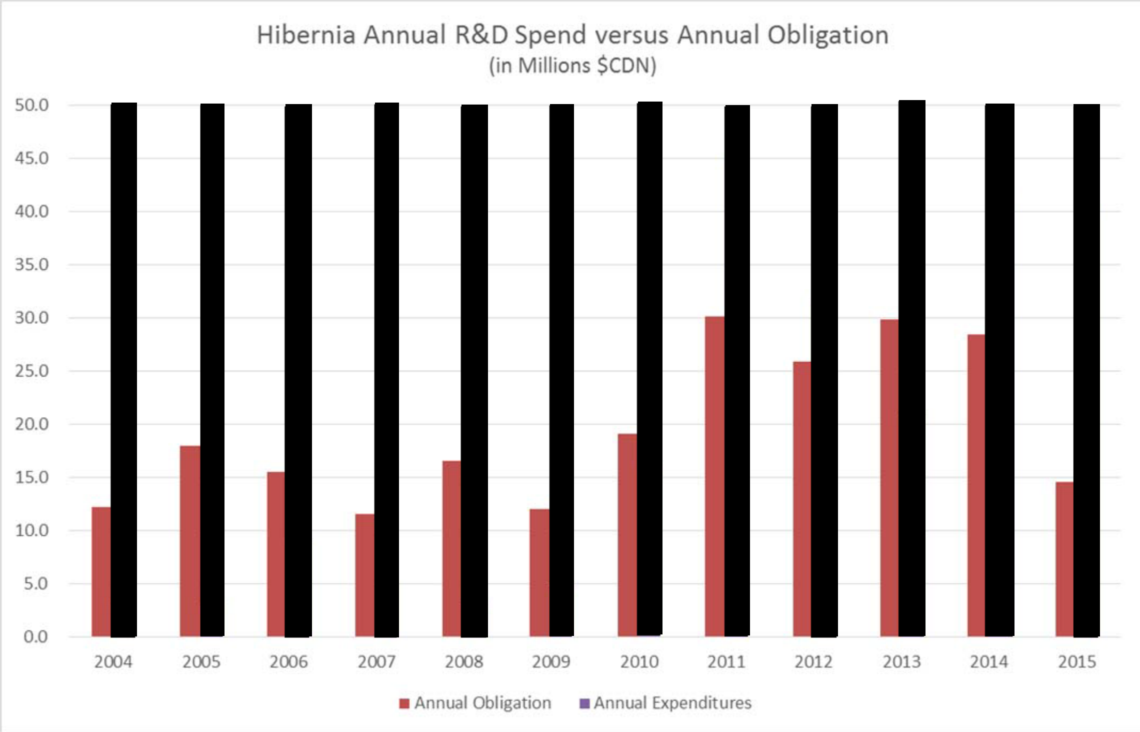
[14] *Id.*, ¶ 80.

[15] **CW-1**, Phelan Statement I, ¶ 52 ("Mobil, as an investor in the projects, ultimately bears its share of spending made through the projects' respective joint accounts according to its pro rata ownership interests.").

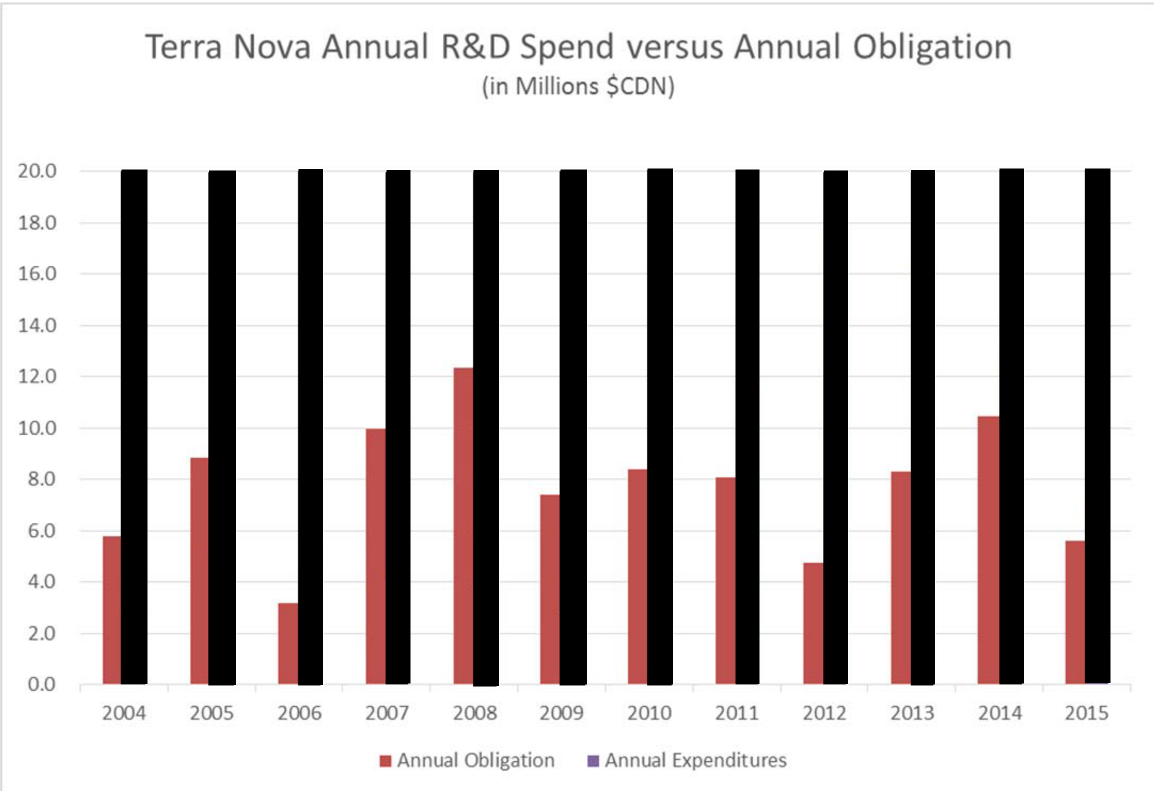
[16] Memorial, ¶ 115.

[17] *Id.*, ¶ 125.

Phelan Statement II, Fig. 2



Phelan Statement II, Fig. 5



12. Against this empirical backdrop, the Mobil I Tribunal was clearly correct when it held that "the effect of the 2004 Guidelines bespeaks a set of requirements to purchase, use or accord a preference to local goods and services that have *undergone a substantial expansion* as compared with the earlier legal framework."[18] Canada cannot credibly maintain a contrary position.

13. Ultimately, Canada's criticisms of the Mobil I Decision and Award are irrelevant to the issues in dispute in these proceedings. Canada has accepted that it is bound by the holdings made by the Mobil I Majority. Therefore, in this Reply Memorial, Mobil will not distract the tribunal by engaging in detail with Canada's "respectful[] but vigorous[]"[19] disagreement with the Mobil I Decision and Award.

B. Canada mischaracterizes the claims put to, and decided by, the Mobil I Tribunal

14. Despite being bound by the holdings of the Mobil I Tribunal, Canada fundamentally mischaracterizes the claims decided by that tribunal. A proper understanding of these holdings is critical to understanding the fatal deficiencies in Canada's two defenses. It asserts that the claim for losses incurred between 2012-2015 cannot be brought in this arbitration because it is time barred. This argument sits in uneasy contrast with Canada's further argument that the Mobil I Tribunal decided all claims concerning the Guidelines, including the claim for compensation for expenditures incurred pursuant to the Guidelines between early 2012 and 2015 that Mobil raises in this arbitration, and thus, Canada asserts that this claim may not be raised again.

15. The Mobil I Decision on Liability and on Principles of Quantum was limited, as its title indicates, to *principles* of quantum. The Mobil I Decision determined that the Guidelines, as applied to Mobil, breached the NAFTA and established the principles according to which it would determine quantum. It also held that the claim asserted in this proceeding, namely the claim for compensation for losses suffered from 2012 through 2015, was not ripe for determination.

16. Before the Mobil I Decision, the Mobil I Tribunal was confronted with two competing arguments in relation to the approach it should take to assessing damages. Mobil and Murphy initially sought to recover damages for the life of the Hibernia and Terra Nova fields, claiming for damages up to 2036.[20] Canada disagreed, contending that only damages incurred by the date of the

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[18] **C-1**, Mobil I Decision, ¶ 401 (emphasis added).

[19] Counter Memorial, ¶ 7.

[20] **C-1**, Mobil I Decision, ¶¶ 102 and 414 ("The Claimants seek compensation for incremental expenditures that will arise as a result of the introduction of the 2004 Guidelines and their application for the period from 2004 until 2036.").

Request for Arbitration (November 2007) could be awarded by the Mobil I Tribunal.[21]

17. In the Mobil I Decision, the Majority found that "Article 1116(1) does not, in our view, as a jurisdictional matter, preclude the Tribunal from deciding on appropriate compensation for future damages," which it defined as "losses which crystallise (i.e. become quantifiable) and must be paid sometime in the future[.]"[22]

18. The Mobil I Majority understood that the Guidelines were intended to apply for the life of the Projects.[23] However, it decided that it would only address losses that were ripe for adjudication in those proceedings: "for the purposes of determining the quantum of damages, the Majority will consider any loss which is incurred, *i.e.* which is actual, as of the date of the Award."[24] It further clarified that:

> actual damages occur when there is a firm obligation to make a payment and there is a call for payment or expenditure, or the occurrence of payment or expenditure has transpired. Indeed, expenditure of money is not always required for damages to be compensable. Expenditures which have not yet been paid may be included as compensation if a claimant can prove that they are under an obligation to pay such expenses (*e.g.* there has been some kind of call for payment).[25]

19. While Mobil and Murphy were likely to incur future losses under the Guidelines, those were not ripe for determination by the Mobil I Tribunal. As a natural corollary to its decision on principles of quantum, the Mobil I Majority determined: "Given that the implementation of the 2004 Guidelines is a continuing breach, the Claimants can claim compensation in new NAFTA arbitration proceedings for losses which have accrued but are not actual in the current proceedings."[26]

20. The continuing nature of Canada's liability under Article 1106 was a significant factor in the Mobil I Decision:

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21 **C-1**, Mobil I Decision, ¶ 416: "The Respondent's principal objection concerns the question of whether the Tribunal has jurisdiction to compensate damages, which, in its opinion, were incurred after the filing of the claim on November 1, 2007 (but during the arbitral proceedings) or will be incurred in the future (up to 2036). Effectively, the objection is to the Tribunal awarding future or prospective damages."

22 **C-1**, Mobil I Decision, ¶¶ 427-429.

23 **C-1**, Mobil I Decision, ¶ 391.

24 *Id.*, ¶ 440.

25 *Id.*

26 *Id.*, ¶ 478.

> Many of the decisions to which we were referred concerned unlawful termination of contracts and the international awards frequently concerned 'one off' breaches of international law, such as expropriations and termination of contracts. Such circumstances are entirely different from the facts in this proceeding … In the present case … the Respondent's breach gives rise to continuing losses, whereby the Claimants' losses unfold over time. … Decisively, the situation at hand is starkly different, in that the future damages that are being claimed may be required by the Respondent to be paid at some point as the required incremental spending under the 2004 Guidelines, and will at that point be fully ascertainable and 'actual.'[27]

21. Applying these principles, the Mobil I Decision analyzed the ripeness of claims for 2004-2008, 2009, and 2010-2036. However, the Mobil I Decision did not definitively quantify *any* of Mobil's claims for those time periods.

22. Canada asserts that the Decision's finding that the 2010-2036 claim was not yet ripe amounted to a "reject[ion]" of Mobil's present claim for 2012-2015 losses.[28] The unambiguous text of the Mobil I Decision contradicts Canada's position: with respect to the 2010-2036 portion of Mobil's claim, "[t]he Tribunal has applied the reasonable certainty standard discussed above, which has not led to a conclusion *per se*, but rather to a finding that there is too much *uncertainty* at this stage for the Tribunal to make a determination."[29]

23. Canada insinuates that Mobil and its "damages model" was to blame for this uncertainty.[30] This position is not supported by the text of the Mobil I Decision, which identifies the Board and its regulatory decisions as responsible for the uncertainty arising out of the future application of the Guidelines.[31] Indeed, Canada at one point accepted responsibility for this uncertainty,[32] but now appears to have retracted that recognition to better suit its current position.

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27 *Id.*, ¶ 476.

28 Counter Memorial, ¶¶ 10 and 191.

29 **C-1**, Mobil I Decision, ¶ 474.

30 Counter Memorial, ¶ 10 ("Responsibility for this failure lies solely with the Claimant: by its own design, it proposed a single damages model which was so speculative and overreaching that the Mobil/Murphy tribunal had no choice but to reject the claim for the damages that the Claimant now wants a second-chance to recover.").

31 **C-1**, Mobil I Decision, ¶ 474 (discussing uncertainty arising out of "the Board's regulatory decisions" as well as "objective, market-based factors" selected by Board as formula factors under Guidelines).

32 See, *e.g.*, **R-79**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4), Canada's Rejoinder Memorial ("Mobil I Canada's Rejoinder Memorial") ¶¶ 299-300 (claiming that application of Guidelines was "speculative" because of "uncertain[ty]" in, among others, "the future StatsCan Factor," "the … future SR&ED tax savings

24. Reflecting the fact that no quantum claims were considered in the Decision, the Mobil I Decision's *dispositif* invited Mobil and Murphy to file specific claims for losses incurred by that point "no later than 60 days of receipt of this Decision."[33] Mobil and Murphy did so on July 23, 2012, claiming as follows:

> The Tribunal's Decision made clear that the Tribunal 'will consider any loss which is incurred, i.e. which is actual, as of the date of the Award.' In this submission, Claimants update the evidence of the actual damages that they have incurred as a result of the application of the Guidelines over the period April 2004 to December 31, 2011 for Terra Nova, and April 30, 2012 for Hibernia.[34]

With respect to losses incurred *after* those dates, Mobil and Murphy "note the Tribunal's statement that Claimants can claim compensation in new NAFTA arbitration proceedings for losses which have accrued but are not actual in the current proceedings, and reserve all their rights in this regard."[35]

25. The Mobil I Award was limited to the time periods claimed by Mobil and Murphy (*i.e.*, up to December 31, 2011 for Terra Nova, and April 30, 2012 for Hibernia).[36] It did not decide claims for losses incurred after these time periods. In accordance with the Mobil I Decision and Award, Mobil filed for losses incurred from those dates through 2015 in this arbitration.

III.

MOBIL'S CLAIM IS NOT TIME BARRED

A. Overview

26. Canada alleges that Mobil's claim in this arbitration is barred because it was not brought within three years of the Guidelines' promulgation in November 2004.[37] It cites Articles 1116(2) and 1117(2) of the NAFTA, which provide as follows:

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and royalty payment deductions," and even "the continued existence of the Guidelines in their present form").

[33] **C-1**, Mobil I Decision, ¶ 490(5) (*dispositif*).

[34] **R-75**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4), Claimants' Damages Submission dated July 23, 2012 ("Mobil I Claimants' Damages Submission"), ¶ 5.

[35] *Id*. (quotation marks omitted).

[36] **C-2**, Mobil I Award, ¶¶ 28-29.

[37] Counter Memorial, Section III. Canada's reference to 2004 is illogical at best, as the Guidelines were not enforced until 2009. **C-1**, Mobil I Decision, ¶ 88.

> ***Article 1116: Claim by an Investor of a Party on Its Own Behalf***
>
> … 2. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.
>
> ***Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise***
>
> … 2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.

27. Canada mischaracterizes these provisions as affecting the jurisdiction of this tribunal. It asserts that they have a "preclusive effect" and "serve as a prerequisite to engage Canada's consent to arbitrate under Article 1122(1)."[38] Canada is wrong: arbitral tribunals and commentators agree that time bar provisions, such as those in Articles 1116(2) and 1117(2), do not affect jurisdiction.

28. Canada goes on to argue that there was only one three-year window (November 2004-2007) within which Mobil could bring claims to recover losses it had not yet suffered. Hence, according to Canada, Mobil's claim is *too late*. Canada's position stands in clear contrast with what it argued in the Mobil I Arbitration, in which Canada claimed that nearly all of Mobil's claims—including those concerning the time period at issue in this arbitration—were *too early* and should be filed in a subsequent arbitration.[39]

29. This tribunal is faced with a unique situation. Not only has an arbitration tribunal already determined that the Guidelines, as applied to Mobil, breach the NAFTA, but Canada has refused to stop enforcing the Guidelines and continues to perpetuate this breach and to cause Mobil to incur ongoing loss.

30. In the Decision, the Mobil I Majority instructed Mobil to file another arbitration if and when it incurred further losses under the Guidelines, stating:

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[38] Counter Memorial, ¶ 137.

[39] As Canada's pleadings in the Mobil I Arbitration show, Canada originally contended that Articles 1116 and 1117 barred the Mobil I Tribunal from considering any losses incurred after the Mobil I Request for Arbitration, filed in November 2007. As Canada argued in its Mobil I Rejoinder Memorial, Mobil and Murphy "claim damages from the time that the Guidelines were implemented in 2004 until the end of their projects in 2036. *However, the NAFTA prevents the Tribunal from awarding damages incurred after the Notice of Arbitration was filed on November 1, 2007*" (emphasis added). **R-79**, Mobil I Canada's Rejoinder Memorial, ¶ 231. See *supra* Section II(B).

> In our view, there is no basis to grant at present compensation for uncertain future damages. Given that the implementation of the 2004 Guidelines is a continuing breach, the Claimants can claim compensation in new NAFTA arbitration proceedings for losses which have accrued but are not actual in the current proceedings.[40]

31. In fact, Mobil's Request for Arbitration in this dispute was filed before the Award determining quantum in the first proceeding was rendered. This claim was not brought because of "dissatisfaction with the outcome" of the Mobil I Arbitration, as Canada would have this tribunal believe.[41] Instead, it was brought at the direction of the Mobil I Majority, *prior to the conclusion of the Mobil I Arbitration*, in order to recover losses in this arbitration that were not yet ripe for recovery in the first arbitration.[42] Canada has been on notice of the claim for the time period at issue in this arbitration since 2007.

32. Under applicable international law, time does not begin to run for the purposes of a limitation period until the continuing breach in question ceases to exist.[43] Canada's arguments ignore the fact that in continuing breach cases, Articles 1116(2) and 1117(2) have been construed as only establishing a temporal limitation on the recovery of losses. It is, of course, unarguable that Mobil seeks damages for the losses it incurred in the three years prior to bringing its claim before this tribunal. In the event that Canada seeks to contest the Mobil I Majority's characterization of this case as involving a "continuing breach" and succeeded in persuading this tribunal to depart from that view, Mobil's claim nonetheless satisfies the time bars in Articles 1116(2) and 1117(2).[44]

33. Canada's time bar arguments undermine the purpose of limitation periods, *i.e.*, to prevent parties from bringing stale claims—and not to immunize wrongdoers from perpetuating unlawful conduct.[45] If Canada is concerned about the Guidelines "be[ing] permanently subject to challenge,"[46] the solution lies not in Articles 1116 and 1117 but rather in ceasing its continuing breach of international law. In July 2012, Mobil wrote to Canada confirming that, in the Mobil I

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40 **C-1**, Mobil I Decision, ¶ 478.

41 Counter Memorial, ¶ 5.

42 Counter Memorial, ¶ 5.

43 **CE-1**, Sarooshi Report I, ¶¶ 47 *et seq.*

44 *Id.*, Section 6.

45 **RL-6**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability of March 17, 2015, ¶ 277 ("A host state can be prejudiced by a loss of institutional memory or documents on its part concerning the alleged breaches. Delay in bringing a claim might result in a situation where a host state is unknowingly carrying on acts or omissions for which it might be ordered to pay compensation.").

46 See *infra* ¶ 50.

Decision, "the Tribunal found that the … Guidelines … violate Article 1106" and seeking, *inter alia*, Canada's "assurance that the Guidelines will not be applied to ExxonMobil Canada Properties, ExxonMobil Canada Ltd. and ExxonMobil Canada Hibernia Company Ltd. for 2012 or any future period."[47] Such assurances are mandated in instances of continuing breaches.[48] Contrary to international law, Canada refused to cease applying the Guidelines to Mobil.[49] As Professor Sarooshi concludes:

> If Canada's position were upheld in the present case and Mobil were not able to bring a claim before this Tribunal and indeed before subsequent Tribunals, there would be a grave injustice suffered by Mobil as a result of Canada's continuing breach of Article 1106 and the effectiveness of NAFTA Chapter 11 dispute resolution would be severely compromised. Canada's position here simply cannot be permitted as a matter of law, decided authority, logic or indeed principle.[50]

B. Canada's time bar defense does not affect this tribunal's jurisdiction

34. Canada first argues that Articles 1116(2) and 1117(2) determine its "consent to arbitration" and thus affect this tribunal's jurisdiction.[51] As a corollary, it alleges that Mobil bears the burden of proof for establishing its compliance with Articles 1116(2) and 1117(2).[52] In making this argument, Canada fails to grasp the fundamental distinction between jurisdiction and admissibility. Chapter 11's time bars are defenses that affect, at most, the admissibility of Mobil's claims. They do not concern this tribunal's jurisdiction. Professor Sarooshi explains that:

> [t]he issue of the time-bar … is a decision on admissibility for the Tribunal and does not go to the distinct issue of the Tribunal's jurisdiction to hear the claims since it does not concern a State's consent to arbitration but is rather a procedural barrier that stipulates in what circumstances is it appropriate for a tribunal to exercise its

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[47] **C-174**, Letter from P. Sacuta, ExxonMobil Canada Ltd., to J. Bugden, C-NLOPB (July 5, 2012). Also note **C-175**, Letter from C. Buchanan, Murphy Oil Company Ltd., to J. Bugden, C-NLOPB (July 9, 2012).

[48] **CL-69**, U.N. Articles on the Responsibility of States for Internationally Wrongful Acts, Article 30.

[49] **C-176**, Letter from J. Bugden, C-NLOPB, to P. Sacuta, ExxonMobil Canada Ltd. (July 9, 2012) (refusing to alter the Guidelines' application to Mobil because "the validity of the Board's guidelines have been affirmed by the Courts" of Canada). Also note **C-177**, Letter from J. Bugden, C-NLOPB, to C. Buchanan, Murphy Oil Company Ltd. (July 12, 2012).

[50] **CE-1**, Sarooshi Report I, ¶ 65.

[51] Counter Memorial, ¶ 140.

[52] Counter Memorial, ¶ 172.

> adjudicative power to hear the specific claims in a particular arbitration.[53]

35. As the *Pope & Talbot* tribunal held in another NAFTA dispute involving Canada: "Canada's contention that the Harmac claim is time barred [under Article 1116(2)] is in the nature of an affirmative defense, and, as such, Canada has the burden of proof of showing factual predicate to that defense. … it is for Canada to demonstrate that the three-year period had elapsed prior to that date."[54] Other tribunals concur. The *Feldman* tribunal characterized Articles 1116(2) and 1117(2) as a "limitation defense."[55] Similarly, the *Tecmed* panel was tasked with construing a time bar with similar wording to Articles 1116(2) and 1117(2) in the Spain-Mexico bilateral investment treaty.[56] It found that the time bar "do[es] not relate to the jurisdiction of the Arbitral Tribunal but rather to (non)compliance with certain requirements of the Agreement governing the admissibility of the foreign investor's claims."[57]

36. This characterization of Articles 1116(2) and 1117(2) as going to admissibility is supported by leading commentators. Professor Paulsson, in a seminal chapter on "Jurisdiction and Admissibility" in international arbitration, defined the distinction as follows: "[i]f the reason for such an outcome would be that the claim could not be brought to the particular forum seized, the issue is ordinarily one of jurisdiction and subject to further recourse."[58] However, "[i]f the reason would be that the claim should not be heard at all (or at least not yet), the issue is ordinarily one of admissibility and the tribunal's decision is final."[59]

37. Paulsson's "lodestar" is the following question: "is the objecting party taking aim at the tribunal or at the claim?"[60] The former is jurisdictional; the latter goes to admissibility. Put otherwise, if the alleged condition was not

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[53] **CE-1**, Sarooshi Report I, ¶ 8.

[54] **CL-70**, *Pope & Talbot Inc. v. Canada*, UNCITRAL, Award in Relation to Harmac Motion of February 24, 2000, ¶ 11.

[55] **RL-8**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award of December 16, 2002, ¶ 63.

[56] **CL-71**, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of May 29, 2003, ¶ 72.

[57] **CL-71**, *Tecmed*, *id*., ¶ 73. Also note **CL-72**, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Dissenting Opinion of Keith Highet of May 8, 2000, note 45 (characterizing allegation that "claim is time-barred" as potential "defect on the face of the complaint which does not, however, invalidate or depreciate the Tribunal's jurisdiction as such").

[58] **CL-73**, J. Paulsson, "Jurisdiction and Admissibility" in *Global Reflections on International Law, Commerce and Dispute Resolution - Liber Amicorum in honour of Robert Briner*, ICC Publishing (Publication 693, November 2005), p. 617.

[59] *Id.*, p. 617.

[60] *Id.*, p. 616.

complied with, "was it the parties' intention that the relevant claim should no longer be arbitrated … but rather [heard] in some other forum, or was it that the claim could no longer be raised at all?"[61] Only the first situation described can be properly characterized as a jurisdictional objection. For Professor Paulsson, allegations concerning the timeliness of claims are "properly matters of admissibility."[62]

38. Canada's time bar defense "tak[es] aim … at the claim"[63] and, as such, goes to the admissibility of Mobil's claim. Canada's core contention is that Mobil's claim cannot be heard because Mobil allegedly failed to file a notice of arbitration within three years of the promulgation of the Guidelines.[64] Canada does not allege the existence of an alternative forum in which these Chapter 11 claims might be heard, or challenge this tribunal's general competence to hear such claims. Rather, Canada's allegation is that the time bars have "preclusive effect" on Mobil's claims.[65]

39. Canada simply cannot recast a timeliness defense as a jurisdictional objection. As primary support for this contention, Canada relies upon Article 1122(1), which states that "[e]ach Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement."[66] This provision does not expressly address Article 1116(2) or 1117(2), and would, on Canada's reading, elevate compliance with *all* NAFTA provisions to jurisdictional requirements—a patently absurd result. As Professor Sarooshi states:

> Article 1122(1) is concerned with the **expression of consent** by a **NAFTA State** to binding arbitration; while Article 1116(2) and 1117(2) relates to the entirely different matter of **what an investor must do** in order to "*claim that another Party has breached an obligation*".
>
> The only provision in Chapter 11 of the NAFTA that is headed "***Conditions Precedent** to **Submission of a Claim to Arbitration***" (emphasis added) relating to what **an investor must do to bring a claim** is Article 1121. This article contains the only "*Conditions Precedent*" or preconditions for an investor to be able to submit a claim to arbitration against a NAFTA Party and Article 1121 nowhere

61 *Id.*, p. 616.

62 *Id.*, p. 609 (characterizing "whether the claim was formally submitted within the time limits provided for in the relevant treaty" as a "matter[] of admissibility").

63 *Id.*, p. 616.

64 Counter Memorial at, *e.g.*, ¶¶ 148 and 151 ("Claimant cannot seek damages for a measure enacted on November 5, 2004 by filing a Notice of Arbitration on January 16, 2015").

65 Counter Memorial, ¶ 137.

66 Counter Memorial, ¶ 139.

> makes any reference to the time-bar contained in Articles 1116(2) and 1117(2). This is important, as the Tribunal in Mondev International Ltd v. United States, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002 stated at paragraph 44: "*It may be that a distinction is to be drawn between compliance with the conditions set out in Article 1121, which are specifically stated to be 'conditions precedent' to submission of a claim to arbitration, and other procedures referred to in Chapter 11*".[67]

40. To buttress its arguments, Canada also invokes the NAFTA awards in *Methanex*[68] and *Apotex*,[69] as well as defensive Article 1128 submissions by the NAFTA Parties.[70] After reviewing these decisions, Professor Sarooshi concludes that:

> [T]hese general and unrelated statements relating to jurisdiction have no bearing on, nor can they detract from, the express and specific statements made by the Tribunals in *Pope & Talbot v. Canada* and *Tecmed v. Mexico* that a time-bar defence is a matter of admissibility and not jurisdiction.[71]

41. Finally, as elaborated in paragraphs 64 to 71 of this Reply Memorial, Article 1128 submissions do not bind this tribunal and should be accorded minimal, if any, persuasive force.[72] In fact, a review of these submissions reveals either that they did not address the precise issue (jurisdiction *versus* admissibility) or did so in cursory fashion. In some instances, Canada cites to an Article 1128 submission that endorses its pleadings in that arbitration,[73] indicating the circularity of Canada's arguments.

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[67] **CE-1**, Sarooshi Report I, ¶¶ 38-40 (emphasis in original)

[68] Counter Memorial, ¶ 139 (citing to **RL-2**, *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award of August 7, 2002, ¶ 120).

[69] Counter Memorial, ¶ 144 (citing to **RL-5**, *Apotex Inc. v. United States of America*, UNCITRAL, Award on Jurisdiction and Admissibility of June 14, 2013, ¶¶ 318-320, 324-325).

[70] See Counter Memorial, note 219 (citing to, among others, **RL-10**, *Eli Lilly and Company v. Government of Canada* (UNCITRAL) Submission of Mexico Pursuant to NAFTA Article 1128, 18 March 2016, ¶¶ 4-8; **RL-11**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL) Submission of the United States of America, 14 February 2014, ¶¶ 2-3; **RL-12**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL) Submission of Mexico Pursuant Article 1128 of NAFTA, 14 February 2014, ¶¶ 21-23).

[71] **CE-1**, Sarooshi Report I, ¶ 35. See also **CL-73**, J. Paulsson, pp. 603 and 607-608 (reviewing **RL-2**, *Methanex*).

[72] See *infra* ¶¶ 64-71.

[73] See, *e.g.*, **RL-10**, *Eli Lilly and Company v. Government of Canada* (UNCITRAL) Submission of Mexico Pursuant to NAFTA Article 1128, 18 March 2016 ("Mexico concurs with Canada's submissions on the three-year time limit prescribed by Articles 1116(2) and 1117(2), as stated in paragraphs 66 to 80 of [Canada's] Rejoinder.").

42. Once Canada's timeliness defense is properly understood as going to admissibility, not jurisdiction, two consequences follow. First, this tribunal's competence to hear the claim is simply not implicated by Mobil's compliance with Articles 1116(2) and 1117(2).[74] Second, Canada bears the burden of proof for its defense of timeliness.[75] It cannot carry that burden.

C. Canada fails to grasp the significance of the continuing nature of its liability to Mobil under Article 1106

43. Canada continues to apply the Guidelines to the Projects and thus Mobil continues to incur losses. In this situation, Canada is committing a continuing breach of the NAFTA and, as such the time bar is inapplicable:

> [I]n the *sui generis* case of a "*continuing breach*" the construction to be given to Articles 1116(2) and 1117(2) mandates that the limitation period does not start to run until the breach has come to an end.[76]

44. The Mobil I Majority determined that the "implementation of the 2004 Guidelines is a continuing breach," and contrasted it to "'one off' breaches," such as expropriations and termination of contracts. It found the latter situations to be "entirely different" from the case before it.[77] The Mobil I Majority's conclusion in this regard is supported by well-established doctrine distinguishing between 'one off' and continuing breaches of international law. Although Canada asserts that a continuing course of conduct does not renew the limitations period, the authorities upon which it relies to support this assertion all relate to 'one off' breaches and thus do not address the rare situation, as here, where a state continues to perpetuate its wrongdoing even after a competent tribunal has determined liability and the state concedes it is bound by that finding.

45. The official commentary to the ILC Articles supports the characterization of Canada's liability in this case as a continuing breach of the NAFTA: "Examples of continuing wrongful acts include *the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting State*, unlawful detention of a foreign official or unlawful occupation of embassy premises, maintenance by force of colonial domination, unlawful occupation of part of the territory of another State or stationing armed forces in another State without its consent" (emphasis added).[78]

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[74] **CE-1**, Sarooshi Report I, ¶ 41.

[75] *Id.*

[76] **CE-1**, Sarooshi Report I, ¶ 61.

[77] **C-1**, Mobil I Decision, ¶ 476.

[78] **CL-74**, International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, p. 60. Also note **CL-75**, *Pac Rim Cayman LLC v.*

46. As Professor Sarooshi explains:

> [t]here is good authority that where there is a continuing breach, then time does not begin to run for the purposes of a limitation period until the breach in question ceases to exist.[79]

47. This position is well-accepted under customary international law, and must inform the application of Chapter 11 to this dispute. The starting principle in this case must be that "a claim can only be inadmissible on the ground of lapse of time once the breach has ceased to exist, that being the earliest date from which any time limit can possibly start to run."[80] This is supported by the consistent approach of the International Law Commission.[81] Indeed, as recognized by the Commission "in the case of a 'continuing' wrongful act … this **dies** can be established only **after** the end of the time of the commission of the wrongful act itself."[82]

48. In the present case, as Professor Sarooshi explains:

> There is cogent and directly relevant authority provided by NAFTA Tribunals (specifically in relation to Articles 1116(2) and 1117(2)) and other international courts that affirm the position that a time-bar or other temporal limitation will not preclude the bringing of a claim by a foreign investor in relation to a continuing breach by a State. Moreover, a "*continuing breach*" being given such an effect in relation to Articles 1116(2) and 1117(2) is further mandated on the facts in the present case by application of the objectives (objects and purposes) of the NAFTA. The continuing breach in the present case has the consequence that the time-bar under Articles 1116(2) and 1117(2) is satisfied.[83]

49. As Professor Sarooshi notes, two Chapter 11 decisions address Articles 1116(2) and 1117(2) in the context of a continuing breach— *United Parcel Service of America Inc. (UPS) v. Canada* and *Feldman v. Mexico*—and both support the conclusion that Mobil's claim is not time-barred.

Republic of El Salvador, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections of June 1, 2012, ¶ 2.67 (defining nature of continuing breach under international law).

[79] **CE-1**, Sarooshi Report I, ¶ 47.

[80] **CE-1**, Sarooshi Report I, ¶ 48 (quoting **CL-76**, J. Pauwelyn,"The Concept of a 'Continuing Violation' of an International Obligation: Selected Problems," 66 BYIL 415 (1995)).

[81] **CE-1**, Sarooshi Report I, ¶¶ 49-50.

[82] **CE-1**, Sarooshi Report I, ¶ 49 (quoting **CL-77**, International Law Commission, "Report of the International Law Commission on the work of its thirtieth session, 8 May – 28 July 1978", in *Yearbook of the International Law Commission*, 1978, vol. II, Part Two, A/33/10).

[83] **CE-1**, Sarooshi Report I, ¶ 8.

50. In *UPS v. Canada*, the tribunal acknowledged that nearly all of "the measures that UPS claims violate Canada's NAFTA obligations were first implemented by Canada well before April 1997,"[84] or, in other words, more than three years before UPS's request for arbitration in April 2000.[85] The tribunal summarized the parties' arguments as follows at paragraphs 24 to 26:

> 24. … UPS states that on-going conduct constitutes a new violation of NAFTA each day so that, for purposes of the time bar, the three year period begins anew each day. Thus, under UPS' view, for any conduct that continued past April 1997, the limitation in Article 1116(2) does not affect this Tribunal's jurisdiction over UPS' claim.
>
> 25. Canada disputes this assertion, stating that the purpose of the time limitation in article 1116(2) was to give certainty and finality so that the conduct of a NAFTA Party would not be permanently subject to challenge. Under Canada's view, that purpose is defeated if each day of a continuing course of conduct constitutes a potential new breach of NAFTA obligations. On this view, whenever an investor knew or should have known of the conduct, the time bar should run from that point.
>
> 26. UPS' response to this argument draws on logic and on precedent. Its argument on the basis of logic is that an investor cannot know whether a NAFTA Party will continue the conduct that constitutes an alleged breach before the Party determines whether it will end or continue the conduct. Its argument from precedent is that under international law generally, and also under prior NAFTA decisions, continuing acts are treated as continuing violations of international law obligations (and of NAFTA obligations) such that time bars do not begin until the conduct has concluded.

51. The tribunal agreed with UPS, finding that:

> We agree with UPS that its claims are not time-barred. We put aside for the moment the question of when it first had or should have had notice of the existence of conduct alleged to breach NAFTA obligations and of the losses flowing from it. The generally applicable

[84] **RL-25**, *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of May 24, 2007, ¶ 22. UPS's claims were as follows: "Canada's enforcement of its customs laws is unfair to UPS; Purolator's access to Canada Post's infrastructure is unfair to UPS; Canada permits Canada Post to misuse its monopoly infrastructure in ways unfair to UPS; Canada's use of the Publications Assistance Program under which publishers wishing to get the subsidy for which it provides must use Canada Post is unfair to UPS; Canada Post's retaliation against UPS in respect of a possible contract with Fritz Starber for raising this NAFTA claim is unfair to UPS." *Id.*, ¶ 11.

[85] *Id.*, ¶ 2.

> ground for our decision is that, as UPS urges, continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly. This is true generally in the law, and Canada has provided no special reason to adopt a different rule here. [86]

52. While Canada now alleges that the *UPS* decision was "wrong," it previously endorsed the very sections of the *UPS* award which it now seeks to disavow.[87] Canada's Rejoinder in the Mobil I Arbitration took the position that "[t]he operation of Article 1116 was confirmed in *UPS v. Canada*." In making that argument, Canada cited to paragraph 30 of the *UPS* award (which begins by observing that "[w]e find that there is no time bar to the claims"[88]). Mobil now seeks no more than to apply the approach taken by the *UPS* tribunal on the "operation of Article 1116" to Canada's "continuing course of conduct," *i.e.*, the application of the Guidelines.

53. The *UPS* tribunal expressly based its reasoning on, *inter alia*, *Feldman v. Mexico*,[89] which Canada also cites with approval in its Counter Memorial.[90] *Feldman* involved a continuing breach of the NAFTA, as recognized by the Mobil I Tribunal.[91] In that dispute, the "measures complained of by Claimant practically extend over the whole period starting in the years 1990 or 1991."[92] The *Feldman* panel acknowledged claims for "lost profits in the period of January 1, 1994 - May 1996," i.e., from the date of the NAFTA's entry into force.[93] However, the request for arbitration was filed on April 30, 1999, more than five

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[86] *Id.*, ¶ 28.

[87] **R-2**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4), Canada's Counter Memorial, ¶ 330; **R-79**, Mobil I Canada's Rejoinder Memorial, *e.g.*, ¶¶ 232 *et seq.*

[88] **RL-25**, *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of May 24, 2007, ¶ 30.

[89] *Id.*, ¶ 28: "The *Feldman* tribunal's conclusion on this score buttresses our own."

[90] Counter Memorial, ¶ 143.

[91] **C-2**, Mobil I Award, note 6: "NAFTA tribunals have been confronted with continuing breaches (see, e.g., … Marvin Roy Feldman v United Mexican States…"

[92] **CL-78**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues of December 6, 2000, ¶ 43.

[93] **RL-8**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award of December 16, 2002, ¶ 199: "The second element of damages seeks lost profits in the period of January 1, 1994 - May 1996 and, therefore, is covered by the three-year limitation period under NAFTA Article 1117(2), as explained in paras. 39-47 of the Interim Decision on Preliminary Jurisdictional Issues of December 6, 2000. In that Interim Decision we held that the cut-off date of the three-year limitation period is April 30, 1996."

years after the entry into force of the NAFTA and some nine years after the inception of the offending measures.[94]

54. *Feldman* and *UPS* defeat Canada's contention in this arbitration that the limitation period for continuing breaches is counted strictly from the promulgation of the offending measure, in spite of its continuing character and regardless of the subsequent dates on which losses may be incurred.

55. As Professor Sarooshi makes clear:

> [A] "*continuing breach*" being given such an effect in relation to Articles 1116(2) and 1117(2) is further mandated on the facts in the present case by application of the objectives (objects and purposes) of the NAFTA. These objectives are given a primary and specific role in construing the terms of the NAFTA by Article 102(2) which stipulates that "[t]*he Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law*."[95]

56. Article 102 provides that the NAFTA's objectives include, amongst others, "creat[ing] effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes." Similarly, the Canadian Statement on Implementation of the NAFTA Chapter 11 recognizes that "[t]he purpose of the section [i.e., Section B on Settlement of Disputes] … is to establish a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal."[96] Professor Sarooshi also observes that:

> The objectives in Article 102(1) of the NAFTA that are relevant to the construction to be given to Articles 1116(2) and 1117(2) in the present case include '*eliminating barriers to trade in, and facilitate the cross-border movement of, … services between the territories of the Parties*' and to '*create effective procedures for the implementation and application of this Agreement … and for the resolution of disputes*'.[97]

57. The interpretative principle of *effet utile*, or effectiveness, which Canada invokes in its Counter Memorial and which is "settled[] as a canon of

[94] **CL-78**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues of December 6, 2000, ¶ 2.

[95] **CE-1**, Sarooshi Report I, ¶ 62.

[96] **C-392**, Canadian Statement on Implementation of the NAFTA Chapter 11 (January 1, 1994), pp. 152-153.

[97] **CE-1**, Sarooshi Report I, ¶ 63 (emphasis in original).

interpretation in all systems of law," "requires favouring the interpretation that gives to each treaty provision 'éffet utile'."[98]

58. Canada's construction is also contrary to the object and purpose of the Chapter 11 time bars. Tribunals and commentators identify two main objectives of these provisions. First, they prevent submission of claims relying on evidence that may be stale or otherwise lost or destroyed.[99] Second, they further legal certainty by limiting the circumstances in which a state may be 'surprised' by Chapter 11 proceedings.[100] Canada, for its part, has emphasized this second policy factor in prior arbitrations, stating that the "purpose of the time limitation in article 1116(2) was to give certainty and finality so that the conduct of a NAFTA Party would not be permanently subject to challenge."[101]

59. Mobil's claim accords with both policy factors. First, its claim relates to 2012 through 2015. As such, the vast majority of documents and testimony is recent. Nor do Canada's defenses require consideration of old or 'stale' evidence. While Canada attempts to take this tribunal back some three decades to the 1985 Atlantic Accord,[102] these issues concern its liability for the adoption and application of the Guidelines to Mobil—an issue which was finally determined by the Mobil I Majority and which Canada does not, and cannot, contest. The only real issue for this tribunal is the quantum of the 2012-2015 losses. Second, to quote *Bilcon*, Canada is not "unknowingly carrying on acts or omissions for which it might be ordered to pay compensation," nor do these proceedings belatedly surprise Canada as to the illegality of the Guidelines. To the contrary, Canada has knowingly maintained the Guidelines vis-à-vis Mobil in contravention of its international obligations. Moreover, given the history of this dispute, Canada can claim no surprise or prejudice by the timing of this arbitration and the weight of authority mandates the conclusion reached by Professor Sarooshi, namely that "there is no time-bar that precludes the Tribunal from hearing the claims in the present case."[103]

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[98] **CL-65**, *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award of June 27, 1990, ¶ 40.

[99] **RL-6**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability of March 17, 2015, ¶ 277: a "host state can be prejudiced by a loss of institutional memory or documents on its part concerning the alleged breaches."

[100] *Id.*: "Delay in bringing a claim might result in a situation where a host state is unknowingly carrying on acts or omissions for which it might be ordered to pay compensation."

[101] **RL-25**, *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of May 24, 2007, ¶ 25.

[102] Counter Memorial, ¶ 3.

[103] **CE-1**, Sarooshi Report I, ¶ 104.

D. Canada's authorities should not inform the interpretation of Articles 1116(2) and 1117(2)

60. Canada contends that "NAFTA Articles 1116 and 1117 impose a strict three-year time limitation period for submitting a claim to arbitration" from the promulgation of the Guidelines that is not affected by "[t]he continuation of the 2004 Guidelines."[104] The jurisprudence that Canada cites involved 'one off,' or completed, breaches of international law. As such, the jurisprudence cited by Canada simply does not address the situation at hand.

61. As discussed above, this tribunal is confronted with a continuing breach of the NAFTA. In contrast, the authorities that Canada cites involved 'one off' breaches and are distinguishable from the present case. None of the cases involved a prior tribunal establishing liability and directing the claimant to file another arbitration for damages incurred in the future. While, in some cases cited by Canada, there may have been financial effects that extended in time from the breach, this fact does not transform them into continuing breaches:[105]

- *Grand River v. United States of America.* The tribunal suggested that the claims "involv[ed] a series of similar and related actions by a respondent state,"[106] rather than one continuing act. The trigger for the limitations period was the "clear and precisely quantified statutory obligation to place funds in an unreachable escrow for 25 years … even if actual payment into escrow is not required until the following spring[.]"[107] As the tribunal found that the claims involved a series of 'one off' acts, it agreed to hear claims concerning certain acts within the relevant period, such as the "adoption and implementation of the states' complementary legislation/contraband laws in late 2001 or 2002 (that is, less than three years before the claim was filed)[.]"[108]

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[104] Counter Memorial, Section III(B)-(C).

[105] See **CL-74**, Commentary to ILC Articles, p. 60 ("An act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues … The prolongation of such effects will be relevant, for example, in determining the amount of compensation payable. They do not, however, entail that the breach itself is a continuing one."). This distinction has been recognized and applied in the NAFTA context by, among others: **RL-4**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award of October 11, 2002, ¶ 58; **RL-6**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability of March 17, 2015, ¶ 268; and **C-1**, Mobil I Decision, ¶ 478.

[106] **RL-3**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, ¶ 81.

[107] *Id.*, ¶ 82.

[108] *Id.*, ¶ 87.

- *Mondev v. United States of America.* The tribunal "conclud[ed] that any expropriation of the enterprise occurred not later than the date of foreclosure, and that it was completed at the latest by that date. Similarly, LPA's rights associated with the Hayward Parcel option terminated when the option terminated. As to these rights or interests, *there was no continuing wrongful act in breach (or potentially in breach) of Article 1110* at the date NAFTA entered into force"[109] (emphasis added).

- *Apotex v. United States of America.* The tribunal did not reject Apotex's legal argument that a "single continuous set" of acts would affect the operation of the NAFTA's time limitation, but instead rejected Apotex's factual assertion that the FDA decision and later litigation were a single continuous set of acts. Rather, it found that the FDA decision was a "discrete government or administrative measure."[110]

- *Bilcon v. Canada*. The tribunal, like in *Grand River*, "finds it possible and appropriate … to separate a series of events into distinct components, some time-barred, some still eligible for consideration on the merits."[111]

- *Corona Materials v. Dominican Republic*. The tribunal found that "[t]here is … no basis to consider that there was a continuing breach."[112]

62. Canada's cases thus address 'one off' breaches and do not deal with the "particular application" of the limitation period in cases of continuing breaches.[113] Indeed, at most, many of these cases stand for the unremarkable "proposition that the limitation period applicable to a discrete government or administrative measure … is not tolled by litigation, or court decisions relating to the measure."[114] This, in fact, is how the *Apotex* tribunal expressly characterized the situation with which it was faced, as well as the issues confronting the *Mondev* and *Grand River* tribunals.[115]

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[109] **RL-4**, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award of October 11, 2002, ¶ 73.

[110] **RL-5**, *Apotex Inc. v. The Government of the United States of America*, UNCITRAL, Award on Jurisdiction and Admissibility of June 14, 2013, ¶ 328.

[111] **RL-6**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability of March 17, 2015, ¶¶ 266-269.

[112] **RL-9**, *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections of May 31, 2016, ¶ 211.

[113] **RL-25**, *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of May 24, 2007, ¶ 30.

[114] **RL-5**, *Apotex Inc. v. The Government of the United States of America*, UNCITRAL, Award on Jurisdiction and Admissibility of June 14, 2013, ¶ 328.

[115] *Id*.

63. Canada also cites *Mesa Power*, which is similarly irrelevant. In the part of that award cited by Canada, the *Mesa Power* tribunal seeks to interpret Article 1116(1), not the time bar provision in Article 1116(2).[116]

64. Canada also contends that the views of the NAFTA Parties in pleadings and Article 1128 submissions are aligned on the admissibility of claims concerning continuing breaches. In its view, this alleged consensus "on the interpretation of the limitation period should be given considerable weight."[117]

65. Canada's reliance on unilateral pleadings and submissions ignores Chapter 11, which looks to the Free Trade Commission ("FTC") for "interpretation[s] … of a provision of this Agreement [that] shall be binding on a Tribunal established under this Section."[118] The FTC "compris[es] cabinet-level representatives of the Parties or their designees" and "shall … resolve disputes that may arise regarding its interpretation or application."[119]

66. While the NAFTA Parties have issued interpretations through the FTC previously, they have not done so with respect to the time bar arguments advanced by Canada. Canada should not be allowed to cobble together a result that it has not achieved through the precise mechanisms envisaged by the NAFTA for issues of treaty interpretation.

67. Moreover, these pleadings and submissions were made in other matters and therefore do not take into account the novel situation confronting this tribunal, in which, despite a Request for Arbitration being first filed in 2007 and Canada's liability confirmed in 2012, Canada's breach continues unabated.

68. In any event, Canada concedes that this tribunal is not bound by those submissions.[120] The tribunal should, in the circumstances, give any such consensus minimal, if any, weight. Professor Sarooshi opines that:

> [I]t is problematic in my view to attach weight – let alone the '*considerable weight*' suggested by Canada – to pleadings by States in a particular case as evidence of the existence of a 'subsequent agreement' as envisaged by Article 31(3)(a) of the Vienna Convention on the Law of Treaties or indeed as '*subsequent practice*' by States in the application of the treaty.[121]

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

[117] Counter Memorial, ¶ 161.

[118] **CL-5**, NAFTA, Article 1131(2).

[119] *Id*., Article 2001 (The Free Trade Commission).

[120] Counter Memorial, ¶¶ 161-162 (Canada suggests that the alleged consensus "should be given considerable weight").

[121] **CE-1**, Sarooshi Report I, ¶ 79.

69. As Ms. Magraw observes in a recent article, tribunals appear to be generally skeptical of construing pleadings by states as constituting subsequent agreements or practice under Article 31 of the Vienna Convention on the Law of Treaties. As she notes, "[t]he use of SPPs [state party pleadings] as subsequent agreements or subsequent practice is controversial … [T]ribunals seem hesitant to determine that SPPs can qualify as subsequent agreements or practice[.]"[122]

70. Indeed, the Mobil I Majority declined to recognize or give effect to the Article 1128 submissions in that matter, rejecting Canada's allegations that they constituted a subsequent agreement.[123] Similarly, the *Pope & Talbot* tribunal refused to give effect to an alleged consensus of the NAFTA Parties.[124] As another ICSID tribunal recognized, "[w]e do not believe … that an argument made by a party in the context of an arbitration reflects practice establishing agreement between the parties to a treaty within the meaning of Article 31(3)(b) of the Vienna Convention on the Law of Treaties."[125]

71. In conclusion therefore, as Professor Sarooshi confirms:

> The continuing breach in the present case has the consequence that the time-bar under Articles 1116(2) and 1117(2) is satisfied. As such, the Tribunal in the <u>*Mobil I Decision*</u> was correct when it stated in terms at paragraph 478 "[g]*iven that the implementation of the 2004 Guidelines is a continuing breach, the Claimants can claim compensation in new NAFTA arbitration proceedings for losses*

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[122] **CL-79**, K. Magraw, "Investor-State Disputes and the Rise of Recourse to State Party Pleadings As Subsequent Agreements or Subsequent Practice under the Vienna Convention on the Law of Treaties," 30(1) ICSID Review 142, 146 (2015).

[123] See, *e.g.*, **C-78**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4), Canada's Reply to Article 1128 Submissions of September 1, 2010, ¶ 7 ("[B]y agreeing with Canada's pleadings in this arbitration, the submissions of the United States and Mexico have created an agreement within the meaning of Article 31(3)(a) of the Vienna Convention."). Canada comments that "[t]he difficulty in understanding the Majority's interpretation is compounded by the fact that there was agreement amongst the Parties to the NAFTA that 'the measure' in paragraph 2(f)(ii) meant the listed measure and not all other subordinate measures." Counter Memorial, ¶ 117.

[124] **CL-80**, *Pope & Talbot Inc. v. Canada*, UNCITRAL, Award on the Merits of Phase 2 of April 10, 2001 (tribunal rejects all three NAFTA Parties' views on Article 1102).

[125] **CL-81**, *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction of June 17, 2005, ¶ 47. Also note **CL-82**, *Telefónica S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/20, Decision on Objections to Jurisdiction of May 25, 2006, ¶ 111 ("The distinct, independent positions taken by the two Contracting States as respondents in different arbitral proceedings, moreover not involving the other Contracting State, does not amount to an 'agreement', in any one of the manifold forms admitted by international law, between the two parties concerning such an interpretation.").

> *which have accrued but are not actual in the current* [Mobil I] *proceedings.”*[126]

E. Even if Articles 1116(2) and 1117(2) impose a cut-off date on damages, Mobil’s claim is timely

72. As set forth above, in the case of a continuing breach there is no time bar to bringing the claim until such time as the breach has come to an end. Tribunals in the continuing breach context, including the *UPS* tribunal, have instead construed Articles 1116(2) and 1117(2) as providing a temporal limitation on the recovery of losses. Even on this interpretation, Mobil’s claim satisfies these provisions. The *UPS* tribunal stated:

> Although we find that there is no time bar to the claims, the limitation period does have a particular application to a continuing course of conduct. If a violation of NAFTA is established with respect to any particular claim, any obligation associated with losses arising with respect to that claim can be based only on losses incurred within three years of the date when the claim was filed. A continuing course of conduct might generate losses of a different dimension at different times. It is incumbent on claimants to establish the damages associated with asserted breaches, and for continuing conduct that must include a showing of damages not from the inception of the course of conduct but only from the conduct occurring within the period allowed by article 1116(2). This is not, however, a matter we need to address further at this point apart from the specific claims.[127]

73. The Request for Arbitration in this case was filed on January 16, 2015, less than three years after the first invoice for incremental expenditures claimed herein was received by Suncor in February 2012.[128] It is therefore unarguable that all losses sought by Mobil in this arbitration were suffered by Mobil in the three year period predating the Request for Arbitration.

F. Even in the absence of a continuing breach, Mobil’s claim still falls within the limitation period in Articles 1116(2) and 1117(2)

74. The Mobil I Majority expressly found that Canada’s conduct constituted a continuing breach of the NAFTA. The Mobil I Majority’s decision on this point has been further vindicated by Canada’s subsequent conduct, in particular Canada’s refusal to cease the application of the Guidelines to Mobil.

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[126] **CE-1**, Sarooshi Report I, ¶ 8.

[127] **RL-25**, *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of May 24, 2007, ¶ 30.

[128] **CW-9**, Phelan Statement II, ¶ 12.

Despite acknowledging that it is bound by the findings in the Mobil I Arbitration and asserting arguments that selected aspects of the Mobil I Decision and Award are *res judicata*, in a footnote to its Counter Memorial Canada states that it does not, however, "concede that this [breach of the NAFTA] constitutes a 'continuing breach'."[129] If Canada does contest this issue, it should not succeed. If, however, this tribunal were to find that, rather than a continuing breach occurring, there has instead been a succession of discrete breaches of the NAFTA, then in any event Mobil's claim in this arbitration complies with the relevant period established by Articles 1116(2) and 1117(2).

75. Articles 1116(2) and 1117(2) provide that a claim may not be made "if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage." As Professor Sarooshi states:

> These provisions contain two cumulative requirements that must be satisfied for determining the relevant starting point for the time-bar to run. The plain terms of Articles 1116(2) and 1117(2) mandate that the relevant starting point here is when the Claimant first acquired knowledge (actual or constructive) of both the breach <u>and</u> the loss or damage incurred.[130]

76. Canada seeks to persuade this tribunal that the breach in question must have occurred in 2004. As Professor Sarooshi makes clear, Canada is wrong on this point:

> It is important from the outset to correct what Canada says in its Counter-Memorial at paragraph 148 that the "*measure at issue in this arbitration is the same as that challenged in Mobil I: the 2004 Guidelines.*" First, it is not the "*measure*" as Canada says that counts for Articles 1116(2) and 1117(2), but rather knowledge of the "*alleged breach*". The second point is that the breach by Canada has been caused not only by the 2004 Guidelines, but more specifically by Canada's decision to continue to implement or apply the Guidelines on an ongoing basis specifically in relation to the projects at Hibernia and Terra Nova.
>
> The specific "*alleged breach*" in the alternative scenario considered in this section is the decision by the Board notified to Mobil by its letter dated 9 July 2012 that despite the Tribunal's <u>*Mobil I Decision*</u> it would continue to implement the 2004 Guidelines and not "*'waive' in whole or in part any of the Operator's obligations respecting*

[129] Counter Memorial, note 224.

[130] **CE-1**, Sarooshi Report I, ¶ 92.

research and development or education and training".[131] (Emphasis added)

77. Therefore, if this tribunal does not find that there has been a continuing breach of the NAFTA, the specific breach for the purposes of Articles 1116(2) and 1117(2) is the express failure of Canada to cease applying the Guidelines to Mobil on the basis of the findings in the Decision.

78. Further, as the treaty's text makes clear, it is only the later of two events to occur (knowledge of breach and knowledge that loss has been incurred) that triggers the start of the limitations period.[132] This is corroborated by the *Glamis Gold* tribunal, which stated that "[t]he three-year limitation period presumably runs from the later of these events [knowledge of breach and of damage] to occur in the event that the knowledge of both events is not simultaneous."[133] Canada's construction of Articles 1116(2) and 1117(2) incorrectly focuses exclusively on the element of knowledge of breach, ignores the presence of the words "loss" and "incurred," and disregards the use of the past tense in those provisions.

79. The time periods in Articles 1116(2) and 1117(2) are only triggered at the point at which the investor was, or should have been, aware that it "*has incurred* loss or damage" (emphasis added). The definition of "to incur" includes "to render oneself liable to (damage)" and "to become … liable or subject to."[134] The word, therefore, presupposes an existing liability, rather than a future, contingent one—an interpretation that is, moreover, confirmed by the tense of its usage in Chapter 11 ("has incurred").

80. Therefore, Articles 1116(2) and 1117(2) apply from the later of knowledge of the breach and of the occurrence of a particular loss. This position is consistent with the Mobil I Majority's recognition that on the facts of this case claims are only ripe when a loss is "incurred, *i.e.* [a loss] which is actual."[135] The Mobil I Majority's interpretation of incurred loss should inform this tribunal's interpretation of Articles 1116(2) and 1117(2). According to the Majority, losses are incurred and thus actual either "when there is a firm obligation to make a payment and there is a call for payment or expenditure, or the occurrence of

[131] *Id.*, ¶¶ 95-96.

[132] See also **CE-1**, Sarooshi Report I, ¶ 93: "Since the time-bar requires that the Claimant has actual or constructive knowledge of both the breach and the loss or damage incurred, then it necessarily follows that the three year period commences from the later of these points."

[133] **CL-83**, *Glamis Gold, Ltd. v. The United States of America,* UNCITRAL, Final Award of June 8, 2009, ¶ 347.

[134] **C-393**, OED Online, Oxford University Press, "incur, v.", definitions 2 and 4(a).

[135] **C-1**, Mobil I Decision, ¶ 440 ("[T]he Majority will consider any loss which is incurred, *i.e.* which is actual, as of the date of the Award.").

payment or expenditure has transpired."[136] While calls for payment and expenditures related to the Guidelines may be made well into the future, such future losses necessarily are not yet incurred and actual. This is why the Mobil I Majority did not review future losses at the time of that proceeding.[137] Indeed, as the Mobil I Majority opined generally with respect to the Guidelines, "the breach (i.e. the application and enforcement of the 2004 Guidelines) gives rise to continuing losses which are typically not known until well after the relevant year has passed."[138]

81. The two elements of Articles 1116(2) and 1117(2) are therefore satisfied in this case. As Professor Sarooshi concludes in relation to Mobil's knowledge of the *breach*:

> Mobil could simply not have known after the decision by the Tribunal in *Mobil I* whether Canada would continue to enforce and implement the 2004 Guidelines. As such, the Claimant went on to do what a "*reasonably prudent investor should have done*" and sought a decision from the Board confirming that it would desist from committing a further breach of the NAFTA by refraining from implementing the 2004 Guidelines as required by the *Mobil I Decision*. It was only subsequently when the Claimant received the Board's letter dated 9 July 2012 that it became evident to the Claimant for the first time after the *Mobil I Decision* that there would be a new alleged breach by Canada of the NAFTA for the calendar year 2012 onwards. As such, the earliest date at which the Claimant knew of an alleged breach by Canada was **9 July 2012**.[139]

82. In relation to the occurrence of *loss*, Professor Sarooshi concludes:

> [T]he earliest the Claimant knew that it had "incurred loss" was when it knew there would be "*a firm obligation to make a payment*" or "*the occurrence of payment or expenditure has transpired*". In terms of the existence of "*a firm obligation to make a payment*" or "*the occurrence of payment or expenditure has transpired*", the earliest

[136] *Id.*, ¶ 440. Note also *id.*, ¶ 469 ("As indicated in paragraph 440, the Majority considers that in the present case . . . damages are incurred and compensation is due when there is a firm obligation to make a payment and there is a call for payment or expenditure, or when a payment or expenditure related to the implementation of the 2004 Guidelines has been made.").

[137] *Id.*, ¶ 477 (observing "the fact that the damages in this case will eventually be 'actual' . . . is a decisive distinguishing factor" for why the practice of other tribunals considering future damages caused by "one off" breaches was not instructive), ¶ 478 ("Given that the implementation of the 2004 Guidelines is a continuing breach, the Claimants can claim compensation in new NAFTA arbitration proceedings for losses which have accrued but are not actual in the current proceedings.").

[138] *Id.*, ¶ 478 (emphasis added).

[139] **CE-1**, Sarooshi Report I, ¶ 99.

date was February 2012, albeit that the Claimant did not know the quantum of losses at that point.[140]

83. In the event that a continuing breach is not found, Mobil's claim nevertheless remains timely. The coincidence of the two elements: breach and loss, occurred, at the earliest, in July 2012, well within the three year limitation period prescribed by Articles 1116(2) and 1117(2).

G. Canada cannot ignore the existence of the Mobil I Arbitration

84. The arbitration before this tribunal cannot be viewed in a vacuum. In making its time bar arguments, however, Canada wishes to persuade this tribunal to disregard the existence of the previous arbitration in its entirety, as well as resulting consequences flowing from it.[141]

85. Canada bases its *res judicata* argument on the fact that this arbitration is directly related to the Mobil I Arbitration, but fails to notice that its arguments are internally inconsistent. Namely, it cannot simultaneously argue that a claim was not timely made and also that the same claim was made *and determined* in prior proceedings. Canada fails to show why the Mobil I Arbitration can simply be ignored.

86. If Canada's acceptance and satisfaction of the Mobil I Decision and Award are to be given effect, Canada must be precluded from challenging the timeliness of Mobil's claim in this arbitration and this tribunal should take notice of the Mobil I Tribunal's instruction regarding future arbitrations and the Mobil I Tribunal's conclusion that this dispute concerns a continuing breach. As stated in Mobil's Memorial, "[i]n terms of the scope of the application of the *res judicata* doctrine, both the dispositifs of the Decision and the Award and the reasoning required to reach such decisions should be considered binding."[142] The Mobil I Majority's decision on principles of quantum is inextricably intertwined with its finding that Mobil could bring future arbitrations in the event that Canada continued to breach the NAFTA.

87. The Mobil I Majority made a binding finding in the Decision's *dispositif* on the quantum principles applicable to Mobil's claims arising out of the Guidelines. The Majority's reasoning in the Decision confirms that its express instruction regarding further arbitrations for actual losses accruing in the future

[140] **CE-1**, Sarooshi Report I, ¶ 103 (emphasis in original). Also note **CW-9**, Phelan Statement II, ¶ 12 ("For clarity, all of the losses claimed in this arbitration were incurred by Mobil no earlier than three years before the Request for Arbitration in this case. The earliest invoice for the incremental expenditures claimed in this proceeding was received in February 2012 for the Terra Nova Young Innovators Award, as I confirmed with my counterparts at Suncor.").

[141] In making its *res judicata* arguments, however, it takes a completely different—and inconsistent—tack.

[142] Memorial, ¶ 200.

was fundamental to its adoption and application of those principles. If Canada were allowed to resile from that conclusion in this arbitration, the Mobil I Majority's decision would be thwarted.

88. The Mobil I Majority clearly intended to preserve Mobil's ability to present a claim for future damages when they were "incurred" within the meaning of Article 1116. As such, it must be taken to have precluded Canada from raising "affirmative defense[s]," like the limitations defense.[143]

89. Finally, Canada's contention that "the Mobil/Murphy tribunal had no authority to confer jurisdiction on this Tribunal"[144] is irrelevant. Mobil does not argue that the decision by the Mobil I Majority that Mobil could file subsequent arbitrations if Canada persisted in applying the Guidelines to Mobil can be construed as conferring jurisdiction upon any subsequent tribunal. However, this instruction by the Mobil I Majority not only demonstrates that Canada was well-aware that, if it did not cease the application of the Guidelines to Mobil, it would face further proceedings, but also precludes Canada from arguing now that Mobil should not be permitted to advance its claim quantifying Canada's liability for early 2012 to 2015.

H. Canada's invocation of the time bar is an '*abus de droit*'

90. As one tribunal observed, "[t]he principle of good faith has long been recognized in public international law … Nobody shall abuse the rights granted by treaties, and more generally, every rule of law includes an implied clause that it should not be abused."[145] Put otherwise, "[i]t is generally acknowledged in international law that a State *exercising a right for a purpose that is different from that for which that right was created commits an abuse of rights*."[146] Tribunals acknowledge that, pursuant to this doctrine, a State may be precluded from invoking a defense like timeliness.

91. In the recent award in *Renco v. Peru*, the tribunal accepted that an objection to the form of a waiver required by the treaty could be ineffective if "raise[d] … for an improper motive[.]"[147] It clarified that the state's objection would be abusive and therefore in bad faith where that state "is seeking to evade its

[143] **CL-70**, *Pope & Talbot Inc. v. Canada*, UNCITRAL, Award in Relation to Harmac Motion of February 24, 2000, ¶ 11.

[144] Counter Memorial, ¶ 169.

[145] **CL-84**, *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award of April 15, 2009, ¶ 107.

[146] **CL-85**, *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award of June 30, 2009, ¶ 160 (emphasis added).

[147] **CL-86**, *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, ¶ 185.

duty to arbitrate [the investor's] claims under the Treaty rather than ensure that its waiver rights are respected or that the waiver provision's objectives are served."[148]

92. The *Renco* tribunal cautioned that Peru's anticipated invocation of a time bar argument in a second case could be abusive.[149] Peru had raised an objection concerning the claimant's waiver of non-arbitration remedies "nearly three years after Renco had submitted its claims to arbitration."[150] The tribunal ultimately accepted this objection, "conclud[ing] that Renco failed to comply with the formal requirement of Article 10.18(2)" such that the tribunal lacked jurisdiction.[151] The tribunal, however, recognized that the claimant was entitled to re-file its claims in a second arbitration with the appropriate waivers.

93. The *Renco* tribunal cautioned Peru that, should it object under Article 10.18(1) to the timeliness of Renco's claims in the anticipated second arbitration, the objection might be abusive: "the Tribunal does not wish to rule out the possibility that an abuse of rights might be found to exist if Peru were to argue in any future proceeding that Renco's claims were now time-barred under Article 10.18(1)."[152] As such, the *Renco* tribunal "unanimous[ly]" found that "justice would be served if Peru accepted that time stopped running for the purposes of Article 10.18(1) when Renco filed its Amended Notice of Arbitration on August 9, 2011."[153] Similarly, the NAFTA tribunal in *Feldman v. Mexico* found that in exceptional circumstances a state may be prevented from invoking Chapter 11's time bars because of its inconsistent or improper conduct.[154]

94. Even if Canada were technically correct, which it is not, in asserting Chapter 11's time bars, that effort is no more than an attempt to entirely exclude, or drastically reduce, its financial exposure for an internationally wrongful act that it perpetuates and of which it has had actual notice since 2007. This ongoing non-compliance is founded on a deliberate misunderstanding of international law. In response to the Mobil I Decision, Canada indicated that, in its view, the decisions

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148 *Id*.

149 *Id*. While the claims were brought under the Peru-U.S. Trade Promotion Agreement, the time bar at Article 10.18(1) therein is materially similar to that in Articles 1116(2) and 1117(2) of the NAFTA. It provides: "No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage." **CL-86**, *Renco*, *id.*, ¶ 67.

150 *Id.*, ¶ 180.

151 *Id.*, ¶ 184.

152 *Id.*, ¶ 187.

153 *Id.*, ¶ 188.

154 **RL-8**, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award of December 16, 2002, ¶ 63

of Canadian courts upholding the Guidelines trumped the Mobil I Decision.[155] International law clearly does not allow the decisions of national courts to override those of international tribunals applying the NAFTA. Canada ultimately attempts to manipulate Articles 1116(2) and 1117(2) to achieve a result that is contrary to international law and is simply an artifice to enable Canada to continue in its unlawful conduct. It has moreover offered inconsistent interpretations of Articles 1116 and 1117, claiming that Mobil's claim was *too early* in the Mobil I Arbitration and *too late* in these proceedings. Canada's conduct is contrary to good faith: "[a]lmost all systems of law prevent parties from blowing hot and cold."[156]

IV.

MOBIL'S CLAIM FOR DAMAGES FOR 2012-2015 WAS NOT DETERMINED BY THE MOBIL I TRIBUNAL AND THEREFORE CANNOT BE *RES JUDICATA* BETWEEN THE PARTIES

95. Canada's second defense is that Mobil's claim for losses incurred from 2012 through 2015 should be barred under the doctrine of *res judicata*. Canada contends that the claim for losses incurred in this time period was put to, and finally decided by, the Mobil I Tribunal.

96. Canada dedicates approximately ten pages of its Counter Memorial to framing this argument, without addressing in detail the real question that this tribunal faces: was the issue at the heart of this arbitration, namely the determination of the quantum of losses suffered by Mobil from 2012 through 2015, finally determined by the Mobil I Tribunal such as to render it *res judicata* between the parties? The answer is no.

A. The requirements for *res judicata* to arise

97. As this tribunal will appreciate, the policy reason underlying the principle of *res judicata* is to avoid the vexation, expense, and duplicative effort of having to re-litigate issues or claims which have previously been determined, thus minimizing the risk of "divergent" decisions.[157] Mobil has argued throughout this

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[155] **C-176**, Letter from J. Bugden, C-NLOPB, to P. Sacuta, ExxonMobil Canada Ltd. (July 9, 2012) (refusing to alter the Guidelines' application to Mobil because "the validity of the Board's guidelines have been affirmed by the Courts" of Canada). Also note **C-177**, Letter from J. Bugden, C-NLOPB, to C. Buchanan, Murphy Oil Company Ltd. (July 12, 2012).

[156] **CL-52**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award of October 2, 2006, ¶ 475.

[157] Memorial, ¶¶ 184 and 194.

case that *res judicata* is a well-established principle of international law that should be applied by this tribunal.[158]

98. For *res judicata* to arise with respect to Mobil's claim for losses from 2012 through 2015, there must have been a final determination on the merits of the issue in dispute between the parties by a prior competent tribunal. As noted by the tribunal in *Apotex*, "the doctrine of *res judicata* defines the binding effect of a prior final determination made by a competent tribunal."[159] Indeed, as Canada recognizes in its Counter Memorial, "[t]here can be no *res judicata* effect on a question that was never put before and determined by a previous tribunal."[160]

99. The key question for Canada's current argument is, therefore, whether Mobil's present claim was put to, and finally determined by, the Mobil I Tribunal. The Mobil I Decision makes clear that these losses had not yet arisen at the time of the Mobil I Arbitration and were accordingly deemed not yet ripe for adjudication in those proceedings. Thus, contrary to Canada's assertions, no tribunal has ever ruled on the quantum of loss suffered by Mobil from 2012 through 2015, and, therefore, this issue is not *res judicata* between the parties. Having subsequently been suffered by Mobil as a result of Canada's continuing breach, these losses are accordingly claimed in this arbitration.

B. The Mobil I Tribunal did not determine Mobil's losses for early 2012 through 2015

100. In *Grynberg v. Grenada*, the tribunal opined that "a finding [of a prior competent tribunal] concerning a right, question or fact may not be re-litigated (and, thus, is binding on a subsequent tribunal), if, in a prior proceeding: (a) it was distinctly put in issue; (b) the court or tribunal actually decided it; and (c) the resolution of the question was necessary to resolving the claims before that court or tribunal."[161] Despite Canada's attempt at misdirection, the issue of the actual losses suffered by Mobil between 2012 and 2015 was, to quote the *Grynberg* tribunal, not

[158] Memorial, ¶ 188. Also note Counter Memorial, ¶ 180.

[159] **CL-22**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America,* ICSID Case No. ARB(AF)/12/1, Award, ¶ 7.12. See also **CL-87**, *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1 Decision on Jurisdiction (Resubmitted), ¶ 30 (a "right, question or fact distinctly put in issue and distinctly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed").

[160] Counter Memorial, ¶ 170.

[161] **CL-18**, *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award, ¶ 7.1.1. See also **CL-88**, *The Orinoco Case* (1902), 10 RIAA 184 ("every matter and point distinctly in issue in said cause, and which was directly passed upon and determined in said decree, and which was its ground and basis, is concluded by said judgment, and the claimants themselves and the claimant Government in their behalf are forever estopped from asserting any right or claim based in any part upon any fact actually and directly involved in said decree.").

"distinctly put in issue," was not "decided" by the Mobil I Tribunal, and was not "necessary" to resolving the claims before it.

101. Canada mistakes the Mobil I Tribunal's decision on "liability and on *principles* of quantum" for a definitive decision on the individual incremental expenditures comprising Mobil's claim in this arbitration. As Ripinsky and Williams clarify, "[i]n cases involving a continuing breach by the respondent, where claimant's losses unfold over time (such cases involve impairment to, rather than destruction of, an investment), there is a choice between compensating for future losses to be incurred as a result of the continuing breach or awarding only past losses (up to the time of award) in the expectation that the respondent will cease its wrongful conduct. If the second course of action is chosen by the tribunal, the claimant should be entitled to subsequent compensation where the respondent fails to cease the breach."[162]

102. While Mobil and Murphy initially sought "compensati[on] for future losses" for the lives of the fields (including the 2012-2015 time period at issue in this arbitration), that does not inform the matters definitively decided by the Mobil I Tribunal. Rather, as discussed above, the Mobil I Majority decided that, as a matter of principle, it would only award past losses.[163] Canada invokes the Mobil I Decision's finding that the claim for 2010-2036 losses was not yet ripe as an implied rejection of Mobil's present claim for 2012-2015 losses. The Mobil I Decision expressly found, to the contrary, that it could not make a final decision yet, as the claim was not yet ripe: "[t]he Tribunal has applied the reasonable certainty standard discussed above, which has not led to a conclusion *per se*, but rather to a finding that there is too much *uncertainty* at this stage for the Tribunal to make a determination."[164]

103. In the Mobil I quantum phase following the Decision on Liability and on *Principles* of Quantum (emphasis added), Mobil and Murphy sought recovery of, and recovered compensation for, damages actually incurred up to December 31, 2011 (Terra Nova) and April 30, 2012 (Hibernia).

104. In its Decision, the Mobil I Tribunal did not rule upon any particular incremental expenditures or shortfalls. Rather, the Mobil I Decision set out the principle that only "actual" (or past) damages should be awarded. The Mobil I Majority then directed Mobil to present a claim in relation to losses that had been actually incurred from 2004 up to no later than sixty days after receipt of the Mobil

[162] **CL-57**, S. Ripinsky and K. Williams, Cross-cutting Issues in Damages in International Law (BIICL 2009), pp. 115-116.

[163] See *id*.

[164] **C-1**, Mobil I Decision, ¶ 474. Despite Canada's insinuations to the contrary, the Mobil I Majority recognized that the Board was responsible for this uncertainty. *Id*. (attributing uncertainty to "the Board's regulatory decisions" as well as "objective, market-based factors" selected by the Board as formula factors under Guidelines).

I Decision (*i.e.*, July 23, 2012).[165] Following the quantum principles set out in the Mobil I Decision, Mobil and Murphy claimed for losses incurred between 2004 and 2012: "[t]he Tribunal's Decision made clear that the Tribunal 'will consider any loss which is incurred, i.e. which is actual, as of the date of the Award.' In this submission, Claimants update the evidence of the actual damages that they have incurred as a result of the application of the Guidelines … to December 31, 2011 for Terra Nova, and April 30, 2012 for Hibernia."[166] With respect to losses incurred *after* those dates, Mobil and Murphy stated that they "note the Tribunal's statement that 'Claimants can claim compensation in new NAFTA arbitration proceedings for losses which have accrued but are not actual in the current proceedings,' and reserve all their rights in this regard."[167] No evidence or argument relating to the 2012-2015 damages was presented for determination by the Mobil I Tribunal during its quantum phase. As such, this claim was not put to the Mobil I Tribunal.

105. The same logic applies in reaching the conclusion that the present claim was not decided by the Mobil I Tribunal. Expenditures which were not yet incurred or actual by 2012 were not deemed ripe by, nor put to, the Mobil I Tribunal.[168] Rather, the Mobil I Majority's approach resulted only in the final determination of actual damages incurred by the Claimants between 2004 and 2012. In fact, the Mobil I Tribunal expressly reserved the issue of damages that may be incurred from 2012, including those now presented in this arbitration, to later proceedings.[169] The claimants' express reservation of claims to future proceedings, as well as the Mobil I Majority's holding that such claim was not yet ripe, undermines Canada's argument that Mobil's claim for losses incurred between early 2012 through 2015 was considered and rejected by the Mobil I Tribunal.

106. Finally, the claim relating to losses incurred in 2012 through 2015 was not necessary to resolving the claims in the Mobil I Arbitration. Once the

[165] **C-1**, Mobil I Decision, ¶ 490: "the Claimants are entitled to recover damages incurred as a result of the Respondent's breach provided that the Claimants submit evidence of any such damages no later than 60 days of receipt of this Decision[.]"

[166] **R-75**, Mobil I Claimants' Damages Submission, ¶ 5.

[167] *Id*.

[168] The scope of the Mobil I Award was limited to claims concerning "any actual damages incurred because of the application of the 2004 Guidelines." The Mobil I Majority defined the scope of its determination as follows: actual losses are those for which "'… a call for payment has been made or that damages have otherwise occurred … money need not have been expended for compensation to be due, but there must, at minimum, be a 'firm obligation to make a payment.'" **C-2**, Mobil I Award, ¶ 28; also note **C-1**, Mobil I Decision, ¶ 489.

[169] **C-1**, Mobil I Decision, ¶ 478. Also note **C-2**, Mobil I Award, ¶ 164, finding that the Claimants could "claim whatever portion of the [expenditures related to [redacted]] they believe is incremental, in later proceedings."

Mobil I Majority had reached its conclusion that the life of the field claim was not yet ripe for determination, then the distinct question posed to *this tribunal*, namely the quantification of the damages suffered by Mobil from 2012 through 2015, cannot be considered to have been necessary to resolving the claims before the Mobil I Tribunal.

C. The determination that a claim is not yet ripe does not constitute rejection of that claim on the merits for the purposes of *res judicata*

107. The fact that Mobil initially made a claim for future losses does not mean that its present claim for 2012-2015 losses was considered or definitively rejected by the Mobil I Tribunal. A claim that has been asserted in prior proceedings but initially determined not to be ripe may be raised in subsequent proceedings once it has become ripe.

108. Tribunals regularly find that prior decisions to dismiss claims for want of jurisdiction, admissibility, or other preliminary objections do not bind future tribunals as to the merits of those claims. Thus, while the Mobil I Majority did not award compensation for losses incurred from 2012 through 2015, the fact that it reached that decision on ripeness grounds, rather than on the merits, means that Mobil's present claims should not be impeded. *Res judicata* can only attach to a final decision on the merits of a claim.[170]

109. As the *Waste Management II* tribunal noted, "[t]here is no doubt that, in general, the dismissal of a claim by an international tribunal on grounds of lack of jurisdiction does not constitute a decision on the merits and does not preclude a later claim before a tribunal which has jurisdiction. The same is true of decisions concerning inadmissibility. … The point is simply that a decision which does not deal with the merits of the claim … does not constitute res judicata as to those merits."[171]

110. Similarly, the tribunal in *Amco v. Indonesia* stated that, "when a matter is set aside by an appeal tribunal for want of jurisdiction (rather than because of a reversal on the merits), there is a decision of nullity, but not a decision 'in the sense of deciding the question of right, title, or liability in the dispute … which question is henceforth in the same position as if it had never been heard or determined at all.'"[172] The tribunal in *Amco* further found that a "finding by a

[170] As Professor Cheng observes, *res judicata* "only attaches … to a final judgment of a competent tribunal. Where a tribunal has merely declared itself to have no jurisdiction to entertain a suit, this does not prevent the same issue from being presented before another tribunal which may be competent." **CL-17**, Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals, Cambridge University Press, at pp. 337-338.

[171] **CL-89**, *Waste Management, Inc. v. United Mexican States* ("Number 2"), ICSID Case No. ARB(AF)/00/3, Decision on Preliminary Objection, ¶ 43.

[172] **CL-87**, *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1 Decision on Jurisdiction (Resubmitted), ¶ 35.

Tribunal that, in the circumstances before it and in the context of its own reasoning, it is unnecessary to rule on certain matters, is not res judicata for another Tribunal[.]"[173]

111. Decisions on preliminary objections therefore do not have *res judicata* effect so as to bar the future consideration of the merits in other proceedings. The International Court of Justice held in the *South West Africa Cases* that "a decision on a preliminary objection could never be preclusive of a matter appertaining to the merits, whether or not it has in fact been dealt with in connection with the preliminary objection."[174]

112. Thus, quantification of the damages currently sought was never determined by the Mobil I Tribunal and cannot be considered to be *res judicata* between the parties. As the *Apotex* tribunal put it when faced with similar contentions:

> Shorn of all semantic technicalities, it is worth asking the simple question after reading the relevant passages from the Apotex I & II Award in the Annex to this Part VII: how would that tribunal respond to the specific claims made by Apotex Inc. in this arbitration under NAFTA Article 1139? In this Tribunal's view, that question admits of only one answer: the Apotex I & II tribunal would say that it had already decided the essential issues relating to these claims in its award; and, applying the same two lines of its operative part with its same supporting reasons, that these claims failed to meet the requirements of NAFTA Article 1139 for jurisdiction under NAFTA's Chapter Eleven.[175]

113. Adopting this approach, this tribunal must ask itself the following question: how would the Mobil I Tribunal respond to the specific claim made by Mobil in this arbitration? Would that tribunal take the position that it had already ruled upon Mobil's entitlement to the actual losses it suffered from 2012 through 2015? The answer must be no. The express reservation by the distinguished tribunal in the Mobil I Arbitration—"[g]iven that the implementation of the 2004 Guidelines is a continuing breach, the Claimants can claim compensation in new NAFTA arbitration proceedings for losses which have accrued but are not actual in the current proceedings"[176]—permits no other conclusion to be reached.

[173] *Id.*, ¶ 65.

[174] **CL-90**, International Court of Justice, South West Africa/Namibia Advisory Opinions and Judgments (Second Phase), Judgment of 18 July 1966, ¶ 59.

[175] **CL-22**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America,* ICSID Case No. ARB(AF)/12/1, Award, ¶ 7.58.

[176] **C-1**, Mobil I Decision, ¶ 478.

V.

CANADA'S EFFORTS TO ATTACK THE QUANTIFICATION OF MOBIL'S LOSSES ARE UNMERITORIOUS

114. Mobil is entitled to full compensation that eliminates the consequences of the illegal imposition of the Guidelines against its investments. Rather than challenge this bedrock principle of compensation, Canada tries to draw attention away from it.

115. To start, Canada presents through its expert, Mr. Walck, an alternative model of damages that would severely undercompensate Mobil. This model assumes that the cumulative expenditure obligation for each Project as of December 31, 2015 constitutes a "ceiling" on Mobil's actual losses, such that any amount of incremental expenditures in excess of this level are non-compensable. Canada's proposed "ceiling" finds no support in the Mobil I Decision or Award. Nor does it find support in the Guidelines' regulatory framework which—fatally to Canada's damages model—allows for temporary "surpluses" of Guidelines-eligible spending to be carried forward and applied against future spending obligations. Viewed correctly, the "ceiling" concept is revealed as an unmeritorious litigation position.

116. In a further attempt to chip away at Mobil's compensation, Canada challenges each and every incremental expenditure at issue in this case. The indiscriminate nature of Canada's attacks reveals that it lacks any real basis for questioning the soundness of the witness testimony. Moreover, Canada advances a number of arguments against the incremental expenditures claim that are simply rehashed versions of arguments that Canada already tried, unsuccessfully, in the Mobil I Arbitration.

117. In the end, Canada's position avoids the central damages inquiry applied in the Mobil I Arbitration and which applies equally here: Would the claimed incremental expenditures in this case have been incurred but for the Guidelines? The answer is found with the witnesses: Krishanswamy Sampath, Ryan Noseworthy, Paul Durdle, Rob Dunphy, and Paul Phelan. These individuals have firsthand knowledge of the incremental expenditures at issue, decades of relevant professional experience, and personal familiarity with the Hibernia and Terra Nova projects. Against this conclusive testimony, Canada's indiscriminate second-guessing fails.

118. For the convenience of the Tribunal, Mobil has compiled and organized in Appendix A to this Reply Memorial the parties' contentions and evidence regarding each individual expenditure, including excerpts of the witness testimony, Appendix A to Canada's Counter Memorial, and references to the Mobil I Award.

A. The principle of full reparation is the correct approach to damages

119. Mobil's compensation should be based on the principle of full reparation. As Mobil demonstrated in its Memorial, the principle of full reparation, as set forth in *Chorzów Factory*, is universally recognized to be the guiding principle under international law for quantifying compensatory damages.[177] As the Permanent Court of International Justice stated in *Chorzów Factory*, "reparation must, as far as possible, wipe out all of the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[178] In the Mobil I Arbitration, Canada recognized *Chorzów Factory* as "[t]he seminal decision on compensation in international law."[179] In fact, the Mobil I Majority noted the centrality of *Chorzów Factory* to Canada's damages arguments.[180]

120. The Mobil I Majority's award of compensation fulfilled the principle of full reparation, as it sought to award the amount that would re-establish the situation that would have existed absent Canada's illegal imposition of the Guidelines.[181] To accomplish this restoration, the Mobil I Majority adopted the 'but for' test to determine whether Mobil's claimed R&D and E&T expenditures were compensable.[182] By requiring Canada to reimburse Mobil for each R&D and E&T expenditure that would not have been undertaken but for the Guidelines, the Mobil I Majority's damages award adhered to the principle of full reparation set forth in *Chorzów Factory*.[183]

121. Mobil's quantification of its losses during the period at issue in this arbitration, as presented by Mr. Phelan, comports with the principle of full reparation because it accounts for *all* expenditures that would not have been made

[177] Memorial, ¶¶ 281-82.

[178] **CL-51**, *Case Concerning the Factory at Chorzów*, 1928 P.C.I.J. (ser. A) No. 17, Judgment No. 13 at 47.

[179] **R-2**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Canada's Counter-Memorial ¶ 333 ("The seminal decision on compensation in international law is the decision of the PCIJ in *Chorzow Factory*.").

[180] **C-1**, Mobil I Decision, ¶ 435 (recounting how Canada "emphasize[d]" the *Chorzow Factory* case in relation to its damages arguments).

[181] **C-1**, Mobil I Decision, ¶ 401 (concluding that the "additional spending requirement" of the Guidelines "involves expenditures of millions of dollars beyond that which would have likely been spent but for the 2004 Guidelines").

[182] **C-2**, Mobil I Award, ¶ 52 (noting that "incremental expenditures" are those that "would not have been made in the ordinary course of business in the absence of the Guidelines").

[183] **C-2**, Mobil I Award, ¶¶ 149-150 (refusing to leave Mobil "out of pocket" and "undercompensated" by reducing the compensation to reflect royalty deductions).

but for the Guidelines.[184] It is the same quantification method that was presented to and accepted by the Mobil I Majority.[185]

B. Canada's damages model would unjustly deny Mobil full compensation for losses caused by the illegal imposition of the Guidelines

122. Canada's damages model, as presented by Mr. Walck, ignores the principle of full reparation, disregards the Mobil I Majority's decision on principles of quantum, and would leave Mobil severely undercompensated for the losses it has suffered.

123. Canada's damages model is *designed* to undercompensate Mobil solely because the Hibernia and Terra Nova Projects had temporary spending surpluses at year-end 2015.[186] Its key feature is treating the expenditure minimum set under the Guidelines as of December 31, 2015 as a "ceiling" on Mobil's losses.[187] Canada's proposed "ceiling" is an artifice of its own creation. It bears no relation to Mobil's actual losses.[188]

124. As discussed in greater detail below, three important considerations inform why Canada's proposed model of damages cannot be accepted.

125. *First*, Canada's proposed model does not comport with the principles of quantum contained in the Mobil I Decision. These principles define Canada's responsibility for incremental expenditures in terms of when "the occurrence of a payment or expenditure has transpired."[189] That is, the occurrence of a *quantified loss* at the time it is claimed triggers Canada's responsibility, and the tribunal's

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[184] **CW-1**, Phelan Statement I, ¶¶ 63-64 (explaining that by deducting ordinary course expenditures from all R&D and E&T expenditures, Mobil's damages claim includes all incremental expenditures).

[185] Canada's argument to the contrary is wrong, as Mr. Phelan shows. See **CW-9**, Phelan Statement II, ¶¶ 67-74 (explaining that he "employed the same basic method for quantifying Mobil's damages attributable to incremental R&D and E&T spending" and Canada's allegation to the contrary "is simply not true").

[186] **CW-9**, Phelan Statement II, ¶¶ 64-66 (Mr. Walck's damages model "treats the mandated spending minimum as a 'ceiling' on Mobil's compensable losses" and thus its "propensity to undercompensate Mobil is inherent in its design."). See also **RE-1**, Walck Report I, ¶ 40 (presenting Canada's damages model, which is designed not to award surplus spending); Counter Memorial, ¶ 211 (referring to surplus spending as "not compensable").

[187] **CW-9**, Phelan Statement II, ¶ 64. See also Counter Memorial, ¶ 215 (characterizing the amount of compensation due under Canada's model as a "ceiling"); **RE-1**, Walck Report I, ¶ 53 (taking the amount the Projects were required to spend on R&D and E&T under the Guidelines as the "starting point" of the damages model).

[188] **CW-9**, Phelan Statement II, ¶ 65 ("Mr. Walck's treatment of temporary 'surplus' incremental spending as non-compensable . . . ignores that all incremental spending caused by the Guidelines represents a loss incurred by Mobil").

[189] **C-1**, Mobil I Decision, ¶ 440. See also *id.* ¶ 469, ¶ 488.

inquiry is at an end. By contrast, Canada's proposed model seeks to rewrite this aspect of the principles of quantum by instead requiring the occurrence of a *quantified obligation*. Canada's revisionist take finds no support in the principles of quantum that govern this proceeding, and is actually contrary to them.

126. *Second*, the temporary spending surpluses as of December 31, 2015 are applied to obligations accruing continuously over the life of the field.[190] Indeed, the entirety of the Hibernia Project's spending surplus at year-end 2015 has already been applied against obligations that have accrued thus far in 2016.[191] Mr. Walck acknowledges the carry-forward treatment of temporary surpluses,[192] yet he advocates a damages model that treats such temporary surpluses as irrelevant to meeting the spending obligations under the Guidelines. This double position is indefensible.

127. *Third*, Canada's damages model ignores the myriad real-world variables that make the required spending level a moving target. It is virtually impossible for HMDC and Suncor, as the respective operators of the Projects, to make and to report exactly as much Guidelines-eligible expenditures as required in any given month, year, or OA period.[193] There is no just reason for designing a damages model that allows the unpredictability inherent in the illegal measure to inure to the benefit of the wrongdoer, to Mobil's detriment.

1. The principles of quantum are satisfied by the occurrence of a quantified loss caused by the Guidelines

128. The Mobil I Decision's principles of quantum govern this proceeding.[194] Following them, "compensation is due" when "a payment or expenditure related to the implementation of the 2004 Guidelines has been made."[195] All of Mobil's losses in this proceeding meet this test, having been actually incurred.

129. Canada seeks to supplant the governing principles of quantum with those more to its liking. Its "ceiling" concept implies there is a level of quantified

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[190] **CW-9**, Phelan Statement II, ¶¶ 29-37.

[191] *Id.*, ¶¶ 38-63 (examining the myriad variables that make temporary spending surpluses virtually inevitable).

[192] **RE-1**, Walck Report I, ¶ 39.

[193] **CW-9**, Phelan Statement II, ¶¶ 38-63 (overviewing the real-world variables); **CW-10**, Sampath Statement II, ¶¶ 7-11 (noting that the "projections of the required and actual levels of Guidelines-eligible spending were inexact, as they depended on a number of unpredictable variables).

[194] Canada concedes that the Mobil I Decision and Award is "binding as between the Claimant and Canada." Counter Memorial, ¶ 7.

[195] **C-1**, Mobil I Decision, ¶ 469. Alternatively, compensation is due when "there is a firm obligation to make a payment and there is a call for payment or expenditure[.]" *Id.*

obligation that the level of quantified loss cannot exceed. This concept lacks any foundation in the principles of quantum pronounced in the Mobil I Decision. Worse, it is contrary to these binding principles, because it treats certain losses that have actually been incurred as non-compensable.

130. Canada cannot *sub silentio* rewrite the principles of quantum through its damages model. Being contrary to these principles, Canada's "ceiling" concept should be dismissed out of hand.

2. The Projects' spending surpluses have already been carried forward to eliminate or reduce post-2015 expenditure obligations

131. Canada portrays the Projects' spending on Guidelines-eligible R&D and E&T activities that is in excess of the mandatory minimum—that is, a transitory "surplus" in spending—as irrelevant to the Projects' expenditure obligations under the Guidelines and therefore unrecoverable in this arbitration.[196] This portrayal is not accurate. Far from being irrelevant, transitory "surpluses" of actual spending are a normal part of the Projects' ongoing compliance with the Guidelines over the lives of the fields. The Guidelines,[197] the Board,[198] and even Canada's own damages expert[199] confirm that when they arise, temporary spending surpluses are simply carried forward and applied against subsequent expenditure obligations.

132. In fact, the Hibernia Project's surplus spending as of December 31, 2015 has already been eliminated by virtue of having been applied against fresh spending obligations that have accrued between January 1, 2016 and July 31,

[196] Counter Memorial, ¶ 211 (claiming that Mobil "proceeded to spend even more than what it was obliged to" and that "[t]here is no causal link between the spending required by the 2004 Guidelines and the Claimant's surplus expenditures").

[197] **CW-9**, Phelan Statement II, ¶ 33 ("These principles are set forth in the Guidelines themselves[.]"). See also **C-3**, Guidelines, § 4.2.

[198] **CW-9**, Phelan Statement II, ¶¶ 34-35 (recounting the Board's carry-forward treatment of the temporary surpluses at Terra Nova); **C-373**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada*, ICSID Case No. ARB(AF)/07/4, First Witness Statement of Frank Smyth of November 26, 2009, ¶ 37 ("For any given POA period, if an Operator's spending exceeds the required spend, then the surplus can be applied to the next POA as a credit towards expenditure requirements for that POA or where the amount was large enough the surplus could be carried forward for credit against subsequent POA periods until all surplus is credited."). See also **C-128**, C-NLOPB, Research and Development – Education and Training – Guidelines Overview (Feb. 5, 2015), at MOB0002728; note also **C-383**, C-NLOPB, Benefits Plan Guidelines Draft (January 2016), Appendix 2, at p. 6 ("Carryover of surplus eligible expenditures to the next OA period is permitted.").

[199] **RE-1**, Walck Report I, ¶ 39 ("Claimant's surplus spending can be carried forward to future production periods to offset its future expenditure obligations.").

2016.[200] A significant portion of the surplus spending at Terra Nova as of December 31, 2016 has already been eliminated as over this same period, as well.[201] The remainder of Terra Nova's temporary surplus—of which [redacted] is attributable to Mobil—will continue to be applied against obligations accruing through the end of the life of that field.[202]

133. In short, temporary spending surpluses receive carry-forward treatment under the Guidelines and offset continuously accruing obligations. By focusing narrowly on historical spending surpluses, Canada seeks to distract this Tribunal from the real issue: Mobil has already incurred ***all*** of the losses claimed in this arbitration, for which full reparation is due. That the Hibernia and Terra Nova Projects were in a temporary "surplus" position at the end of 2015, relative only to their spending obligations at that point in time, does not make Mobil's losses any less actual or less deserving of reparation.

3. The Guidelines establish a spending formula that is a continuously moving target

134. Canada's proposed damages model is indefensible for an additional reason: The Projects came into temporary surplus positions at the end of 2015 *because of* the unpredictable features of the Guidelines. Thus, if Canada's model were accepted, it would permit the unpredictable features of the illegal measure at issue—the Guidelines—to inure to the benefit of the wrongdoer, to the detriment of the aggrieved claimant.[203]

135. The operators plan and make incremental R&D and E&T expenditures with a view toward achieving the required minimum without significantly exceeding it.[204] The Guidelines established by the Board determine the required expenditure commitments through a complex benchmark, or formula.[205] This expenditure formula is inherently unstable because it fluctuates continuously, making it virtually impossible for project operators to spend

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[200] **CW-9**, Phelan Statement II, ¶ 36 ("In light of the carry-forward treatment of surpluses, the entirety of the Hibernia project's "surplus" as of December 31, 2015 has in principle already been applied to expenditure obligations that have accrued through the end of July 2016.").

[201] **CW-9**, Phelan Statement II, ¶ 36.

[202] *Id.*

[203] Canada's position runs afoul of the maxim *commodum ex injuria sua non habere debet* ("no one ought to profit from his wrong").

[204] **CW-10**, Sampath Statement II, ¶¶ 6 ("I planned and managed the level of HMDC's incremental expenditures with a view toward meeting the Guidelines' required spending level. . . . [T]he goal was for HMDC to meet the spending minimum set under the Guidelines at the end of the relevant OA period without significantly exceeding it."

[205] **C-3**, Guidelines, § 2.2; **CW-9**, Phelan Statement II, ¶¶ 54-60.

precisely as much on R&D and E&T as is required under the Guidelines at any given time.[206]

136. Thus, the operators face a number of practical uncertainties in planning incremental expenditures. These uncertainties include the amount of R&D and E&T services that will be required in the ordinary course, the amount of R&D and E&T that contractors and project owners will report, and which expenditures the Board will actually approve as eligible under the Guidelines.[207]

137. The practical reality is that, when planning their incremental R&D and E&T spending, operators cannot forecast their spending obligations under the Guidelines with exactitude. Mr. Sampath testifies to the real-world circumstances that make this task so challenging:

> Necessarily, my projections of the required and actual levels of Guidelines-eligible spending were inexact, as they depended on a number of unpredictable variables. For instance, the projected required expenditure level at Hibernia rose or fell in line with projected market fluctuations in the price of crude oil. This projection also varied according to changes in actual production and the projections of Hibernia project's production output. For future projections, I used the most recent 5-year running average of the Statistics Canada R&D factor; this factor has been going up steadily from 0.36% of total project revenues in 2008[208] to 0.74% in 2015.[209] The level of R&D and E&T spending by other HMDC owners also varied from year to year, with this data becoming available during the first quarter of the following year. In addition, the timing of when a Guidelines-eligible expenditure would become reportable was not entirely within my control, as external vendors were sometimes less

[206] **CW-1**, Phelan Statement I, ¶¶ 28-33 ("Our efforts to plan compliance were further complicated by the fact that we would not know our actual spending obligations for a given year until after the end of the year in question. This is so because the Guidelines formula applied by the Board includes several variables that cannot be predicted to a certainty."); **CW-9**, Phelan Statement II, ¶ 65 ("[I]t is practically impossible for the operators to spend only as much on R&D and E&T as the Guidelines require as of any given date, given that the amount of the final expenditure obligation can only be known retrospectively."); **CW-10**, Sampath Statement II, ¶ 11 ("Necessarily, my projections of the required and actual levels of Guidelines-eligible spending were inexact, as they depended on a number of unpredictable variables."). Thus, Canada's allegation that the projects spending obligation amounts are known to the projects' operators, or to Mobil, "in real time" is not accurate. **RE-1**, Walck Report I, ¶ 43 (claiming that "the Board's letters [calculating expenditure calculations] simply formalize after the fact the calculation of what the project operators knew in real time.").

[207] **CW-10**, First Witness Statement of Krishnaswamy Sampath ("Sampath Statement II"), ¶¶ 7-10 (describing the uncertain variables faced when planning incremental R&D and E&T expenditures).

[208] **C-363**, Richard E. Walck, Summary of Five-Year Benchmark Calculations (2004-2009).

[209] **R-32**, Letter from Mike Baker, C-NLOPB to Jennifer Walck, HMDC attaching May-Dec 2015 R&D/E&T Expenditure Obligations (February 9, 2016), at p. 2.

> than prompt in submitting their invoices. I also lacked control over the expenditures incurred by the Hibernia operations team for activities like the [redacted] and the Gas Utilization Study.[210]

138. Nor can operators modulate the Projects' Guidelines-eligible spending such that it perfectly syncs with the expenditure obligation. As Mr. Phelan explains this important point:

> Between the unpredictability of 'ordinary course' spending on the one hand and the Guidelines' spending minimum on the other, the operators have a difficult time in planning the necessary level of spending to make up the difference. Their task is complicated by the lead times required to make incremental spending. The operators cannot modulate the level of incremental spending in real time like one controls the flow of a faucet, opening and closing the spigot to increase or decrease the desired flow. Rather, relatively long periods of time can separate the date when the decision is made to spend on a given R&D or E&T activity and the date when the actual outlay is incurred. In practical effect, the Hibernia and Terra Nova operators are often 'locked into' their past decisions about what R&D and E&T activities to fund for many months or even years into the future.[211]

139. Canada agreed in the Mobil I Arbitration that the difference between ordinary course spending and the level required by the Guidelines was inherently unpredictable due to the propensity of the key variables to fluctuate.[212] The Majority likewise recognized that "critical market-based variables" in the Guidelines' formula, including oil prices and change rates, "routinely experience considerable fluctuations."[213]

140. Indeed, the temporary spending surpluses at the Hibernia and Terra Nova Projects at year end 2015 are attributable to such fluctuations in the Guidelines' benchmark formula. As Mr. Phelan and Mr. Sampath note, a sharp decline in the price of oil starting in 2014 was a major contributing factor to the temporary "surplus" situation that existed at year end 2015.[214] Mr. Phelan calculated the impact of this one variable's steep decline:

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[210] **CW-10**, Sampath Statement II, ¶ 11.

[211] **CW-9**, Phelan Statement II, ¶ 61.

[212] **R-2**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Canada's Counter-Memorial ¶ 341 ("Every element of the claim for damages from 2009 until 2036 is uncertain . . . . "); **R-79**, Mobil I Canada's Rejoinder Memorial, ¶¶ 299-300; **R-231**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4), Expert Report of Richard E. Walck; **C-1**, Mobil I Decision, ¶¶ 453-463.

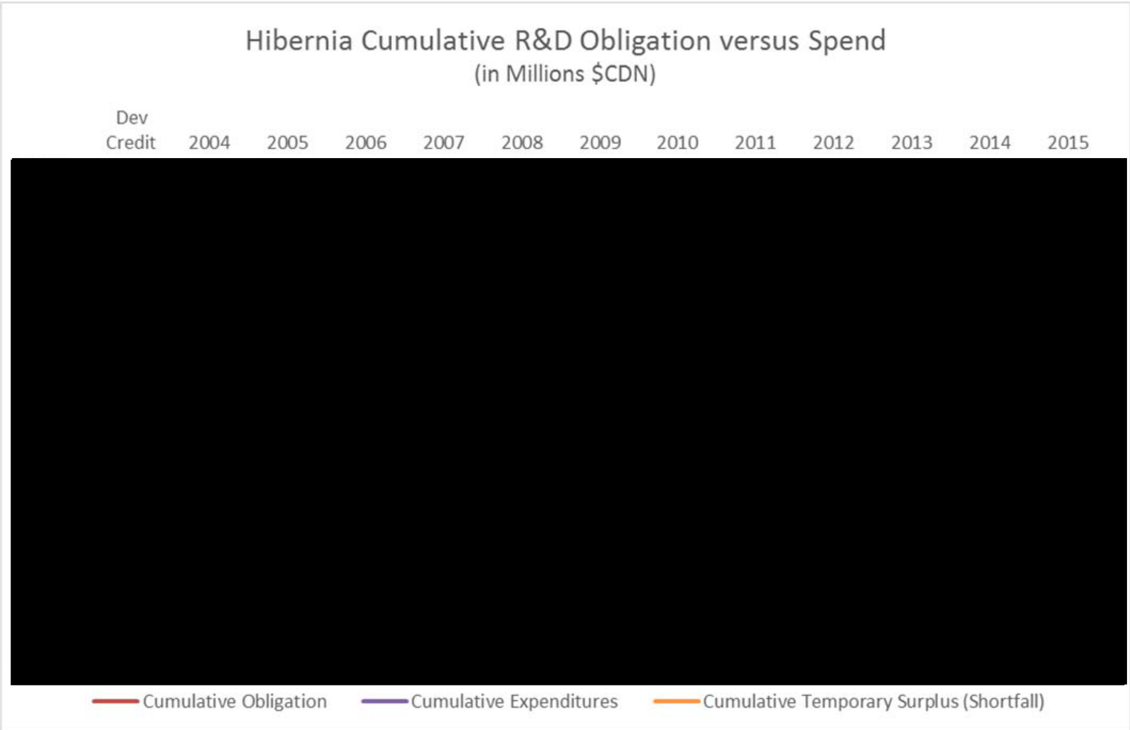
[213] *Id.*, ¶ 474.

[214] **CW-9**, Phelan Statement II, ¶¶ 55-57; **CW-10**, Sampath Statement II, ¶ 14.

> Hibernia's expenditure obligation during the 2012-2015 period was reduced by **<u>$18,976,414</u>** due to the price's fall beneath its 30-month historical average, while Terra Nova's expenditure obligation was reduced by **<u>$8,215,097</u>**. Of course, this market-driven reduction of the projects' respective expenditure obligations was outside the control of the projects' operators, HMDC and Suncor.[215]

141. Clearly, there is a disconnect between Canada's abstract damages model and the concrete facts. For instance, the Hibernia Project was in deficit relative to its expenditure obligations under the Guidelines during the entire period covered in the Mobil I Arbitration, as well as in 2012, 2013, and 2014, and at least part of 2015. The graph below illustrates the historical expenditure profile at the Hibernia Project in relation to its spending obligation under the Guidelines:

Phelan Statement II, Fig. 1



142. Mr. Phelan explains the significance of this graph:

> [F]rom 2004 through 2014, the Hibernia project was consistently in a 'shortfall' position relative to its expenditure obligation. Only in 2015, for the first time, the Hibernia project made more cumulative actual expenditures than the cumulative actual obligation at that point in time. In other words, for the majority of time during which the Guidelines have thus far been in force, the Hibernia project was

215 **CW-9**, Phelan Statement II, ¶ 56.

underspent in relation to its cumulative expenditure obligations under the Guidelines.[216]

143. As late as September 2015, the Board informed the Hibernia Project's operator that there was a current "deficit" of over [redacted] relative to that Project's expenditure obligation.[217] Yet the damages model asserted by Canada suggests that the Hibernia Project was in a "surplus" position all along.

144. In summary, it is virtually impossible for the operators to forecast their expenditure obligations under the Guidelines with exactitude, much less is it possible for an operator to ensure that its Project's overall expenditures are exactly as much Guidelines-eligible expenditures as required at any moment in time. Indeed, the temporary "surpluses" at year end 2015 were due to the unpredictable features of the Guidelines themselves. To allow Canada to avoid a substantial portion of its liability because of the unpredictable features inhering in the illegal measure itself would be unjust.

C. Canada's attempts to chip away at Mobil's losses are unavailing

145. Mr. Phelan has submitted a calculation of Mobil's losses due to the illegal and continuing imposition of the Guidelines. Neither Canada nor its expert have challenged the accuracy of the calculations performed by Mr. Phelan or the veracity of the expenditure information supporting them. Nor has Canada contested that the principle of full compensation should result in Mobil recovering all of the losses incurred because of the Guidelines.

146. Even so, Canada advances a number of alternative arguments in an attempt to avoid responsibility to make Mobil whole for the losses caused by the Guidelines.

- *First*, Canada attempts to hold the incremental expenditures to the wrong standard, ignoring that the correct standard is whether the incremental expenditures would have been made but for the Guidelines. As will be seen, Canada's arguments in this regard are simply repackaged versions of arguments that Canada tried, unsuccessfully, in the Mobil I Arbitration. Canada's attempts to revisit the Mobil I Majority's clear decisions are foreclosed and should not be accepted.

- *Second*, Canada engages in uninformed second-guessing of Mobil's witnesses based on its selective reading of the documentary evidence. Indeed, Canada uses this method to challenge *each and every* incremental expenditure in this arbitration. Canada's indiscriminate approach reveals

[216] **CW-9**, Phelan Statement II, ¶ 41.

[217] **C-125**, Letter from S. Tessier, C-NLOPB, to J. Walck, HMDC (September 30, 2015), at p. 2 (MOB0002707).

that it has no sound basis on which to question the first-hand knowledge of Mobil's witnesses.

- *Third*, the incremental nature of several expenditures at issue in this case is *res judicata* pursuant to the Mobil I Award, which Canada completely ignores.

- *Fourth*, Canada attempts to revisit the Mobil I Majority's well-founded decision that Mobil's compensation should not be reduced in respect of uncertain provincial royalty "savings." Canada fails to justify overturning this decision or to acknowledge its *res judicata* effect.

- *Fifth*, Canada tries to persuade this Tribunal to offset unspecified "gains" and "benefits" from the compensation owed to Mobil, without offering any evidence. The Mobil I Majority squarely considered and rejected this same attempt at reducing Mobil's compensation. So should this Tribunal.

- *Finally*, ignoring the Mobil I Majority's decision yet again, Canada argues that Mobil could have deposited all of its incremental expenditures into a Board-managed "R&D fund," and thereby reduced some of the alleged uncertainty surrounding the quantification of its claim. This argument did not dissuade the Mobil I Majority from its review of the damages evidence. Furthermore, the evidence shows that the factual premises of Canada's argument are incorrect.

1. Canada attempts to hold incremental expenditures to the wrong standard

147. Following the Mobil I Majority's principles of quantum, compensation is due for all expenditures caused by the Guidelines.[218] The test for incremental expenditures is whether they would not have been made in the ordinary course of business in the absence of the Guidelines.[219] This is an evidence-based inquiry that considers the particular facts and characteristics of each incremental expenditure in light of the related testimony and evidence.[220]

148. While the Mobil I Majority's enunciation of the 'but for' test was clear, one peruses Canada's Counter Memorial in vain for any substantive

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[218] **C-1**, Mobil I Decision, ¶ 469.

[219] **C-2**, Mobil I Award, ¶ 52.

[220] **C-2**, Mobil I Award, ¶ 34 ("The Majority's task at [the quantum] stage in the proceeding has largely been an evidence-based one."), ¶ 51 ("The Majority finds itself thus obliged to consider the particular facts and characteristics of each of the identified and challenged expenditures, together with the related testimony and evidence before us, separately.").

discussion of it.[221] Instead, Canada injects irrelevant considerations that the Mobil I Majority already dealt with and did not accept.

149. Canada attempts to distract from the 'but for' test by focusing on isolated statements in the documentary evidence describing potential benefits that the incremental expenditures *might* yield, if the funded activities turn out to be successful.[222] Mobil has never denied that the operators complied with their Guidelines obligations by undertaking incremental expenditures that could potentially generate value for the Projects and their owners. As Mr. Sampath stated in his first witness statement:

> In selecting which R&D proposals to submit to the Board, the most important criterion I considered was their eligibility under the Guidelines. Also, given that the Guidelines mandated R&D spending, we preferred to fund R&D work that held a possibility of generating some value for the Hibernia project, the project's owners or the industry in general, even if the potential value was incommensurate with the amount spent.[223]

150. Canada's position is essentially that, in order to recover incremental expenditure damages, the operators should have instead spent substantial sums on R&D and E&T that would have little or no relevance to the Projects or their owners. The Mobil I Majority squarely rejected this position:

> [T]he mere fact that an expenditure may be beneficial to the Claimants or Projects does not definitively answer whether it was undertaken as a result of the Guidelines or not. It is logical that if the Claimants were under an expenditure requirement, they would seek to make the necessary expenditures of some utility. Any sensible investor would not choose to make an expenditure that was wholly superfluous to the investment.[224]

151. Mobil is entitled to compensation for its losses in respect of project-level incremental expenditures, regardless of whether there was any possible benefit to making them. For instance, Canada makes the slightly tongue-in-cheek argument that "Canadian taxpayers should not have to compensate the Claimant

[221] Canada makes a fleeting acknowledgment that the test is whether "the R&D and E&T expenditures [Mobil] demands as damages would not have been engaged in the absence of the 2004 Guidelines." Counter Memorial, ¶ 225.

[222] Counter Memorial, ¶ 228 (arguing that expenditures that potentially create benefits for other oil projects are non-compensable). See also, *e.g.*, Counter Memorial, A-9 (in relation to an incremental expenditure, arguing that "Canadian taxpayers should not be required to compensate the Claimant for an expenditure that will be highly relevant and useful for the Claimant in its future exploration activities").

[223] **CW-3**, Sampath Statement I, ¶ 23.

[224] **C-2**, Mobil I Award, ¶ 51.

for enhancing the [redacted]."[225] Yet the fact remains that Mobil would not be incurring the cost of undertaking projects, such as the [redacted], were it not for the existence of the Guidelines.[226]

152. Canada attempts to exaggerate the potential benefits generated by the incremental expenditures, contending that Mobil or its affiliates could use the results to support other projects "elsewhere in the world."[227] Canada has presented no evidence of any such use. In actual fact, as Mr. Sampath testifies, the incremental expenditures resulted in either very little or no value to the Projects, to Mobil, or to any of Mobil's affiliates:

> [T]o my knowledge, none of the results generated by the expenditures have been applied to any project in which Mobil or any of its affiliates has an interest. This includes the Hibernia and Terra Nova projects, which have not benefited at all from any of the incremental R&D and E&T expenditures covered in my first and second witness statements.[228]

153. Even if one assumes *arguendo*—and contrary to the evidence—that the incremental expenditures will result in some utility to an affiliate of Mobil "elsewhere in the world," Canada's argument still fails. Mobil is a legally distinct entity from its global affiliates. Canada cites no principle of international law that might permit imputing a potential advantage received by an affiliate of a claimant due to a state's wrongful conduct back to the claimant itself. Furthermore, Canada provides no explanation or evidence to show how a theoretical benefit to a project in which Mobil has no interest accrues to Mobil.

154. Relatedly, Canada speculates that, if not for the mandatory spending requirements imposed on Mobil's investments, an affiliate of Mobil might instead have funded some of the R&D projects on that affiliate's own account.[229] Besides not being supported by the evidence, this contention misses the relevant test. Mobil is the claimant in this matter. Therefore, the damages inquiry focuses on the

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225 Counter Memorial, A-90.

226 **CW-3**, Sampath Statement I, ¶¶ 60-61; **CW-10**, Sampath Statement II, ¶ 79.

227 Counter Memorial, ¶ 226.

228 **CW-10**, Sampath Statement II, ¶¶ 26. See also, *e.g.*, **CW-11**, Second Witness Statement of Ryan Noseworthy ("Noseworthy Statement II"), ¶ 34 ("HMDC has gotten very little benefit out of its donation of laboratory equipment to Petroforma."); **CW-8**, Dunphy Statement I, ¶ 16 ("Simply put, the projects contributing to this study [of the impact of seismic activity on shrimp behavior], including Hibernia and Terra Nova, had nothing to gain by it[.]"); **CW-12**, Second Witness Statement of Paul Durdle ("Durdle Statement II"), ¶ 11 (observing that the Escape-Evacuation-Rescue (EER) in Ice project "is unlikely to yield any benefit for the Hibernia or Terra Nova projects, and HMDC and Suncor would not have funded it in the ordinary course of their business").

229 Counter Memorial, ¶ 227 (*e.g.*, speculating that the Drift and Divergences of Ice Floes project "would have been engaged by ExxonMobil regardless of the 2004 Guidelines").

incremental expenditures that Mobil would not have incurred in the Guidelines' absence.[230] Canada cites no principle of international law, much less any part of the Mobil I Decision or Award, that might support a different inquiry focusing on what the affiliates of a claimant might have done but for the illegal measure.

155. Canada alternatively contends, as it did in the prior proceeding, that the incremental expenditures' compatibility with the pre-Guidelines regime indicates they would have been incurred even in the absence of the Guidelines.[231] This is an attempt to exclude virtually all of the incremental expenditures claimed in this proceeding. It is also contradicted by witness testimony and documentary evidence.

156. The Mobil I Majority saw through Canada's "unconvincing" argument.[232] It recognized that "R&D spending commitments under the Benefits Plans (the pre-Guidelines regime) were general and unspecified," meaning that the mere fact that an expenditure is consistent with the pre-Guidelines regime does not resolve whether it is introduced as a result of the Guidelines or not."[233] The Guidelines imposed an expenditure obligation that went beyond the requirements of the Accords Act, which were "silent as to the amounts that are to be expended [on R&D]. [They do] not set an amount, or a ceiling, or a floor."[234] Canada's argument fails for this simple reason.

157. Canada's argument also disregards the fact that the Projects' ordinary course expenditures, which amounted to over [redacted] between 2012 and 2015,[235] more than satisfy the R&D and E&T provisions of the Accord Acts and Benefits Plans. Canada does not explain or even address why this spending is inadequate to meet the requirements of the pre-Guidelines legal regime. Expenditures on specific R&D projects were never required by the Board before the Guidelines. Thus, none of the incremental expenditures at issue would have been necessary to satisfy the pre-Guidelines legal regime reflected in the Accord

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230 The Mobil I tribunal concerned itself only with the losses of the claimants before them. **C-1**, Mobil I Decision, ¶ 476 (stating that "the Respondent's breach gives rise to continuing losses, whereby the *Claimants' losses* unfold over time" (emphasis added)); **C-2**, Mobil I Award, ¶ 32 (noting that the Mobil I Majority was faced with "assessing the *Claimants' losses*" (emphasis added)).

231 Counter Memorial, ¶¶ 229-233; **C-2**, Mobil I Decision, ¶ 49 (noting Canada's argument in the Mobil I Arbitration that "Claimants were already obligated to spend on R&D and E&T prior to the implementation of the Guidelines").

232 **C-2**, Mobil I Award, ¶ 121 ("The Respondent's arguments are … unconvincing in this regard.").

233 **C-2**, Mobil I Award, ¶ 121, ¶ 126.

234 **C-1**, Mobil I Decision, ¶ 400.

235 **CW-9**, Phelan Statement II, Annex A, Table "Summary of Mobil Investments' Claim for Incremental Expenditures (2012-2015)," References B, C, and E.

Acts and Benefits Plans, and Canada has not introduced any evidence that suggests otherwise.

2. The witnesses substantiate the incremental nature of the expenditures claimed in this proceeding

158. Canada offers no witness who might contradict the detailed testimony presented by Messrs. Sampath, Noseworthy, Durdle, Dunphy, and Phelan concerning the incremental expenditures. Instead, Canada declares that these individuals "simply decided for themselves which R&D and E&T expenditures should be paid for by Canada as compensation."[236]

159. Mobil's witnesses have firsthand knowledge of the incremental expenditures claimed in this proceeding. Applying their professional judgment and familiarity with the Hibernia and Terra Nova Projects, they have explained why each of the incremental expenditures would not have been made in the ordinary course of business. The witnesses did not "simply decide[] for themselves" the question, as Canada contends. Rather, they have presented their knowledge of which expenditures would not have been made in the ordinary course of business, and why.

160. Without the support of fact witnesses, Canada contends that the testimony of Mobil's witnesses contradicts selective excerpts of the documentary evidence.[237] Canada's cherry-picked snippets are unavailing. The Mobil witnesses have submitted further witness statements to correct Canada's take on the documentary evidence and to demonstrate why each expenditure claimed in this case is incremental.[238]

161. Canada additionally argues Mobil should not receive compensation for Terra Nova incremental expenditures because "Claimant does not proffer any witness from Suncor[.]"[239] This is a canard. Except for two small-value expenditures, Mobil was awarded compensation in respect of all claimed Terra Nova expenditures in the Mobil I Arbitration.[240] This award of Terra Nova incremental expenditures was supported by the testimony of employees of HMDC and its affiliates. Testimony by a Suncor representative was not essential then, nor is it now.

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[236] Counter Memorial, ¶ 219.

[237] Counter Memorial, ¶ 221 (arguing that "the opinion testimony by the Claimant's own employees is, for many of the claimed expenditures, inconsistent with internal documents").

[238] **CW-9**, Phelan Statement II; **CW-10**, Sampath Statement II; **CW-11**, Noseworthy Statement II; **CW-12**, Durdle Statement II; **CW-13**, Second Witness Statement of Rob Dunphy.

[239] Counter Memorial, ¶ 220.

[240] **C-2**, Mobil I Award, ¶ 129 (i.e., [redacted] ([redacted]) and [redacted] ([redacted])).

162. Furthermore, the majority of the incremental expenditures at Terra Nova during the 2012-2015 period were joint industry projects ("JIPs"), meaning that both Hibernia and Terra Nova funded the same R&D activity.[241] In such instances, the testimony of Mobil's witnesses concerning Hibernia expenditures are likewise applicable to Terra Nova's corresponding expenditures. As for non-JIP incremental expenditures, Mr. Sampath, HMDC's former R&D Manager, obtained relevant knowledge through his longstanding collaboration with his counterparts at Suncor and through other avenues.[242]

3. Canada is bound by the Mobil I Award's decisions on incremental expenditures

163. In several instances, the incremental expenditures incurred after the periods at issue in the Mobil I Arbitration were for the same projects that the Mobil I Majority found to be incremental in nature,[243] or that Canada otherwise conceded were compensable.[244] Canada has omitted discussion of these binding determinations and prior concessions when discussing these expenditures. Nevertheless, with respect to such continuing expenditures, this Tribunal must determine that they are compensable on an application of the doctrine of *res judicata*.[245] These particular expenditures are detailed in full in Appendix A.

4. Following the Mobil I Majority's decision, Mobil's compensation must not be reduced in respect of provincial royalty deductions

164. Subtracting the value of royalty deductions from Mobil's compensation, before the Province decides whether incremental expenditures are

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[241] See expenditures designated as "Both" in the "Project" column of Memorial Appendix A. Except for three expenditures, all Terra Nova projects were JIPs with Hibernia.

[242] **CW-3**, Sampath Statement I, ¶ 24 ("[A]s a member of the research management committee of PRNL, I learned from Suncor's representative on the committee about Terra Nova's R&D activities. In addition, I often communicated directly with my counterparts at Suncor with respect to joint projects that both Hibernia and Terra Nova funded."); **CW-10**, Sampath Statement II, ¶¶ 19 ("[redacted] [of Suncor] also confirmed to me that—with one qualification that I explain . . . —all of Terra Nova's R&D expenditures that were covered in my first witness statement would not have been made in the Guidelines' absence.").

[243] *E.g.*, **CW-3**, Sampath Statement I, ¶ 85 (Industrial Chair in Petroleum Geosciences), ¶ 120 (CARD Annual Contributions), ¶ 137 (Young Innovators Award); **CW-5**, Noseworthy Statement I, ¶ 19 (Gas Utilization Study or WAG Pilot), ¶ 31 (SARA & Metal Analysis).

[244] **C-2**, Mobil I Award, ¶ 128 & note 162. *E.g.*, **CW-3**, Sampath Statement I, ¶ 89 (Enhanced Field School Program), ¶ 92 (Girl Quest Camp Fund), ¶ 138 (Johnson GEO Centre Programming), ¶ 144 (Rovers Search and Rescue Infrastructure Contribution), ¶ 146 (Red Cross Centre), ¶ 150 (Women in Science and Engineering Program), ¶ 152 (WRDC Contributions).

[245] Memorial, ¶ 188 *et seq*.

properly deductible from royalty obligations, would unjustly expose Mobil to the risk of being left severely undercompensated, as the Mobil I Majority held.[246]

165. To date, Canada still has refused to state its position on the deductibility of incremental R&D and E&T.[247] The Province has not completed any audit of the R&D and E&T expenditures at issue in his arbitration, as Canada has confirmed.[248] It still remains uncertain whether the Province will 'claw back' claimed deductions for R&D and E&T incremental spending, and it remains true that Mobil will have to pay a significant interest penalty if the Province disallows any deductions.[249]

166. Furthermore, as Mr. Phelan testifies, Mobil has undertaken to repay the Province the royalty deductions related to incremental expenditures to reflect any compensation that Mobil receives from Canada as a result of this arbitration.[250] Indeed, Mobil has already compensated the Province in respect of royalty deductions relating to the incremental expenditures awarded in the Mobil I Award.[251] Thus, in following the Mobil I Majority's considered decision not to reduce compensation based on royalty deductions, there is no risk of overcompensation.

5. Unspecified "gains" or "benefits" do not reduce Mobil's compensation

167. Canada seeks to offset Mobil's damages based on purported, yet unspecified, "gains" or "benefits" that the incremental expenditures "may" yield.[252] This attempt was squarely rejected by the Mobil I Majority,[253] and the awarded compensation reflected no offset in respect of such alleged benefits.[254]

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246 **C-2**, Mobil I Award, ¶¶ 149-150.

247 **CW-9**, Phelan Statement II, ¶¶ 21-22.

248 Procedural Order No. 5, Redfern Schedule at p. 7 ("Canada understands that the Province has not completed its assessment and consideration of royalty obligations owed to the Province arising from the Hibernia project for the years 2009-2015 and the Terra Nova project for the years 2010-2015."); **CW-9**, Phelan Statement II, ¶¶ 18-20.

249 *See* **C-2**, Mobil I Award, ¶¶ 149-150; **CW-9**, Phelan Statement II, ¶¶ 24-25.

250 **CW-1**, Phelan Statement I, ¶ 87.

251 **CW-9**, Phelan Statement II, ¶ 27.

252 Counter Memorial ¶ 242 (arguing that "financial or other value-added gains" should be offset; **RE-1**, Walck Report I, ¶ 80 (conjecturing that "the R&D projects that were undertaken to meet the spending requirement *may* provide financial or other benefits" (emphasis added)). See also **C-1**, Mobil 1 Decision, ¶ 447 ("Respondent argues that the Claimants fail to take into account the benefits the Claimants will receive from any additional R&D and E&T expenditures that they plan to undertake" due to the Guidelines.).

253 **C-1**, Mobil I Decision, ¶ 468.

254 The Mobil I Majority reduced the claimants' compensation for incremental expenditures only with respect to SR&ED credits. **C-2**, Mobil I Award, ¶ 138. Consisting with this decision, Mobil has

168. In addition to being legally foreclosed, Canada's requested offset is not supported by any evidence of what "gains," if any, Mobil might have received by way of the incremental expenditures at issue. Indeed, Mobil's witnesses have testified that the incremental expenditures in this case have yielded little, if any, benefits.[255] Nor does Canada offer any quantification of its requested offset.[256]

169. Devoid of factual and legal support, and being foreclosed by the Mobil I Decision and Award, the requested offset for "gains" or "benefits" cannot be sustained.

6. Canada is wrong to suggest that Mobil could have paid into a Board-managed R&D fund

170. The Mobil I Majority was "not influenced" by the concept of a Board-managed "R&D fund" while undertaking its examination of the damages-related evidence.[257] Ignoring this decision, Canada and its damages expert persist in suggesting that Mobil could have made such deposits.[258]

171. Fatal to Canada's suggestion, the option of whether to pay into a Board-managed fund could not belong to Mobil as an indirect investor in the Hibernia and Terra Nova Projects. Mr. Phelan explains why this is so:

> Mobil, through its minority-owner subsidiaries, does not have unilateral control over how the Hibernia and Terra Nova operators, HMDC and Suncor, comply with the Guidelines. Rather, HMDC or Suncor are responsive to the collective decisions of all of the co-owners of the respective projects, not just Mobil's subsidiaries. The co-owners of the Hibernia and Terra Nova projects preferred to have some input into the operators' decisions on the budget level and the type of R&D and E&T expenditures to make. At a meeting with the Board that Andrew Ringvee facilitated on behalf of the industry in February 2009, local industry expressed its collective preference to meet its expenditure obligations through direct expenditures on R&D and E&T. This preference aligned with the stated intention of the Guidelines, which was to have the project operators make the required R&D and E&T expenditures.[259]

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already reduced its compensation in respect of actual or potential SR&ED credits. **CW-1**, Phelan Statement I, ¶¶ 76-80.

[255] See ¶ 152, *supra*.

[256] **RE-1**, Walck Report I ¶ 84.

[257] **C-2**, Mobil I Award ¶ 33.

[258] Counter Memorial, ¶ 219 (note 329); **RE-1**, Walck Report I, ¶ 41.

[259] **CW-9**, Phelan Statement II, ¶ 85 (footnotes omitted).

172. Furthermore, as Canada has admitted, no Board-managed R&D fund ever existed into which any operator could have paid.[260] The Board's public financial statements from 2005 through 2015 nowhere reflect the existence of any R&D fund.[261] Internal Board documents from 2014 and 2015 likewise confirm that there is no R&D fund.[262] Hibernia's former R&D Manager, Mr. Sampath, was never told that any such fund existed or could be made available to the Projects' operators.[263]

173. The evidence shows further that the Board eschewed responsibility for establishing or managing an R&D fund.[264] Indeed, as Mr. Sampath notes, the Board's personnel lacked the technical expertise and resources to productively manage an R&D Fund.[265] Thus, in its administration of the Guidelines, the Board essentially ignored the "R&D fund" provision in the Guidelines by consistently requiring the Projects to make direct expenditures on eligible R&D and E&T.[266] In fact, the Board is already preparing to formally remove from the next iteration of the Guidelines any reference to an R&D fund.[267]

174. Whatever the fate of the "R&D fund," it has always been a nullity in practice. This Tribunal, like the Mobil I Majority, should "not [be] influenced" by the shadow of a creature that never was.[268]

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[260] Procedural Order No. 5, *attaching* Redfern Schedule on Mobil's July 15, 2016 Requests for Production, at p. 26 (responding to Mobil's request for documents concerning the non-existence of the R&D fund, Canada admits, "It is undisputed that there is no R&D fund in existence.").

[261] **C-394**, C-NLOPB, Annual Report 2005-2006 (June 12, 2006), *attaching* Auditors' Report dated April 21, 2006, at 33-35; **C-354**, C-NLOPB, Annual Report 2014-2015 (June 26, 2015), *attaching* Auditors' Report dated May 26, 2015, at 4-8. Additional C-NLOPB Annual Reports are available online at http://www.cnlopb.ca/information/annualreports.php.

[262] **C-127**, C-NLOPB Agenda for Board Meeting (Mar. 25, 2014); **C-128**, C-NLOPB, Research and Development – Education and Training – Guidelines Overview (Feb. 5, 2015).

[263] **CW-10**, Sampath Statement II, ¶ 143 ("[D]uring the more than two years that I served as R&D Manager, the Board never raised with me the possibility of it establishing an R&D fund, including when the Board assessed a shortfall at Hibernia during the 'squaring up' process in 2015.").

[264] **CW-9**, Phelan Statement II, ¶ 91 (citing **C-382**, C-NLOPB, Memorandum to the Board (Subject: Decision Item R&D Obligations – Dealing with Current and Go Forward Shortfalls) (March 15, 2010), at p. 4).

[265] **CW-10**, Sampath Statement II, ¶ 144.

[266] **CW-9**, Phelan Statement II, ¶ 87.

[267] *Id.*; **C-383**, C-NLOPB, Draft Benefits Plan Guidelines (January 2016), Appendix 2 Research and Development and Education and Training Expenditures, at p. 6.

[268] **C-2**, Mobil I Award, ¶ 33.

D. Mobil has suffered losses of $19,883,897 from early 2012 through 2015

175. Mr. Phelan has provided with his second witness statement an updated calculation of Mobil's losses based on the Board's recent decisions on Hibernia and Terra Nova's reported R&D and E&T expenditures in 2015.[269] In addition, he has taken account of additional new information and adjusted Mobil's claim amount for incremental expenditures.[270]

176. In addition to the incremental expenditures incurred by Mobil, the Board has required letters of credit from the owners of the Hibernia and Terra Nova Projects to secure shortfall amounts.[271] Canada has not challenged Mobil's claims for [redacted] and [redacted] for letters of credit obtained by Mobil in connection with Hibernia and Terra Nova, respectively.[272] Because these losses would not have been incurred but for the imposition of the Guidelines, Mobil should be compensated for its expenditures on letters of credit required by the Board.

177. As Mr. Phelan's calculation shows, Mobil's total damages incurred at both Projects from January 1, 2012 (at Terra Nova) and from May 1, 2012 (at Hibernia) to the end of 2015 amount to $19,883,897, before pre-award and post-award interest.[273]

E. Mobil's claim for pre- and post-award interest is unchallenged

178. Mobil claims both pre- and post-award interest at a commercially reasonable rate based on Canadian Dollar Offered Rate plus four percentage points, averaged on a calendar year basis and compounded monthly on all sums awarded as damages by this tribunal.[274] Canada does not challenge Mobil's requests for interest or the foregoing formula for determining interest. Thus, Mobil should be awarded pre- and post-award interest in the amounts requested.[275]

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269 **CW-9**, Phelan Statement II, ¶¶ 4-6.

270 *Id.*, ¶¶ 7-12.

271 Memorial, ¶¶ 317-18 (citing **C-194**, ExxonMobil Canada Properties, "C-NLOPB Security – LC Fees" Q1 2010 through Q4 2015); *see also* **CW-1**, Phelan Statement I, ¶¶ 90-93.

272 The costs of the letters of credit are included in Mr. Phelan's updated statement of Mobil's claim for damages. **CW-9**, Phelan Statement II, ¶ 9.

273 **CW-9**, Phelan Statement II, ¶ 12.

274 Memorial, ¶¶ 319-20; *see also* **CW-1**, First Witness Statement of Paul Phelan ¶¶ 94-96.

275 See also **CW-9**, Phelan Statement II, ¶¶ 13-15 (calculating pre-award interest requested by Mobil in this arbitration through August 31, 2016, which amounts to a total of $2,376,998).

VI.

RELIEF REQUESTED

179. Claimant respectfully requests an award in its favor:

a. Finding or otherwise affirming that the enforcement of the Guidelines constitute a performance requirement within the meaning of Article 1106(1) of the NAFTA, and that Canada has breached its obligations under the Article as a result;

b. Finding or otherwise affirming that the Guidelines are not covered by Article 1108(1) of the NAFTA or Canada's Annex I reservation to the treaty for the Federal Accord Act;

c. Directing Canada to pay damages to Mobil, or alternatively, to its indirectly controlled enterprises, in an amount to be proven at the hearing, but in any event no less than $19,883,897;

d. Directing Canada to pay pre- and post-award interest on all sums awarded;

e. Directing Canada to pay all of Mobil's costs associated with these proceedings, including attorneys' fees, ICSID fees and costs, the fees and costs of the arbitral tribunal, fees and costs associated with fact and expert witnesses, and any other fees and costs incurred in connection with Mobil's claims in this arbitration, in an amount to be determined at the conclusion of the proceedings; and

f. Ordering such other and further relief as the tribunal deems available and appropriate.

Respectfully submitted,

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